



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 20 June 2012

**Interinstitutional File:
2011/0276 (COD)**

**11027/12
ADD 3 REV 1**

FSTR	53
FC	32
REGIO	85
SOC	538
AGRISTR	83
PECHE	212
CADREFIN	297
CODEC	1583

ADDENDUM 3 to NOTE

from: Presidency
to: Permanent Representatives Committee (part 2)/Council

No. Cion prop.: COM(2011) 615 final/2

Subject: Cohesion Policy legislative package
- Presidency compromise on net revenue generating operations and public private partnerships

Delegations will find attached a compromise text on the net revenue generating operations parts of the Common Provisions Regulation and new text on public private partnerships.

The modifications highlighted in bold are those in comparison to the revised versions (corrigendum) presented by the Commission on 14 March 2012.

PROPOSAL FOR REVENUE GENERATING OPERATIONS

Article 54

Operations generating net revenue after completion

1. This article shall apply to operations which generate net revenue after their completion. For the purposes of this article 'net revenue' shall mean cash in-flows directly paid by users for the goods or services provided by the operation, such as charges borne directly by users for the use of infrastructure, sale or rent of land or buildings, or payments for services less any operating costs and replacement costs of short-life equipment incurred during the corresponding period. Operating cost-savings generated by the operation shall be included in the net revenue unless they are offset by an equal reduction in operating subsidies.

Where not all the investment cost is eligible for co-financing, the net revenue shall be allocated *pro rata* to the eligible and non-eligible parts of the investment cost.

2. The eligible expenditure of the operation to be co-financed **from the Funds shall be reduced in advance taking into account the potential of the operation to generate net revenue over a specific reference period that covers both implementation of the operation and the period after completion.**

3. **The potential net revenue of the operation shall be determined in advance by one of the following methods chosen by the managing authority for a sector, subsector or type of operation:**

(a) application of a flat rate net revenue percentage for the **sector or subsector applicable to the operation as defined in Annex [XXX] or in any of the delegated acts hereinafter referred to.**

The Commission shall be empowered to adopt delegated acts in accordance with Article 142 to carry out technical adjustments to the flat rates established in Annex [XXX] taking into account historic data and the potential for cost recovery and the polluter-pays principle where applicable.

The Commission shall be empowered to adopt delegated acts in accordance with Article 142 **within 3 months of the entry into force of this Regulation establishing flat rates for sectors or subsectors within the fields of ICT, research, development and innovation and energy efficiency.**

In addition, the Commission shall be empowered to adopt delegated acts in accordance with Article 142 in duly justified cases for additional sectors or subsectors other than those in the Annex [XXX] falling under the thematic objectives defined in Article 9 and supported by the CSF Funds.

Where this method is applied, all the net revenue generated during implementation and after completion of the operation is considered to be taken into account by the application of the flat rate and is therefore not deducted subsequently from the eligible expenditure of the operation.

(b) calculation of **discounted** net revenue of the operation, taking into account the **reference period appropriate to the sector or subsector applicable to the operation, the profitability normally expected of the category of investment concerned,** application of the polluter-pays principle and, if appropriate, considerations of equity linked to the relative prosperity of the Member State or region concerned. The Commission shall adopt the methodology [...] by means of implementing acts in accordance with the examination procedure referred to in Article 143(3).

Where this method is applied, the net revenue generated during implementation of the operation, resulting from sources of revenue not taken into account in determining the potential net revenue of the operation, is deducted from the eligible expenditure of the operation, no later than at the final payment claim submitted by the beneficiary.

4. **The method for deducting the net revenue determined in accordance with paragraph 3 shall be determined in accordance with national rules.**

5. **As an alternative to the application of the methods laid down in paragraph 3, the maximum co-financing rate referred to in Article 53(1) may at the request of a Member State be decreased at the moment of adoption of a programme for a priority under which all operations to be supported under that priority could apply a uniform flat rate in accordance with paragraph 3(a). The decrease shall be not less than the amount calculated by multiplying the maximum Union co-financing rate applicable under the Fund-specific rules by the relevant flat rate referred to in paragraph 3(a).**

Where this method is applied, all the net revenue generated during implementation and after completion of the operation is considered to be taken into account by application of the decreased co-financing rate and is therefore not deducted subsequently from the eligible expenditure of the operations.

6. Where it is objectively not possible to determine the revenue in advance according to **one of** the methods set out in paragraphs **3 or 5**, the net revenue generated within three years of the completion of an operation or by 30 September 2023, whichever is earlier, shall be deducted from the expenditure declared to the Commission.

7. Paragraphs 1 to 6 shall not apply to:

- (a) **operations or parts of operations supported solely by the ESF,**
- (b) **operations whose total eligible cost before application of paragraphs 1-6 does not exceed EUR 1 000 000,**
- (c) **repayable assistance subject to an obligation for full repayment and prizes,**
- (d) **technical assistance,**
- (e) **support to or from financial instruments,**
- (f) **operations for which public support take the form of lump sums or standard scale unit costs,**
- (g) **operations implemented under a joint action plan,**
- (h) **operations for which amounts or rates of support are defined in Annex 1 to EAFRD Regulation.**

By derogation from paragraph 7(b), a managing authority may apply the provisions of paragraphs 1 to 6 to operations below the threshold.

8. In addition, paragraphs 1 to 6 shall not apply to operations for which support under the programme constitutes:

- (a) **de minimis aid**
- (b) **compatible State aid, where an aid intensity limit is applied or where it is subject to individual verification of financing needs under State aid rules.**

Article 55¹

Eligibility

6. This paragraph shall apply to operations which generate revenue during their implementation and to which the provisions of Article 54, paragraphs 1-6 do not apply.

