



EUROPEAN COMMISSION
 DIRECTORATE-GENERAL
 REGIONAL AND URBAN POLICY
 The Director-General

Brussels,
 REGIO F1/MG/dd

**Subject: Transport Operational Programme (CCI 2007RO161PO003)
 Procedure to suspend Cohesion Fund/ERDF interim payments (Article 92
 of Regulation (EC) No 1083/2006)**

Ref.: See list at end of the letter

Your Excellency

I refer to the audit authority's report submitted to the Commission services on 29 June 2012 on the assessment of the management and control system for public procurement. The report was sent in the context of the action plan implemented in 2011 by the Romanian authorities. The action plan was meant to address the deficiencies detected in the area of management verifications focused on public procurement performed by the Romanian authorities (letters of 28 July 2011 and 4 April 2012).

I refer to the audit mission carried out by the Commission's auditors from 5 to 17 July 2012, to follow up the above-mentioned action plan implemented in 2011 by the Romanian authorities. The mission consisted in performing audit work related to the effective functioning of the bodies involved in the ex-ante public procurement verifications (ANRMAP¹ and UCVAP²) and the effectiveness of public procurement management verifications carried out by the managing authorities.

I write to inform you that, after an in-depth analysis of the report of 29 June 2012 provided by the national audit authority and the Commission audit work carried out in July 2012, the Commission services have concluded that, for the Transport Operational Programme, part of the interim payments may be suspended by the Commission.

The above-mentioned national audit report and Commission audit work show that there is (at least) a serious deficiency in the management and control system of the programme in question, within the meaning of Article 92(1) of Regulation (EC) No 1083/2006.

¹ National Authority for Regulating and Monitoring Public Procurement

² Unit for Coordination and Verification of Public Procurement

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The reasons for reaching these conclusions are described hereafter:

I. DESCRIPTION OF THE ASSISTANCE

On 12 July 2007, the Commission adopted Decision C(2007) 3469 for the "Transport" for Community assistance from the European Regional Development Fund and Cohesion Fund under the convergence objective in the regions in Romania (CCI No 2007RO161PO003). The programme was modified by Decision C(2012)5647 of 3 August 2012.

The Transport Operational Programme has 4 priorities which concern:

- Priority 1: Modernization and development of TEN-T priority axes aiming at sustainable transport system integrated with EU transport networks (Cohesion Fund)
- Priority 2: Modernization and development of the national transport infrastructure outside the TEN-T priority axes aiming at sustainable national transport system (ERDF)
- Priority 3: Modernization of transport sector aiming at higher degree of environmental protection, human health and passenger safety (ERDF)
- Priority 4: Technical assistance (ERDF)

To date, an amount of EUR 171 698 260,76 has been paid by the ERDF as pre-financing and interim payments within the framework of this assistance, which is 13,32 % of the total ERDF contribution for the programme, and an amount of EUR 649 098 000,88 has been paid by the Cohesion Fund as pre-financing and interim payments within the framework of this assistance, which is 20% of the total Cohesion Fund contribution for the programme.

The managing authority is the Ministry of Transport and Infrastructure. The main final beneficiaries are the Road Agency (CNADNR) and the Rail Agency (CFR-SA). The certifying authority is the Ministry of Public Finance. The audit authority is an associated body to the Romanian Court of Accounts.

The National Authority for Regulating and Monitoring Public Procurement (ANRMAP) was set up to ensure coherence with Community *acquis*, ensure conformity in the application of legislation, fulfil EU Directive obligations, monitor, analyse and evaluate the methods used for awarding public contracts, develop public procurement strategies as well as advise and train personnel involved in procurement activities. The ANRMAP has set up the framework for Romanian national procurement methodologies and is providing advice and support. In the framework of management verifications for EU assistance, ANRMAP's role consists mainly in verifications performed during the publication phase.

