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DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

Directorate B - European mobility network
The Director

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COMMUNICATION TO THE CEF COORDINATION COMMITTEE

Subject: CEF model grant agreement.

In the context of the preparation of the CEF transport grant agreements, some Member States raised a number of questions and concerns on specific common provisions of the model grant agreement.

These issues were discussed at the CEF transport committee meeting of 30 September and subsequently at a dedicated seminar for the Member States organised by the Innovation and Networks Executive Agency (INEA) on 12 October 2015.

As a result of those discussions, please find enclosed an explanatory note prepared by INEA in coordination with the Commission.

Please also refer to the Frequently Asked Questions page issued in the INEA web-site, as a complement to the note, in the following address:

<https://ec.europa.eu/inea/en/connecting-europe-facility/frequently-asked-questions>

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Olivier Onidi

Annex: Note on certain issues with regard to the CEF model grant agreement.

Note to the CEF Coordination Committee on certain issues
with regard to the CEF Model Grant Agreement (MGA)

Scope of the note

During the preparation of the first CEF GA's under the CEF transport call 2014, certain delegations have raised questions and concerns regarding a number of common provisions of the CEF model grant agreement. The main issues raised relate to the language of the grant agreements, the role of the Commission in the grant agreements implementation, the implementation of the Member States certification, the designation and role of the coordinators, including their certification role, the Agency's right to suspend the action implementation, the Commission / Agency's rights of use of results of the co-funded actions (notably vis-à-vis the confidentiality of some sensitive data), and beneficiaries' obligations in their relations with their contractors and sub-contractors. A few amendments to the CEF model grant agreement have been proposed by some delegations.

Following the CEF transport coordination committee of 30 September, a technical workshop was organized at INEA's premises on 12 October 2015. Furthermore, INEA has published a set of frequently asked question at its website.

The Commission hereby aims to provide clarifications on the above-mentioned issues for the three sectors of the CEF. Furthermore, the Commission confirms to apply a flexible approach in full respect of the terms of conditions of the grant agreement.

Context

The Regulation (EU) No 1316/2013 establishing the Connecting Europe Facility determines the conditions, methods and procedures for providing Union financial assistance to trans-European networks in order to support projects of common interest in the sectors of transport, telecommunications and energy infrastructures. A single model grant agreement for the three CEF-sectors provides consistency, rationalisation and equal treatment.

The use of grant agreements instead of Commission decisions has been decided by the responsible Commission Services for the following reasons:

- Grant Agreements are enforceable outside the EU to participants from third countries, as provided for under the CEF Regulation, while Grant Decisions are not legally enforceable outside the EU.

- Administrative simplification: all amendments to the GA during the life-time of the Action will be signed by the Agency and formal consultation with other Commission Services is no longer needed.

The form of a grant agreement, already in use for many EU Programmes, allowed also a model well adapted to complex actions with multi-beneficiaries while reducing administrative procedures.

The model agreement for CEF has been developed on the basis of the model used by the Commission for all EU Programmes following the Financial Regulations approved by the European Parliament and the Council. The model was approved by all relevant Commission Services. It means that any modification requires the approval of the same Commission Services, including the three DGs responsible for the CEF Programme.

The model GA sets terms and conditions for EU grants management under CEF, in line with the EU Financial Regulation and CEF Regulation, both adopted under the ordinary legislative procedure, thus with the full involvement of the MS as co-legislator.

Role of the Commission in the implementation of grant agreements

The grant agreements will be signed by the Agency as provided for in its delegation of powers adopted by the Commission. However, the delegation of tasks to the Agency is without prejudice to the Commission's competence as Authorising Officer, for instance regarding checks, audits and evaluation. In addition, the Commission is referred to where it is sole entitled to take action, i.e. enforceable decisions with regard to the recovery of amounts unduly paid. The horizontal services of the Commission confirmed that the Commission does not need to be a co-signer of the grant agreements signed by an executive agency pursuant to its delegation of powers.

The implementation of the Member States' obligations to certify

Article 22 of the CEF Regulation states that Member States shall certify that the expenditure incurred in respect of projects or parts thereof has been disbursed and that the disbursement was in conformity with the relevant rules. This obligation is applicable to all actions financed under CEF, including any Grant Agreement concluded in the framework of the SESAR Deployment Manager. There is no change to the existing TEN-T practice that MS certify for the beneficiaries established in their territory. Gathering the certification by the MS is an explicit requirement for EU beneficiaries under the terms and conditions of the MGA but it is not for the Commission to impose on MS any procedures how to organise this certification. Obviously, beneficiaries have all interest to cooperate with the MS, as there can be no further payments without the certification by the responsible MS. The MS shall receive from the coordinator the necessary information in order to fulfil their obligations.

