



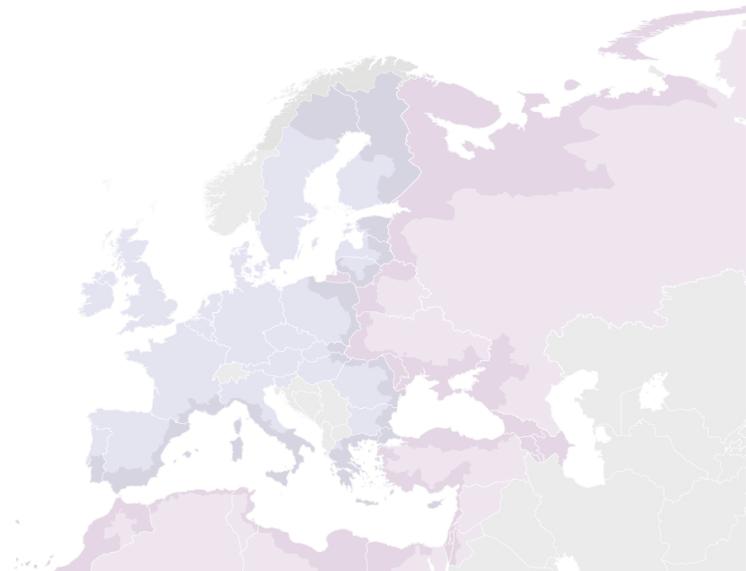
# TESIM

Technical support to the implementation  
and management of ENI CBC programmes

## Meeting on recoveries in ENPI CBC and ENI CBC programmes

Brussels, 27 June 2017

(OFFICIAL PROCEEDINGS)



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9 representatives of ENPI CBC programmes, 4 representatives from DG Near and 3 representatives from TESIM participated in the ad-hoc meeting on recoveries.

### Preliminary note

*All discussions during the meeting were based exclusively on the regulatory requirements applicable to ENPI CBC programmes.*

**Session 1 - Presentation of the aims of the meeting and the legal framework. Presentation of a sample of recovery scenarios and legal tools from the programmes.**

TESIM introduced the main aims of the meeting and the legal framework of the recovery management in the ENPI programmes. On the basis of the recovery cases provided by the programmes, a number of potential scenarios, both with positive and negative consolidated balance, were presented.

**Session 2 - Identification of bottlenecks in recovery management (debtor, procedure, other aspects)**

### A) Positive consolidated balance

Lead Partner	Individual balance for Lead Partner	Individual balance - partner(s) from MS	Individual balance - partner(s) from PC
Member State	↑	↓	↓
Member State	↓	↑	↑
Partner Country	↑	↑	↓
Partner Country	↓	↓	↑

All participating programmes, as well as DG Near, agreed that - in case of **positive consolidated balance** - the **responsibility of the Joint Managing Authority (JMA)**, in accordance with the Grant Contract signed with the Lead partner (Beneficiary), is to **transfer the final balance payment** to the Lead partner. In spite

of the positive consolidated balance, the payments to the partners by the Lead Partner (or vice versa, in case one or more partners has/have a negative individual balance) should be solved within the partnership. The individual negative balances should be paid by the concerned partners to the lead one, who should take care of the final distribution of funds, in accordance with the provisions in the partnership agreement. The participating programmes agreed that the JMA does not have legal grounds to be involved in the financial disputes between the partners.

**These cases are NOT to be considered as cases of recovery.** If the balance is positive, no recovery is needed and there is no debt with the JMA.

In relation to the financial disputes between partners referred above, the partners in some cases might address the respective National Authorities. However, the National Authorities will act only as observers since they do not have legal means to intervene.