In addition, the Unit for Coordination and Verification of Public Procurement (UCVAP) within the Ministry of Public Finance has been appointed as the body responsible for ensuring ex-ante verification of public procurement procedures during the evaluation phase, including those carried out under the Structural Funds and Cohesion Fund programmes

II. PROCEDURE

Following audit work carried out on programmes in Romania, serious deficiencies were identified in relation to management verifications for public procurement procedures.

A meeting between the Commission services and the Romanian authorities was held on 27 June 2011. The Commission services noted that:

- the systems' set-up and functioning arrangements foreseen in relation to public procurement were similar for all programmes;
- the two ex-ante public procurement verification bodies (ANRMAP and UCVAP) were placed outside the management and control system and their verifications did not effectively detect the irregularities;
- the managing authorities did not take responsibility over the decisions made on public procurement issues as foreseen in Article 58(a) and Article 59(2) of Regulation (EC) No 1083/2006;
- the managing authority and certifying authority for the programme "Regional Operational Programme" (CCI2007RO161PO001), as well as for the programmes "Increasing Economic Competitiveness" (CCI2007RO161PO002), "Transport" (CCI2007RO161PO003) and "Environment" (CCI2007RO161PO004), failed to carry out ex-post verifications on public procurement and did not supervise the quality and efficiency of the ex-ante verifications carried out by ANRMAP and UCVAP.

As a consequence, a warning letter was sent on 28 July 2011 by the Commission services to the Romanian authorities drawing their attention to these facts. Two parallel action plans, one to lift the interruption of 17 June 2011 for priority 2, key area of intervention 2.1, of the Regional Operational Programme and a general action plan annexed to the warning letter valid for all programmes in Romania, were launched in 2011 to address the deficiencies found in the management and control systems related to public procurement in Romania.

In July 2011, the Commission services also carried out an audit mission focussing on operations financed from major projects under the Transport Operational Programme, key area of intervention 1.1 "Modernization and development of road infrastructure along the TEN-T priority axis 7" and 2.1 "Modernization and development of national road infrastructure" (mission no. 2011/RO/REGIO/J2/995). The final beneficiary of the 2 key areas of intervention is the Road Agency. The audit covered the adequacy of the management verifications and more particularly the legality and regularity of expenditure declared under public procurement contracts.

The audit report showed serious deficiencies in the management and control system of the Transport Operational Programme which affect the reliability of the procedure for certification of payments.

Irregularities identified concerned public procurement procedures (award of 6 out of 9 contracts sampled from major projects financed under key area of intervention 1.1) and constitute a breach of Article 9(5) of Regulation (EC) No 1083/2006, read in conjunction with Articles 2, 44 (2), 47 and 53.(1a) Directive 2004/18/EC³. The following irregularities identified distorted competition by limiting the access to the market of the bidders (non-respect of equal treatment and non-discrimination);

³ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

- excessive requirements to prove compliance with economic and financial eligibility criteria;
- non-compliance with the selection criteria by winning bidders due to reply to clarifications submitted after the set-up deadline;
- technical offers as award criterion not adequately assessed on the substance;
- significant modifications operated on the initial tender documentation;
- inconsistent approach in asking clarifications form bidders during the tender evaluation process;
- high rates of exclusion based on key experts' criterion.

In addition, within the context of approval of the major projects related to the sample audited, the Commission services sent a letter on 20 November 2011 in which concerns were expressed related to public procurement procedures on the practices noticed in the tendering procedures for the construction of motorways including high rates of exclusion, selection criteria and inadequate award criteria.

On 1 October 2011, the Romanian authorities implemented part of the changes requested by the Commission services in the general action plan of 28 July 2011. The ANRMAP and UCVAP were integrated in the management and control system, making them auditable by the audit authority.

By letter of 23 November 2011, based on the analysis provided by the Romanian authorities on the modifications operated on the system, the Commission services expressed comments in relation to the role of UCVAP and ANRMAP in ex-post verifications and other areas of systemic nature.