Regarding the certification of deliverables/costs, a note was circulated to the CEF Committee end of last year (Ares(2014)4264763 dated 24/11/2014). Member States are free to organise the modalities for providing such certification. Nevertheless, the Commission would welcome any proposal from the Member States to exchange best practices on certification procedures, with a view to rationalise the administrative efforts on both the Member States and beneficiaries' sides.

The designation of the coordinators

The signature of the mandate formally empowers the coordinator to act on behalf of the other beneficiaries for the purpose of the grant agreement implementation. In other words, it aims to provide legal certainty and a legal basis to the coordinator's action. The signature of the mandate is thus necessary in all cases where a coordinator is appointed among the beneficiaries as per the Call for proposals, whether the coordinator is entrusted with power of attorney or not.

The mandate template in Annex IV is drawn up in line with the terms and conditions of the grant agreement and cannot be dissociated from it. It provides for the power of representation of the coordinator (to act on behalf of other beneficiaries) for the specific purpose of implementing the grant agreement and formalises two additional tasks, i.e. the power of attorney and the sole receipt of payments. It is also of utmost importance to ensure the equal treatment of CEF beneficiaries in the implementation of the grant agreements, and avoid the multiplication of customised provisions negotiated by beneficiaries and/or coordinators.

The mandate template thus cannot be modified for the sake of consistency with the grant agreement terms and conditions and for the sake of the equal treatment principle.

The role of the coordinators, including their certification role

A strong coordinator has been identified as a very important element in a successful action. The coordinator is expected to have the overview of the action implementation and is thus requested to gather all required information and documentation for the due submission of deliverables and requests for payment in accordance with the grant agreement.

Certification of costs incurred should be provided by the MS in which the beneficiary is established. However in exceptional cases and where requested by the beneficiary, this certification may be provided by the MS in which the action is implemented. Therefore, the MS where the coordinator is established does not necessarily need to certify the cost incurred by beneficiaries established in other Member States or third countries and the MS does not need to certify the entirety of the costs of the Action incurred in different MS and third countries.

The tasks and obligations of the Coordinator are part of its legal obligations, but all beneficiaries are responsible for carrying out the action in line with the grant agreement and complying with their legal obligations. No penalties are foreseen to be applied except for instance in case of fraud or false declarations. In this respect, the application of penalties would take into account inter alia the origin and seriousness of the fraud.

In line with a consortium approach, the certification of the coordinator is requested in place of the beneficiaries' certification. The coordinator may organise the modalities to deliver its certification (which is different from the MS' obligations under Article 22 of the CEF Regulation) as it deems appropriate. Notably, several means are at the coordinator's disposal to make sure that it can have the reasonable assurance that the information provided is "full, reliable and true" and that costs are "real" and "eligible", for instance:

- it may request a certification by the beneficiaries themselves
- it may request a declaration on honour
- it may base its certification on the Certificates on Financial Statements foreseen in the GA, while the internal arrangements may also foresee the possibility for the coordinator to request additional Certificates
- it may rely on the MS certification, in particular on those delivered by other MS than the competent MS for the Coordinator.

Beneficiaries have the obligation to provide the coordinator with the necessary information and documents so that it may perform its tasks. The coordinator and beneficiaries may agree on the modalities to provide the coordinator with the assurance that the information provided is true and reliable. These arrangements are of implementation nature and it is worth noting that the approach followed may be quite different. These arrangements should thus be specified by the coordinator itself in agreement with the co-beneficiaries. Considering the absence of a harmonised approach among beneficiaries, such arrangements are not to be addressed in the model grant agreement.

The certification by the Coordinator is without prejudice to the Agency's checks and audits. No penalty is foreseen in case of mistake, except if the beneficiaries and/or the coordinator are convicted of fraud, false declaration etc.

In case of recovery, when the coordinator receives all payments, Article II.26 of the grant agreement states that the Agency shall formally notify the coordinator of its intention to recover the amount unduly paid and invite the coordinator to present observations. The Agency has the possibility to initiate the recovery against the coordinator, even if it has not been the final recipient of the amount due. If the coordinator does not repay the Agency by the date specified in the debit note but has submitted evidence on the distribution of payments made to the beneficiaries, the Agency shall recover the amount due from the beneficiary which has been the final recipient of the amount due.

In practical terms, the Agency must inform the coordinator about the recovery. In case the payment has been already done to the beneficiaries and the coordinator is not able to pay back the amount in the debit note, the Agency will recover the amount due from the beneficiary.

If the beneficiary is bankrupt and the coordinator demonstrates the distribution of payments, the Agency will follow the same procedure.

Bank account designated for payments

All payments shall be made to the bank account designated by the coordinator. Upon the explicit request of the coordinator concerned, the grant agreement may include two bank accounts. This should be duly justified and substantiated by the coordinator and must clearly indicate the amount to be paid to each bank account. In addition, a valid BAF form must be provided by the coordinator.

