

## II

*(Preparatory Acts)*

## COURT OF AUDITORS

## OPINION No 1/89

of the Court of Auditors of the European Communities on a proposal for a general revision of the Council Regulation (ECSC, EEC, Euratom) amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities

(89/C 72/01)

THE COURT OF AUDITORS OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 78h thereof,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 209 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 183 thereof,

Having regard to the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities <sup>(1)</sup>, as last amended by Council Regulation (ECSC, EEC, Euratom) No 2049/88 of 24 June 1988 <sup>(2)</sup>, and in particular Article 107 thereof,

Having regard to the Commission proposal of 21 December 1988 <sup>(3)</sup>,

Having regard to the Council decision of 23 December 1988, received by the Court on 4 January 1989, in which the Council requested the Court of Auditors' opinion on this proposal, and asked it to draw up the opinion as a matter of urgency;

HAS ADOPTED THE FOLLOWING OPINION:

The proposal prompts the Court to make two sets of observations which are of a different but complementary nature: firstly, general remarks on the way it would like the system for authorizing and implementing Community budgetary funds to be developed, and, secondly, more specific comments arising from its examination of the articles of the proposal;

<sup>(1)</sup> OJ L 356, 31.12.1977, p. 1.

<sup>(2)</sup> OJ L 185, 15.7.1988, p. 3.

<sup>(3)</sup> DOC. COM(88) 838 final.

PART 1

## GENERAL OBSERVATIONS

1. The Court refers to the opinion it adopted in 1981 <sup>(4)</sup> on an earlier Commission proposal for a revision of the Financial Regulation. The Court is of the view that the detailed amendments now proposed by the Commission represent, as in 1981, only limited improvements of mainly presentational value. Taken as a whole, the proposal does not provide, contrary to what was requested by the European Council at its meeting of June 1987 <sup>(5)</sup>, the means necessary to overcome the many weaknesses which experience has shown to exist in the management of the Communities' finances.

2. In the Court's opinion, the Community Financial Regulation should comply with the following principal criteria:

- (a) its provisions should be clear and unambiguous, no less at the level of principles and objectives than at the level of detailed implementation;
- (b) they should be, so far as possible, universal in their application, and should not include more than minimal provision for exception;
- (c) they should address the financial management problem posed by the decentralized character of the most important components of the Community budget, namely revenue collection and operational expenditure.

3. As regards the internal management of Community funds, the present text of the regulation details provisions relating to certain aspects of the responsibility of the authorizing officer, the accountant and the Financial Controller, but says nothing about the Commission's responsibility for ensuring proper internal audit and inspection of Community funds administered by Member

<sup>(4)</sup> OJ C 232, 11.9.1981.

<sup>(5)</sup> Point 8 of the Conclusion of the Presidency.

States, whether on the revenue side or on the expenditure side of the budget. Furthermore, no central guidance is given to potential beneficiaries of Community funds within the Member states concerning the minimum accounting and reporting standards with which they should conform. None of these important issues is dealt with in the Commissions's latest proposal.

4. In paragraphs 4.1 — 4.4 below, the Court puts forward certain reflections which could contribute to increasing the effectiveness of the tools of budgetary management and control provided by the Financial Regulation. The Court's purpose in so doing is to underline the importance of the issues at stake and also to signpost some of the main problem areas which in the Court's view need to be dealt with in the new Financial Regulation.

### Presentation and management of budgetary provisions

#### 4.1.

##### (a) *Revenue*

There is a need for clarity and simplicity in the management and presentation of all funds to which the Community budget is entitled, including all revenue arising from the operation of the Common Agricultural Policy. The inclusion of revenue on the expenditure side of the budget under the euphemism of 'negative expenditure' is, as the Court has repeatedly pointed out, contrary to fundamental accounting principles and practice. As the budget so presented fails to give a true picture of revenue and expenditure, the opportunity should now be taken to prohibit accounting practices which obscure the true budgetary situation. The treatment of revenue in terms of establishment, authorization, collection and cancellation is not provided for in sufficient detail in the present or the proposed regulation. The control and management of Community funds should be no less rigorous in the case of revenue than in the case of expenditure.

##### (b) *Expenditure*

The Court recognizes that there is a need for simplification in this area but does not regard the Commission's present proposal as an adequate response to the problems caused by the existing rules about the form and utilization of budgetary appropriation. The Court must draw attention to the view it expressed in section 3.2 of its 1981 Opinion <sup>(1)</sup>, namely that 'reconciliation of the amounts authorized and the actual expenditure of one year is made particularly difficult by the fact that not all the appropriations in the budget have the same form and the rules governing their carry-over to the following year are not internally consistent. The result is complex accounts whose general significance cannot easily be discerned and which thus constitute a practical obstacle to budgetary control.' In 3.4 of the same Opinion the Court added that 'a sharper distinction between the appropriations authorized for commitments and those that are authorized for

payments (the present system for certain categories of expenditure) would give the system greater clarity and allow a more direct comparison between authorization and implementation of budgetary expenditure.' The Court adheres to these views and it accordingly recommends that all budgetary appropriations should in future be governed by two basic rules:

- (i) all expenditure headings in the budget must be covered by commitment appropriations and separate payment appropriations;
- (ii) commitments and payments should be charged to the budget of the year in which they are made.