The Commission services called for a meeting with the managing authority, ACIS⁴ and the certifying authority which was held in Brussels on 29 November 2011. During this meeting, the Romanian authorities undertook additional commitments which were confirmed by the Romanian authorities' letter of 2 December 2011. The main areas in which commitments were taken were: (1) decisions on the establishment of irregularities to be taken independently from the process of recovery from the final beneficiary; (2) decisions on the corrective mechanism to be implemented in cases of disagreements between managing authorities and the audit authority; (3) the Romanian authorities to undertake actions to better identify conflict of interests and possible fraud cases; (4) the Romanian authorities to undertake action to increase administrative capacity by providing training on verifications on public procurement to be carried out by the managing authorities.

In addition, the audit authority carried out an assessment of the verifications performed by managing authority and identified public procurement irregularities on which financial corrections were proposed. By letter of 19 December 2011, the audit authority communicated its assessment on the management verifications performed by the managing authority before 1 October 2011. The audit authority's opinion was that substantial improvements were necessary in the area of management verifications of public procurement as existing irregularities were not identified in all cases by the managing authority.

⁴ Authority for the Coordination of Structural Instruments

By letter of 22 December 2011, the Commission services accepted that the Romanian authorities submit payment claims for programmes in Romania with an approach which aims to safeguard the EU budget. One of the key elements was the confirmation by the certifying authority to apply a provisional withholding of the expenditure expressed as a percentage applied to the certifiable expenditure. In respect of the Transport Operational Programme, the precautionary level of withholding was established at 10%, based on the provisional error rate calculated following the audit work performed by the Commission services.

Following analysis of the information received from the Romanian authorities on the verifications carried out by the managing authorities and the assessment made by the audit authority, by letter of 19 December 2011, the Commission services decided to allow the Romanian authorities time to put in place the new set-up of the management and control system in relation to public procurement and to demonstrate its effective functioning in the first semester of 2012. The deadline for implementation of the action plan was the end of June 2012. This deadline was formally communicated by Commission services letter of 1 March 2012. The letter stipulated that after the end of June 2012, any further payment claims should not be submitted by the Romanian authorities until the Romanian audit authority had given its positive assessment of the proper functioning of the management and control system at the level of managing authorities, certifying authority and all the actors intervening in the management and control system, including the role and capacity of ANRMAP and UCVAP.

Following the request of the Commission services sent on 4 April 2012, the Romanian authorities updated the information about the financial corrections for the entire programme. According to several exchanges of information from May and June 2012, the value of financial corrections proposed by the Romanian authorities is approximately EUR 5,64 million for the Transport Operational Programme (RON 179.795.952,10). This amount represents, on average, 13% of contract value financed under priorities 2 – 4. It should be stressed that the re-verifications of the Romanian authorities did not cover 5 public procurement contracts concluded according to EIB/EBRD rules for major projects co-financed from priority 1. These contracts were verified in the past by the audit authority, the Commission services (audit mission 2011/RO/REGIO/J2/995) and the European Court of Auditors.

A meeting was held on 7 – 8 June 2012 and the Commission services selected a sample of 10 contracts from priorities 2 to 4 in order to assess the management re-verifications performed by the managing authority. Of the 10 contracts, the managing authority had already identified irregularities for 5 contracts, leading to a total percentage of errors of 21%. Despite additional errors identified by the Commission services during the review meeting, a similar percentage of errors as those quantified by the managing authority for the 10 projects sampled from priorities 2-4 was obtained. The percentage of errors was calculated by relating the financial impact of the errors found to the value of the 10 selected contracts. Following the review of the documents, the Commission services had additional findings with regard to: modifications of the award criteria without extension of deadline for submitting bids and a different opinion on the percentage of financial corrections to be applied. For some contracts, the Commission services found that the managing authority did not implement the correction proposed by the audit authority following the audit of operations carried out by the audit authority in the second part of 2011.