The eligible expenditure of the operation to be co-financed from the CSF Funds shall be reduced by the net revenue not taken into account at the time of approval of the operation directly generated only during its implementation, not later than at the final payment claim submitted by the beneficiary. Where not all the costs are eligible for co-financing, the net revenue shall be allocated *pro rata* to the eligible and non-eligible parts of the cost.

This rule shall not apply to technical assistance, financial instruments, repayable assistance subject to an obligation for full repayment, prizes, operations subject to the rules on State aid, operations for which public support take the form of lump sums or standard scale unit costs, operations implemented under a joint action plan, operations for which amounts or rates of support are defined in Annex 1 to EAFRD Regulation, or operations for which the total eligible cost does not exceed EUR 50 000.

For the purposes of this article and Article 54, any payment received by the beneficiary arising from a contractual condition on a breach of contract between the beneficiary and third parties (contractual penalties) or has occurred as a result of the withdrawal of its offer by a third party chosen in public procurement rules (deposit) shall not be considered as revenue and shall not be deducted from the eligible expenditure of the operation.

¹ Amendments to Article 55(6) as a consequence of Article 54 as set out above. This text therefore replaces the text provisionally agreed at the General Affairs Council on 24 April 2012, cf.doc. 8207/12 ADD 5 REV 2.

Annex XXX

Definition of flat-rates for net-revenue generating projects

Sector		Flat rates
1	ROAD	30%
2	RAIL	20%
3	URBAN TRANSPORT	20%
4	WATER	25%
5	SOLID WASTE	20%

Special rules on PPPs

New Recital:

Public Private Partnerships ("PPPs") can be an effective means of delivering projects that ensure the achievement of public policy objectives by bringing together different forms of public and private resources. In order to facilitate the use of CSF Funds to support operations structured as PPPs this Regulation takes account of certain characteristics specific to PPPs by adapting some of the common provisions.

New definition:

"Public private partnerships" (PPPs) are forms of cooperation between public bodies and the private sector, which aim to improve the delivery of investments in infrastructure projects or other types of operations delivering public services through risk sharing, pooling of private sector expertise or additional sources of capital.

Title VII

New Chapter II¹

Special rules on support from the CSF Funds to public private partnerships

Article 54/A

Public private partnerships (PPPs)

The CSF Funds may be used to support operations which are implemented or intended to be implemented under a PPP structure ("PPP operation") in the form of grants or other forms of support in accordance with Article 56. Such PPP operations shall comply with applicable Union and national law, in particular on State aid and public procurement.

Article 54/B

Beneficiary under PPP operations

1. In relation to a PPP operation, and by way of derogation from Article 2(8), the beneficiary may be either:
 - (a) the public law body initiating the operation, or
 - (b) a body governed by private law of a Member State (the "private partner") selected or to be selected for the implementation of the operation).

¹ Old chapter II becomes new Chapter III and so forth.

2. The public law body initiating the operation may propose that the private partner to be selected after approval of the operation shall be the beneficiary for the purposes of the support by the CSF Funds. In this case, the approval decision shall be conditional on the managing authority satisfying itself that the selected private partner fulfils and assumes all the corresponding obligations of a beneficiary under this Regulation.
3. The private partner selected to implement the operation may be replaced as beneficiary during implementation where this is required under the terms and conditions of the PPP or the financing agreement between the private partner and the financial institution co-financing the operation. In this case the replacement private partner or public law body shall become the beneficiary provided that the managing authority satisfies itself that the replacement partner fulfils and assumes all the corresponding obligations of a beneficiary under this Regulation.
4. The Commission shall be empowered to adopt delegated acts in accordance with Article 142 laying down additional rules on the change in beneficiary and the related responsibilities.
5. A change of the beneficiary that respects the applicable conditions set out in paragraph 3 and the delegated act adopted pursuant to paragraph 4 shall not be considered a change in ownership within the meaning of Article 61(1)(b).

Article 54/C

Support for PPP operations

1. In the case of a PPP operation where the beneficiary is a public body, expenditure under a PPP operation which has been incurred and paid by the private partner may, by way of derogation from Article 55 (2)¹, be considered as incurred and paid by a beneficiary

¹ The implications for Article 121,1,a and 128,1,a shall be dealt with at a later stage in the context of negotiations on the financial management block in order to ensure that these provisions are consistent with this article.

and included in a request for payment to the Commission provided that the following conditions are met:

- a. **the beneficiary has entered into a PPP agreement with a private partner;**
 - b. **the managing authority has verified that the expenditure declared by the beneficiary has been paid by the private partner and that the operation complies with applicable Union and national law, the programme and the conditions for support of the operation.**
2. **Payments to beneficiaries made in respect of expenditure included in a request for payment in accordance with paragraph 1 shall be paid into an escrow account¹ set up for that purpose in the name of the beneficiary.**
 3. **The funds paid into the escrow account referred to in paragraph 2 shall be used for payments in accordance with the PPP agreement, including any payments to be made in the event of termination of the PPP agreement.**
 4. **The Commission shall be empowered to adopt delegated acts in accordance with Article 142 to lay down the minimum requirements to be included in PPP agreements which are necessary for the application of the derogation specified in paragraph 1, including provisions related to termination of the PPP agreement and to ensure an adequate audit trail.**

¹ Cf. definition in ADD 2