### B) Negative consolidated balance

Lead Partner	Individual balance for Lead Partner	Individual balance - partner(s) from MS	Individual balance - partner(s) from PC
Member State	↑	↓	↓
Member State	↓	↑	↑
Partner Country	↑	↑	↓
Partner Country	↓	↓	↑

Example of the scenario discussed:

Balance at project level	Partner	Balance per partner
-568,74		-568,74
	<b>Lead Partner (MS)</b>	3 901,11
	<b>Partner 2 (MS)</b>	-2 864,00
	<b>Partner 3 (PC)</b>	-1 605,85

All participating programmes agreed that, **as first step**, a recovery claim will be addressed to the Lead partner of the project for the amount of the consolidated balance of the project. However, **as second step**, if the JMA does not succeed in the recovery and needs to apply article 27.2 and/or 27.3 (Regulation No 951/2007 – ENPI IR), recovery claims are then proceeded individually to each project partner with negative individual balance.

In the example above, programmes agreed that the **following approach would be applied** according to the **article 27 of ENPI IR**:

- For project partner 2, located in the Member State – contentious case and recovery order with payment claim forwarded to the Member State of the project partner;
- For project partner 3, located in the partner country – contentious case referred to the EC for further recovery action.

The amount individually due to the Lead partner, as a general principle, will be paid by the JMA to the Lead partner after the payments for the recovery claims against partner 2 and partner 3 will be made to the MA by the Member State and the EC.

DG Near informed that, in case of successful recovery, the individual amount recovered by DG Near will be returned to the EC budget. As a next step, it has to be committed to the CBC budget line in the next accounting year, which is a time-consuming exercise. Therefore, the risk is that DG Near, even in case of successful recovery, will be able to execute the payment to the respective JMA only in the following accounting year. Alternatively, all pending contentious recoveries from the beneficiaries and partners transferred to the EC shall be taken into account in the calculation of the final balance of the programme. Once this final balance is confirmed, the JMA will be able to pay the related amount to the Lead partner or to any partner which is entitled to receive the positive amount.

Questions	Answers
<p>1. The JMA has to react to the complaints from the Lead partners for projects with negative consolidated balance or reduced positive balance, but positive individual Lead Partner balance (as per example in previous page). The payment to the Lead partner depends on the resolution of the recovery cases for other partners with negative balances. Since these cases are referred to the Member States and EC and there is no clear deadline when the payment to the JMA can be expected, <b>is it possible that the programme executes the payment to the Lead partner using the funds available in the programme (unspent), while waiting for the recovery on the EC/Member State level?</b></p>	<p>Yes, if the programme has unspent funds, it is possible that the JMA transfers the necessary amount to the Lead partner, once the transfer of the file and the corresponding amount is formally accepted by the Member State or the EC.</p> <p><b>Note:</b> In line with the exchanges above, this transfer can include amounts due to partners as well. Moreover, if payment to the Lead partner is not possible (e.g., the lead partner is the debtor or is in liquidation) payment of amounts due to partners can take place directly to them.</p>

<b>IMPORTANT!</b> This question applies only to cases in which the final programme balance is <b>positive</b> .	
2. In case article 27.2 is applied, and the recovery case has to be transferred either to the Member State or the EC for further action after one year, <b>does the interest have to be calculated towards each individual partner?</b>	According to article 18 of the General Conditions for a Grant Contract, interest <b>may</b> be applied for the recovery initiated by the Contracting Authority. However, the Grant Contract does not regulate the application of interest when recovery is transferred to the Member States or the EC. The file transferred to the Member States or EC will in any case have to clearly indicate which is the principal amount. Further details on the management on the interest accrued from contentious recovery cases will be provided at a later stage.

When transferring files to EC, programmes should be warned that not always the EC will be able to recover the amount. In this case, after the assessment of the file made by the EC, a debit note will be issued and the amount may be immediately waived. This applies in particular to low amounts owed by debtors with no other contract with EC, as the impossibility of offsetting may render the cost of recovery too high, compared with the amount to recover.

### Session 3 - Creating the decision and stakeholder tree (due diligence and responsibilities during recoveries)

#### A) Due diligence

DG Near informed the participating programmes that, as an overarching objective, the JMAs shall demonstrate the effort taken in every step of the recovery process as the part of recovery file submitted to the EC. In case of pending legal proceedings (initiated by any relevant body – national, anti-fraud body, OLAF, etc.) the EC shall be informed.