As concerns the audit carried out by the Commission services (see letter of 19 March 2012), one step of the contradictory procedure took place during the review meeting of 7-8 June 2012. During this meeting, the Commission services took account of the reply submitted by

the Romanian authorities and recommendations were made in respect to the evaluation process as auditors noticed practices by the Road Agency during the public procurement process which should trigger warnings.

The audit mentioned above covered contracts under major projects financed from priorities 1 and 2 for one main final beneficiary (Road Agency). Findings with financial impact were raised for the 6 contracts financed under key area of intervention 1.1.

On 29 June 2012, the audit authority provided a follow-up of the assessment of the management and control system for public procurement. The opinion expressed categorises the system as "working, but some improvements are needed". This assessment was based on expenditure related to contracts published before 1 October 2011 which were not processed under the 'new' set-up of the management and control system (introduced on 1 October 2011).

By letter of 4 July 2012, the Romanian authorities communicated the measures put in place in order to address the general action plan regarding the establishing of irregularities independent from the recovery process, conflict of interest and increasing administrative capacity.

On 16 July 2012, an interruption letter was sent to the Romanian authorities indicating deficiencies with the management and control system as possible suspicion of fraud regarding the contracts managed by the Road Agency, under priority 1 of the programme, was not detected neither by the managing authority nor the audit authority during their respective checks.

Between 5 and 17 July 2012, the Commission's services carried out a follow-up audit review announced on 25 June 2012. The mission consisted in performing audit work related to:

- the effective functioning of the bodies involved in the ex-ante public procurement verifications - ANRMAP and UCVAP;
- the effectiveness of public procurement management verifications carried out by the managing authorities at the level of operations verified after 1 July 2011 under the programmes Transport, Regional, Environment and Increase of Economic Competitiveness.

Specific to the Transport Operational Programme, the on-the-spot visit carried out on 9-10 July 2012 examined 5 public procurement contracts concluded in the second semester of 2011 and verified by the managing authority at the beginning of 2012. The Commission services identified significant irregularities for 2 out of 5 verified contracts which were tendered under the same procedure organised by the Rail Agency, under key area of intervention 2.2 "Modernization and development of national railway infrastructure and passenger service". Details on the irregularities found are provided under section IV of the present letter.

By letter of 3 August 2012 and in compliance with Article 99 of Regulation (EC) No 1083/2006, the Commission services proposed financial corrections for the Transport Operational Programme, based on serious deficiencies in the management and control system of the programme which have put at risk the Union contribution already paid to the programme and on irregular expenditure contained in certified statement of expenditures which has not been previously corrected by the Romanian authorities. The financial correction proposed has to be applied at the level of the contracts with public procurement launched in SEAP before 1 October 2011.

III. DEFICIENCIES FOUND BY THE COMMISSION

The Commission considers that there are **serious deficiencies in the management and control system** of the Transport Operational Programme which affect the reliability of the procedure for management verifications and certification of payments for public procurement procedures and for which the corrective measures are not sufficient.

These deficiencies are mainly related to:

- The first-level management verifications of the managing authority (Article 58(c),(h), 60(b), 70 of Regulation (EC) No 1083/2006; Article 13(2)-(4) of Regulation (EC) No 1828/2006).
- The organisation of the management bodies (Articles 58(e) and 59(2) of Regulation (EC) No 1083/2006 and Articles 12 and 13(2) of Regulation (EC) No 1828/2006).

IV. LEGAL ASSESSMENT

The Commission considers that there are **serious deficiencies with the first-level verifications of the managing authority for public procurement procedures** in respect of which the corrective measures are not sufficient.

