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**Ref.: Regional operational programme
CCI no. 2007 SK 161PO003**

**Operational programme Bratislava Region
CCI no. 2007 SK 162PO001**

**Subject: Reply to managing authority's request for clarification of issues
related to the implementation mechanism of JESSICA in Slovakia**

Interpretation of Article 44 of the General Regulation related to award of a grant as the **direct financial contribution** by way of donation to a **financial institution** in case of a fund for energy efficiency in existing housing

Dear Ms Kucmanová

In your letter No MPRV-2011-1634-/4583-12, you informed the services of the European Commission that you plan to establish a **thematic fund** in accordance with Article 44, first part, point c) of the General Regulation and **delegate its administration to the public institution "State Fund for Housing Development"** in accordance with Article 44, second part, point b) of the General Regulation, in order to implement projects improving the **energy efficiency in existing housing in urban areas**. In that context you asked the services of the European Commission to **clarify three particular issues**, as follows.

- **Definition of the financial institution for the purpose of financial engineering instruments**

Ms Alexandra Kucmanová

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The term "financial institutions" employed by the Structural Funds regulations, namely under Article 44 of Council Regulation (EC) and Article 43(2) of Commission Regulation (EC) 1828/2006 should be interpreted as comprising banks but also other undertakings which are empowered by the competent national authorities and by their statutes to carry out financial activities, namely as described in points 2 to 12 of Directive 2006/48/EC (OJ L 177, 30.6.2006, p. 1-200).

Slovakia communicated to the Commission that Directive 2006/48/EC had been transposed into the national regulatory framework by means of thirteen Legal Acts indicated in the Annex to this letter.

Accordingly, the financial activities described in points 2 to 12 of Directive 2006/48/EC should also be indicated in the national legal provisions adopted to transpose this Directive.

As a result of the above, in order that the public institution "State Fund for Housing Development", can be appointed to act as the manager for a fund supported with the Structural Funds, it must comply with the above mentioned EU and national legislation and notably that:

- (1) such public institution is empowered by its statutes and by the competent national authorities, according to the applicable legislation, to carry out activities as listed in points 2 to 12 of Directive 2006/48/EC and as may be required to manage the fund in an effective and efficient way with full observance of EU and national law and in line with the principle of sound financial management;
 - (2) the requirements set out in Article 43 of Commission Regulation (EC) No 1828/2006, namely regarding the setting up of the fund as an independent legal entity or as a separate block of finance within a financial institution can effectively and objectively be complied with; and
 - (3) a clear distinction is made between the Fund (i.e. the pool of assets constituting an independent legal entity or the separate block of finance within a financial institution) and the entity which will be given the mandate to act as fund manager.
- **Previous experience of the financial institution with the operations financed by the EU funds or with the implementation of projects through financial engineering instruments**

While the regulatory framework does not specify particular requirements regarding the characteristics of the financial institution, previous guidance provided by the Commission indicates that regarding national law compatible with the Treaty, allowing the direct award of a grant for the purpose of Article 44 second paragraph (b) of the General Regulation to a national or regional financial institution, it is expected that the law will:

- (1) designate the financial institution in question;
- (2) present the public policy objectives which justify the direct award of a grant to it; and
- (3) justify the existence within this financial institution of the expertise necessary for the successful accomplishment of the fund tasks.

- **Compliance with rules in the field of public procurement and State aid**

As mentioned above, the managing authority stated its intention to use the provisions of Article 44, second part, point b) of the General Regulation.

Therefore the selection of the fund would not be carried out in accordance with public procurement law - procedure which would fall under Article 44, second part, point a) of the General Regulation - but conversely by way of a grant awarded to a financial institution.

Where public procurement law is not applicable (since the contribution to a financial engineering instrument does not entail a procurement of services), and if there is no holding fund, a managing authority can award a grant to a financial institution for implementing and running a financial engineering instrument. In this case, the managing authority must ensure that all applicable laws are complied with, including state aid rules and national legislation on grants (notably ensuring a transparent selection procedure for the selection of the financial engineering instruments). - NEVELEANTHE

As regards state aid rules, the Commission clarified in point 3.2 of the Community Guidelines on State Aid to promote Risk Capital investments in Small and Medium Sized Enterprises¹, that it considers that "in general, [...] an investment fund or an investment vehicle is an intermediary vehicle for the transfer of aid to investors and/or enterprises in which investment is made, rather than being a beneficiary of aid itself. However, [...] measures involving direct transfers in favour of an investment vehicle or an existing fund with numerous and diverse investors with the character of an independent enterprise may constitute aid unless the investment is made on terms which would be acceptable to a normal economic operator in a market economy and therefore provide no advantage to the beneficiary".

Where Member States or managing authorities implement an operation comprising contributions to support financial engineering instruments through funds without following a competitive tender, provided that the conditions enunciated in Article 44 second paragraph (b) of the General Regulation are respected, the fund would be considered as simply initiating investments being therefore an intermediary vehicle (unless evidence shows differently) and as such would not be a beneficiary of aid, as is set out in the above-mentioned point 3.2 of the Community Guidelines on Risk Capital.

Furthermore, point 3.2 of the Community Guidelines on Risk Capital also sets out the Commission's view that, "aid to the fund's managers or the management company will be considered to be present if their remuneration does not fully reflect the current market remuneration in comparable situations. On the other hand, there is a presumption of no aid if the managers or management company are chosen through an open and transparent public tender procedure or if they do not receive any other advantages granted by the State".

¹ OJ C 194, 18.8.2006, p. 2

Finally, we welcome once again the decision of the Slovak authorities to implement at least a JESSICA pilot in this programming period, which would be a useful learning experience for the next programming period. In accordance with 2011 Joint Road Map, several key implementation milestones were agreed with the objective to have JESSICA fully operational in 2012. Above all, at this (advanced) stage of the programming period, we would highly recommend that you finalise the remaining steps rapidly and use simple structures so that the funds reach beneficiaries rapidly.

Yours sincerely



for Christopher Todd
Head of Unit

Encl.: National provisions communicated by Slovakia concerning Directive 2006/48/EC

cc.: Ms K. Kukučková – Tomková, Mr R Žatko – Permanent Representation of the
SR to the EU
Mr Ch. Kontogeorgos, European Investment Bank

F3/D1/D3/E2 DG REGIO