The EC needs to be informed as soon as the JMA is 1) notified about the existence of a legal proceeding against it or 2) launches a legal proceeding itself against a beneficiary/partner. This information has an impact on annual clearing. It is recommended to the programme to add a paragraph in the Annual Report submitted to the EC, where the contracts in this situation are listed. During the verification of the Financial Annual Report, the EC may ask clarifications in order

to take proper actions for the clearing of the costs incurred for the respective contracts.

A **complete recovery file** shall provide the necessary evidence allowing to conclude that due diligence has been ensured:

- letter addressed by the Head of the JMA to the Director C informing about the transfer of the recovery order. The letter should include:
  - reference to the project number and title;
  - which was the due date of the debt;
  - a short description of the steps taken during one year after the issue date of the recovery;
  - which was the cause of issuing the recovery;
  - if the amount was already partially recovered how much is left to be recovered;
  - if the amount requested to be recovered includes any share of co-financing;
  - to indicate which is the exact EU part of the amount to be recovered;
  - if the amount transferred includes any interest;
  - reference to the date of the JMC decision when it was approved to transfer the recovery to the EC.
- contractual documents: Special Conditions, General Conditions and Partnership Agreements;
- all payments by Contracting Authority-proof of bank transfers;
- all payments to Contracting Authority in case that the other partner(s) paid partially the debt – proof of bank transfers;
- proof of “right of audit”
- draft audit report – Documentation on contradictory procedure – Final audit report;
- supporting documents proving the non-eligibility of expenditure;
- initial debit note;
- reminder letters send during one year/less to the contractor;
- proof of receipt by debtor (registered mail, recorded delivery, etc.);
- any letter send/received to/from the Partner National Authority in order to receive support in the recovery of the debt;
- any correspondence sent by the contractor which presents their opinion on the auditor(s)/control(s) findings;
- any conciliation meeting with the Contractor after the RO was issued;
- for the companies considered as bankrupt any proof from the Partner National Authorities which will attest the bankrupt status of that organization;
- calculation of any interest or bank charges accrued until the date of the transfer of the file, which may be added to the amount to be recovered;



- updated Legal Identity Form;
- communication to JMC when the recovery is identified as contentious.

Whatever the case, **the JMA is not requested to initiate legal procedures in court as a proof of due diligence.**

**CLARIFICATION**

*In view of the closure requirements, and always that due diligence can be proved, JMAs do not need to wait the full one-year period foreseen in Articles 27.2 and 27.3 of the ENPI CBC Implementing Rules before transferring complete files to the European Commission or to Member States.*

**B) Liquidation/insolvency of the beneficiary or partner**

During the recovery process, there might be situations when the partner of beneficiary is in bankruptcy process or is even liquidated. In case of entities that are already **liquidated**, the recovery process has to be stopped and a waiver has to be initiated, as the entity towards which the recovery was launched does not exist anymore. The waiver needs to be proposed by the JMA to the JMC and the EC when the JMA confirms that the debtor no longer exists and there is no successor.

The waiver proposal has to be accompanied by the official documents prescribed by national legislation to proof the liquidation of the entity. These documents may include, by way of example, a certificate-extract from the official register (commercial or of associations, depending on the entity) of the country of origin, certified copy of the court decision declaring liquidation (in the case of forced settlement or bankruptcy) or the reference of the official journal where the bankruptcy or forced liquidation is published. See **Annex A** with a list of the specific documents needed per country, according to the information provided by the EU Delegations.

However, in case of insolvency, there might be a need to pursue the amount due registering as one of the creditors during the insolvency process. Taking into account that this type of procedure usually takes more than a year, the JMA needs to use the capacity to subrogate the debt to the EC or the Member State, so that they can be included in the creditors' register, as stipulated in article 18.5 of the General Conditions and modified in the Special Conditions, following EC's note of April 2009<sup>1</sup>. In these cases, the JMA cannot wait one year to transfer the

<sup>1</sup> *"In particular, the Beneficiary should undertake that the conditions applicable to it under Article 18.5 on the recovery procedure by the EU Member States and the Commission shall also apply to its partners. It shall include provisions to that effect as appropriate in its contracts with them."*

file to the EC or the MS, as the effective subrogation of the debt might take place too late for the registering as creditor, in accordance with the applicable national legislation.