1. In its audit report sent on 29 June 2012, the audit authority expresses its conclusion regarding the functioning of the management and control system at the level of the managing authority of the Transport Operational Programme. The audit authority considered that the management and control system set up for the programme in question works but some improvements are still needed in the area of the management verifications performed in relation to public procurement. This opinion was based on the conclusions on the verification of the implementation of recommendations previously issued and on the testing of how the managing authority had performed the verification of expenditure declared between December 2011 and February 2012. This expenditure related to contracts published before 1 October 2011 which were not processed under the new set-up of the management and control system introduced on 1 October 2011.

2. In order to review the assessment on the functioning of the systems provided by the audit authority on 29 June 2012, the Commission services carried out a follow-up review announced on 25 June 2012. The Commission services went on-the-spot at the level of four managing authorities (Regional, Transport, Environment and Economic Competitiveness programmes), the certifying authority, ANRMAP and UCVAP in order to confirm the assessment provided by the audit authority on the functioning of the management and control system.

For the Transport Operational Programme, the on-the-spot visit carried out on 9-10 July 2012 aimed at the revision of 5 public procurement contracts concluded in the second semester of 2011 and verified by the managing authority beginning of 2012. The selected sample covered key areas of intervention 1.1 "Modernization and development of road infrastructure along the TEN-T priority axis 7", 1.2 "Modernization and development of railway infrastructure along the TEN-T priority axis 22", 2.2 "Modernization and development of national railway infrastructure and passenger service" and 2.3 "Modernization and development of river and maritime ports".

As regards the public procurement procedures organised by the Rail Agency, the Commission services identified serious irregularities for 2 verified contracts which were tendered under the same procedure under key area of intervention 2.2 "Modernization and development of national railway infrastructure and passenger service", namely:

- use of discriminatory selection criteria: bank guarantee to be issued only by Romanian banks or banks with subsidiaries in Romania (Article 10 and 52 of Directive 2004/17/EC - "Contracting entities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way" – "Qualification and qualitative selection – Mutual recognition concerning administrative, technical or financial conditions, and certificates, tests and evidence)

- unjustified exclusion of bidders based on formal errors without requesting further clarifications. The bidders were excluded because they had quoted different prices in the tender submitted. The error was partly due to the fact that the contracting authority provided poor tender documentation. The evaluation committee did not ask for clarifications of this inconsistent information in the tender thus breaching Article 80(3) from the National Government Decision 925/2006 ("The arithmetic errors shall be corrected as follows: b) if there is a discrepancy between letters and figures, the values as expressed in letters shall be taken into consideration, and the value expressed in figures shall be corrected accordingly)." It should be noted that 2 members of the selection committee drafted a note to the file disagreeing with the decision taken;

- for one of the contracts, the winning bidder did not fulfil the minimum qualification criteria: the tender documentation requested bidders to submit different key experts for each lot. The winning bidder submitted the same team for all 3 lots. Subsequently to clarifications request, the winning bidder modified the initial offer by replacing experts in the teams (Article 51(3) of Directive 2004/17/EC : Contracting authorities must verify that the tenders submitted by the selected tenderers comply with the rules and requirements applicable to tenders).

The Commission services consider that the above mentioned irregularities which were not detected by the managing authority infringe the public procurement Directive 2004/17/EC, (Articles 10, 51(3) 52 and 54) and the National Government Decision 925/2006 (Article 80(3)).

3. As regards the public procurement procedures organised by the Road Agency tendering major projects under priority 1, serious irregularities were identified in the Commission audit report sent on 19 March 2012. Following the analysis of the documents submitted by the Romanian authorities during the contradictory procedure, the Commission services concluded on the following irregularities:

- use of excessive requirements for eligibility criteria: turnover for road construction activities to be proved by translated invoices and bank statements; It is an excessive proof requested by the contracting authorities as regards the turnover. A requirement for candidates to provide certified translations of all invoices is not only in contradiction with the principles of proportionality, but also does not comply with Article 47 of the Directive 2004/18/EC. There ECJ case law indicating that the list of means of proof of the financial and technical capacity indicated in Articles 47 and 48 of the Directive is exhaustive and contracting authorities cannot ask for other means of proof, than the one expressly mentioned in these articles. Article 47 makes no reference to certified translations of invoices. Moreover, such requirements discourage in particular cross-border competition.