The Agency's right to suspend the action implementation

The Commission confirms that Article II.15.2.1 is meant to address the suspension of the financial aid (or grant agreement), and not the action itself. It is worth noting in this respect that neither the Commission nor the Agency has the means to stop the implementation of an action, be it works or studies. This Article of the MGA thus addresses the possibility that costs incurred during the suspension period of an action are not eligible. The Commission also confirms that Article II.15.2.1 will only become applicable if the possibilities of Article II.24.5.1 have been exhausted.

Furthermore, before suspending the financial aid, the Commission via INEA will always consult the concerned beneficiaries.

The Commission/ Agency's rights of use of results of the co-funded actions (notably vis-à-vis the confidentiality of some sensitive data) under Article II.8

The rights of use of the results by the Commission, the Agency and/or other EU bodies relate to the outcome of the Action itself and are without prejudice to the confidentiality regime applicable to deliverables, letters, information exchanged during the implementation of the GA. The action's results may be used by the Commission for feeding the EU policies development. The Commission does not want to become the owner of software, equipment or infrastructure. However, the Commission has to be able to communicate on the output/ impact of the Union funding programmes and the action's results may also be used by the Commission/INEA for communicating on the CEF programme implementation (e.g. communication events and/or publication of brochures on the outcomes of the projects supported by CEF). Dissemination means may take into account the sensitivity of some data as flagged and duly justified by the beneficiaries.

Regarding examples of intellectual property, the model grant agreement is meant to cover a wide range of cases and cannot be exhaustive in the text. However, the beneficiaries are requested to provide the list of IPR related to the supported action.

Beneficiaries' obligations in their relations with their contractors and sub-contractors (Articles II.9 and II.10)

Beneficiaries are requested to ensure that their contractors and/or sub-contractors comply with the provisions of the MGA on confidentiality, absence of conflict of interest, award of contract and checks and audits. However, transition measures may be foreseen for those contracts which have already been launched. For instance, the contractors/sub-contractors may be simply informed of these obligations by the beneficiaries.

It is important to highlight that the Agency's and the Court of Auditors' supervisory rights regarding contractors is a provision in the grant agreement that has to date never been exercised by the Agency since its inception. In reality, it is a provision that would only be exercised in extreme circumstances, when there was a suspicion of fraud or serious malpractice at the level of the contractor. Any audit to contractors will be limited to the contracts relevant for the grant agreement. Furthermore, it is useful to re-confirm that the MGA has to be read in accordance with the Financial Regulation.

Annexes V to VII containing references to templates on INEA's website

The Annexes including the templates on INEA's website are an entire part of the GA. Any modification to the GA including to its Annexes is considered as an amendment, for which appropriate procedures are laid down (Article II.12 of the GA).

Certificate on the financial statements (Annex VII)

The certificate on the financial statements required for in Article II.23.2 shall be produced by an approved auditor or, in case of public bodies, by a competent and independent public officer. Annex VII establishes the model terms of reference for the certificate that, in case of public bodies, may be adapted to the national legal requirements.

Availability of Annex VII in other official EU languages

The Commission / INEA will endeavour to provide translations in the next months.

Relations between the EEIG being the beneficiary of an Action and its members (potentially affiliated entities to the Action)

According to the Financial Regulation, an entity affiliated to a beneficiary is an entity which has a structural link with a beneficiary, in particular a legal or capital link. The legal and capital link defining the affiliation encompasses mainly two notions: (i) control and (ii) membership, i.e. the beneficiary is legally defined as a e.g. network, federation, association in which the proposed affiliated entities also participate or the beneficiary participates in the same entity (e.g. network, federation, association) as the proposed affiliated entities. The structural link is neither limited to the Action nor established for the sole purpose of its implementation.

In cases where there is a sole beneficiary which is formed by several entities (a group of entities) and forming part of the sole beneficiary, thus affiliated to the sole applicant or beneficiary, the definition of the structural link remains applicable. This means that the link may not result from the implementation of the grant agreement but must exist outside the grant agreement. An EEIG is the perfect example.

As affiliated entities are not parties to the grant agreement, the Commission may not impose any obligation on them but the beneficiary must ensure that the affiliated entities respect the right of checks and audits of the Commission, OLAF and the Court of Auditors.

It should be noted that affiliated entities participating in the implementation of an Action declare the costs they incur as eligible. A beneficiary should in principle not contract with its affiliated entities. However, in case such contracting is necessary, the rules of best value for money and absence of conflict of interests must be respected.

The notion of affiliated entity provided by Article 122 of the Financial Regulation may differ from the one established in Article 23 of Directive 2004/17, therefore contracts between the EEIG as the beneficiary and its members shall respect the rules of public procurement.