### **C) Notifying irregularities**

Notification of irregularities is still an open topic. For the time being, it is advised that notification of irregularities is done by the respective National Authorities in Member States, by addressing the national AFCOS (counterpart of OLAF in each country). As regards irregularities in the Partner Countries, the JMA may inform OLAF via AFCOS in their Member State or inform DG Near, which would do the notification via the unit R3, counterpart of OLAF.

When the notifications are done periodically and directly to AFCOS, the programmes are advised to send a list to NEAR R4 - Finance CBC with the contracts under this procedure (contract name, project name, some short description of the issue). In the Annual Report, this aspect has to be considered as well, providing the updated information since the last notification. This will allow EC to have a correct overview of the contracts with issues which don't have to be taken into account for the final decommitment.



## Annex A

### Official documents prescribed by national legislation to proof the liquidation of the entity

#### ❖ **Armenia**

- **Private companies** is stated by the State Register Agency of legal entities under the Ministry of Justice of the Republic of Armenia;
- **Companies as NGOs, LTDs** are officially considered as liquidated from the moment this statement by the State Register Agency is made;
- **Public entities** – the government decision is needed.

#### ❖ **Belarus**

There are several official registers and documents prescribed by Belarusian legislation to proof the liquidation of the entities regardless the type of entity:

- From 02/05/2013 it is used the official database of Ministry of Justice of Belarus <http://www.justbel.info/liquidation/findmyrequest>
- If a legal entity or an individual entrepreneur were liquidated before aforementioned date, it can be found here: <http://minjust.gov.by/ru/egr/registration-and-liquidation/publication/db/>
- If the assets of legal entity are being administered by a liquidator or by a court, the representative of this entity can provide an Extract from the Unified State Register of Legal Entities and Individual Entrepreneurs (paragraphs 21-35) which is given by local Executive Committee (website of Unified State Register <http://egr.gov.by/egrn/index.jsp?content=eJurCheckData>

If a legal entity/ individual entrepreneur is bankrupt or a subject to winding-up procedures we can accept one of these documents:

- Confirmation letter from Department of Reorganization and Bankruptcy of the Ministry of Economy of Belarus <http://economy.gov.by/>;
- Extract from the Unified State Register of information about bankruptcy given by Information Center of Ministry of Economy of Belarus <http://bankrot.gov.by/>;
- Certificate of economic insolvency (bankruptcy) cases, administered by the economic courts (from a Regional economic court) – in case of a court case.



### ❖ **Georgia**

The Official Registry is the only source in obtaining for any type of entity the official proof on any liquidation (<http://napr.gov.ge>). If an entity is listed there as liquidated or in the process of liquidation/bankruptcy, this information may be extracted from the registry (in the form of an official certificate).

### ❖ **Moldova**

According to the Moldovan legislation, the State Registration Chamber must be informed in 30 days after the company decides internally (or the court decides) that the company will be liquidated. After this, the Registration Certificate of a company will contain the mention "in liquidation process". Once the liquidation process is finalised, the status of company (not existing anymore) is confirmed by the Excerpt from the State Register of Legal Entities ("Extras din Registrul de stat al persoanelor juridice"), issued also by the Moldovan State Registration Chamber. As regards the NGOs, it is the Ministry of Justice that issues the Excerpt from the State Register of NGOs, regarding the status of the organisation.

### ❖ **Jordan**

The organization has to provide an extract of the Register open with Company Control Department in the Ministry of Industry.

### ❖ **Palestine**

In conformity with the article 194 of the law 12/1964 a compulsory liquidation should be based on a court decision.

### ❖ **Tunisia**

The creditors are informed by the administrators or liquidators of the organisations put under liquidation. Liquidations are falling under the responsibility of the "Tribunal de Grande Instance". For the commercial companies "La Chambre Commerciale du Tribunal de Grande Instance" is the institution responsible for the liquidation procedure and for issuing any document which relates to this process or final result. For the non-profit organizations the information will follow.

*This list will be updated regularly as soon information  
will be provided by the EU Delegations.*