- non-fulfilment of the minimum qualification criteria by 2 winning tenderers due to late submission of required proof for financial suitability (Article 38 of Directive 2004/18/EC – "Time-limits for the receipt of requests to participate and for the receipt of the tenders" – Article 44 of Directive 2004/18/EC: "Verification of the suitability and choice of participants and award of contracts" and National Government Ordinance 34/2006 (Article 109) which foresees that clarification, details, nuances, additional information or reconfirmation presented upon request of the contracting authority during the evaluation phase should not lead to changes in the basic characteristics of the offer and solutions that led to the launch call for final bids, changes that would cause distortion of competition or creating an additional advantage over the other bidders);

- for a design and build contract, the weighting of 70% for the technical offer specified as award criteria in the tender documents was not properly applied and cannot be considered as an award criteria. It was noted that the technical offer was not duly checked by the evaluation committee, although the technical offer has the highest weight in the final score for the award. The questions in the relevant checklist referred basically to the completeness of the technical dossier and not to the appropriateness and the quality of the technical proposal (form over substance). Without thoroughly evaluating one of the main award criteria, the award decision becomes completely arbitrary. This represents a violation of the recital 46 and the principle of equal treatment (Article 2) of Directive 2004/18/EC (contracts must be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition).

The Commission services consider that the above mentioned irregularities which were not detected by the managing authority infringe the public procurement Directive 2004/18/EC, (Articles 38, 44, 47 and 48) and the National Government Ordinance 34/2006 (Article 109)).

Therefore, taking into account the Commission audit report sent on 19 March 2012, the subsequent answers from the Romanian authorities submitted on 13 April 2012, 6 June 2012 and 25 June 2012, the review meeting organised between the Commission services and the managing authority on 7-8 June 2012, the on-the-spot visit performed by the Commission services on 9-10 July 2012 and the interruption letter sent on 16 July 2012, the Commission services consider that the serious irregularities summarised above were not identified by the managing authority for public procurement procedures managed by the Road and Rail Agencies.

Having in mind that:

- the opinion of the audit authority ("works, but some improvement are needed) was based on audit of expenditure declared under contract contracts published in the national procurement system before the new set-up of the management and control system for public procurement was put in place;
- the Commission services found serious irregularities in relation to contracts managed by the Rail and Road Agencies and verified by the managing authority according to the provisions of the new management and control system;
- following the controls carried out, the managing authority failed to identify the irregularities found by the Commission services during the above audit missions carried out;
- the strategic and financial importance of contracts tendered under major projects financed under priority 1 for both Rail and Road Agencies;

The Commission services consider that there are serious deficiencies in the management and control system of Transport OP which works but significant improvements are necessary for the management verifications in the area of public procurement performed:

- on priority 1 by the Rail and Road Agencies (key areas of intervention 1.1 "Modernization and development of road infrastructure along the TEN-T priority axis 7" and 1.2 "Modernization and development of railway infrastructure along the TEN-T priority axis 22");
- on priority 2 by the Rail Agency (key areas of intervention 2.2 "Modernization and development of national railway infrastructure and passenger service).

The Commission services also notes the fact that a new key area of intervention for the Road Agency had been added to priority 2 of the programme as a result of Commission Decision C(2012)5647. Following this modification, the Road Agency can now finance motorway investments under priority 2. Therefore the findings under priority 1 relating to the road agency are valid under priority 2 as well.

In conclusion, the first-level management verifications of the managing authority cannot be considered to be effective and reliable and thus do not fulfil the requirements of Article 58(c) of Regulation (EC) No 1083/2006 (procedures for ensuring the correctness and regularity of expenditure declared under the programme), Article 60(b) of Regulation (EC) No 1083/2006 (verification that the expenditure declared by the beneficiary for operations has actually been incurred and complies with Union and national rules), and Article 13(2), (3) – (4) of Regulation (EC) No 1828/2006 (verifications that the operations and expenditure comply with Union and national rules); Articles 58(h) and 70 of Regulation (EC) No 1083/2006 (investigating irregularities and making financial corrections required; recovering amounts unduly paid);

V. CONCLUSIONS AND NEXT STEPS IN THE PROCEDURE

In view of the above, the Commission services are of the opinion that the conditions for the application of Article 92 of Regulation (EC) No 1083/2006 are fulfilled for the Transport Operational Programme, for payments related to:

- **Priority 1 (projects where either the Road Agency or the Rail Agency is the final beneficiary); and**
- **Priority 2 (projects where either the Road Agency or the Rail Agency is the final beneficiary).**

As regards Priority 1, with the present letter, I inform you that, in view of the above, the interruption of the payment deadline for the application for interim payments from the Cohesion Fund submitted on 29 May 2012 containing expenditure from CNADNR (Road Agency) for priority 1 will remain interrupted until the Romanian authorities will have taken the corrective measures requested by letter of the Commission services of 16 July 2012 and the corrective measures requested by the present letter.

Pursuant to Article 92 of Regulation (EC) No 1083/2006, the Romanian authorities are requested to submit, **within two months** of receipt of the national language of this letter, their **observations** together with a description of **measures** taken to improve their effective functioning of the management and control system of the assistance in question for the future

and the **related opinion of the audit authority**. The Romanian authorities have also to **demonstrate the effective functioning** of the measures described above.

The measures to improve the functioning of the management and control system for the future must be such as to prevent the recurrence of the identified deficiencies and may be subject to verification by the Commission services.

In this context the Romanian authorities **are requested the following**:

1) Related to the **general action plan** included in the warning letter of 28 July 2011 and the additional commitments taken by the Romanian authorities (see Commission services letter of 23 November 2011 and letters from the Romanian authorities of 2 December 2011 and 4 July 2012), the measures that still need to be implemented and the deliverables are presented in the **Annex I** of this letter.

2) The **managing authority** informed the Commission services during the on the spot visit on 9-10 July 2012, about the implementation of **measures specific to the Transport Operational Programme to strengthen the process of public procurement management verifications**. Therefore, specific to the Transport Operational Programme, the managing authority must take appropriate procedural, organisational and operational measures in order to ensure the effectiveness and quality of the management verifications on public procurement, as well as the legality and regularity of expenditure declared under public procurement procedures, such as:

- Ensure increased and continuous supervision and effective means to act of the managing authority on the two main final beneficiaries, the Road and Rail Agencies. Ex-ante actions should be organised in order to enhance the supervision of the managing authority, such as ensuring compliance of the tender documentation with standard procurement documentation (where this exists), give guidance, trainings and best practice examples to the final beneficiaries.
- Related to the verifications on the public procurement procedures, the Commission services underline the fact that the managing authority must verify, based on a clear and documented risk assessment procedure, the key and risky procurement procedures before submitting the reimbursement claim to the certifying authority. The management authority must implement an adequate risk assessment procedure which should be regularly updated by taking into account: organisation and latest changes in the management and control system in Romania, lessons learnt and results of the verifications and audits carried out.
- Participation of UCVAP's observers in all major public procurement procedures managed by the Road and Rail Agencies and financed under CF or ERDF funds.
- Strengthening the expertise and administrative capacity of staff in charge with management verifications for public procurement in order to be able to implement an efficient verification process so that legal and irregular expenditure is declared to the Commission.
- The set-up and implementation of a clear and concise evaluation procedure/guidance for the evaluation process as essential to ensure open, transparent and non-discriminatory evaluation process at the level of the Road and Rail Agencies.
- Ensuring the effective functioning, on continuous basis, of the actions implemented by the managing authority to ensure legality and regularity of expenditure certified to the Commission.

The Commission services underline that the above required actions are not exhaustive and the Romanian authorities may develop a more detailed action plan.

3) The **audit authority has to provide an audit opinion** on the effective functioning of the management and control system in place which has to take into account:

- the general corrective measures to ensure the effectiveness of the management and control system on public procurement according to Commission services assessment, as presented in Annex I.
- the measures specific to the Transport Operational Programme as presented above.

The audit authority's opinion on the proper functioning of the management and control system in place must **be based on the review of public procurement procedures launched in SEAP after 1 October 2011**. The audit authority is encouraged to report on any other improvements made to the management and control system.

As announced in the interruption letter of 16 July 2012, I remind the Romanian authorities that an interruption of payment deadline is on-going for interim payments from the Cohesion Fund submitted on 29 May 2012 containing expenditure from Road Agency for priority 1. The measures stated in that interruption letter are compulsory for resuming payments under priority 1.

Until such time as the above issues are resolved, whenever new expenditure is certified to the Commission under the Transport Programme, the certifying authority must identify in a statement which new expenditure relates to projects where the Road and Rail Agencies are final beneficiaries, and which expenditure relates to other final beneficiaries.

The measures to improve the functioning of the management and control system for the future must be such as to prevent the recurrence of the identified deficiencies and may be subject to verification by the Commission services.

As the withholding mechanism applied during the 1st semester 2012 is no longer applicable (see letters of 22 December 2011 and 1 March 2012), the Commission might be in a position to reimburse the full amount of certified expenditure. However, the Romanian authorities are requested to confirm, with regard to future applications for payment, that the new expenditure declared to the Commission results from a management and control system which is free from the deficiencies identified and complies with the requirements of all applicable rules, in particular Regulation (EC) No 1083/2006 and 1828/2006.

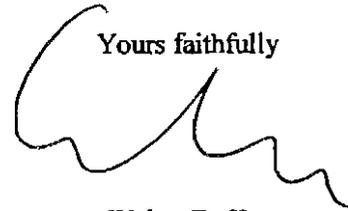
Moreover, the Romanian authorities are asked to ensure that the beneficiaries and any third parties, for whom a suspension or reduction of the EU assistance could have negative consequences, are duly informed.

Following your reply or in the absence of a reply within two months of the letter in the Romanian language, the Commission may, in accordance with Article 92 of Regulation (EC) No 1083/2006, **without any further delay, take a decision to suspend Cohesion Fund and ERDF interim payments** for the Transport Operational Programme in relation to the programme in question, on the basis of the information at its disposal.

The Commission may then, pursuant to Articles 99 and 100 of Regulation (EC) No 1083/2006, initiate the procedure to make **financial corrections** by cancelling all or part of the CF/ERDF contribution to the programme in question.

The Romanian authorities can at any point of the procedure avoid such a financial correction by taking the necessary measures themselves. The amounts released in this way can be re-used by the Romanian authorities for the programme concerned (Articles 100(4) and 98(2) of Regulation (EC) No 1083/2006). It should however be stressed that, according to Article 98(3) of Regulation (EC) No 1083/2006, the contribution cancelled by the national authorities may not be re-used for the operation or operations that were the subject of the correction, nor, where a financial correction was made for a systemic irregularity, for existing operations within the whole or part of the priority where the systemic irregularity occurred.

Yours faithfully



Walter Deffaa

Copy:

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Mr Xenakis, Head of Unit D.4, OLAF

References: Meeting between Commission and Romanian authorities – 27 June 2011
Commission letter of 28 July (Ares(2011)823545)
Romanian authorities' letter no 653 of 31 October 2011
Commission letter of 20 November 2011 (Ares(2011)1121148)
Commission letter of 23 November 2011 (Ares(2011)1252930)
Meeting between Commission and Romanian authorities – 29 November 2011
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