A system of this kind would strengthen the principle of the annual nature of the budget, which would be fully respected at payment level, avoiding the disruptions caused by the present system of carry-overs. In this context an increase in the Commission's recognized powers in the authorization of transfers between payments appropriations could provide flexibility in the implementation of the budget, which would then be justified by management needs.

In addition, this system ought not to preclude any decision by the budgetary authority in favour of multi-annual planning of commitment appropriations or the imposition of time limits for payments arising from commitments that have been entered into. This type of budget would simplify the setting up of an internal control system (which though essential does not at present exist), with the object of regularly aligning the cash situation with budgetary implementation; it would also provide a more reliable, constantly up-to-date source of information on financial obligations, in particular the total of commitments still outstanding.

### Management and Control within the Institutions

4. The Financial Regulation ought to prescribe coherent procedures for the management and control by the Community Institutions of their revenue and expenditure. These procedures should form a coherent sequence containing three main phases, via the authorization phase, the implementation phase and the *a posteriori* phase of audit/evaluation. Existing Community procedures are structured around the roles of the Financial Controller, the authorizing officer and the accountant. Both as defined in legislation and as exemplified in practice, these procedures are defective in the following main ways:

- (a) a key element in the authorization phase is the *visa préalable*. This is given by the Financial Controller, who also has important responsibilities for a *posteriori* appraisal of sound financial management. The Court

<sup>(1)</sup> OJ C 232, 11.9.1981.

drew attention to the potential conflict between these two elements of the Financial Controller's responsibility in its 1981 <sup>(1)</sup> study of the Communities' financial systems. In the Court's view, recent practice with regard to the centralized *visa préalable* militates against efficient management of the Community's increasingly complex and fast-moving financial system;

- (b) as the 1981 Study pointed out, under present arrangements there is a risk that the authorizing officer and the accountant may unduly rely on the Financial Controller's approval rather than duly carry out their own responsibilities;
- (c) financial control is very uneven in its impact. Its effectiveness is greatest in connection with appropriations managed directly by the Commission (e.g. administrative expenditure) and weakest in relation to receipts and operational expenditures which are decentralized to the Member States;
- (d) the Financial Regulation included provisions designed to enforce the personal responsibility of authorizing officers and accountants, but they are of no practical value

The Court recommends:

- (a) the scope of the *visa préalable* should be reduced to legality and regularity matters, leaving sound financial management to a *posteriori* evaluation. Thus, the *a posteriori* phase of audit/evaluation should be the dominant concern (e.g. via increased use of *contrôles orientés*) of the Financial Controller, whose role would then approximate to that of an internal auditor. In this context, the Financial Controller should be explicitly bound to check permanently the accuracy of the cash position, of the accounts and of the balance sheet and make the institution aware of any anomaly relating to the accounts and to the management. All decisions and records of the Financial Controller should be open for examination by the Court of Auditors, as external auditor;
- (b) as a logical corollary of (a) above (cf. the Court's 1981 study), the role of the authorizing officer, which is of crucial importance for sound financial management, should be given a higher profile. The Financial Regulation should stress his duty to appraise expenditure carefully, and to respect budgetary limits;
- (c) the Financial Regulation would need to be amended in order to strengthen the Accounting Officer's responsibility. In the event of loss caused by error or negligence on his part, the loss should be refunded in the first

instance from the guarantee account and recourse to insurance companies should be had only to the extent (if any) that funds in the guarantee account might be inadequate to meet such loss. This change would help to stimulate good accounting practices and reduce the Institutions' insurance costs. Furthermore, the period within which an Institution is required to take a decision on the discharge to be given to accounting officers would be shortened to six months from the date when the account for revenue and expenditure is submitted. This is necessary so that the Budget Authority would be in possession of all relevant facts before taking a decision on giving its discharge in respect of the implementation of the Budget.

#### Decentralized management of funds in the Member States

4.3 A serious omission from the present Financial Regulation is any statement of the principles which should regulate the Commission's supervision of the management of Community funds, whether revenue or expenditure, within Member States. Recent Court reports, notably the 1987 annual report, have made clear that this lacuna represents one of the most serious weaknesses in the management of Community finance. In the Court's opinion the Financial Regulation should clearly establish the following principles:

- (a) the Commission has the obligation (Article 205 of the EEC Treaty) to satisfy itself with regard to the adequacy and reliability of national systems for the control and management of Community funds. The Member States are bound to ensure and facilitate the fulfilment of this obligation (Article 5 of the EEC Treaty).
- (b) within the Commission, the authorizing officer and the Financial Controller, as main pillars of the system of internal control, are responsible for ensuring that these obligations are implemented.

#### EAGGF Guarantee Section

4.4 For most agricultural expenditure, i.e. the EAGGF Guarantee Section, the Community still operates a budget which functions mainly according to rules which do not conform to the general rules of the Community budget.

One effect of the special regime applicable to the EAGGF Guarantee Section is that decisions relating to the commitment of expenditure have hitherto been exempt from scrutiny by the Financial Controller. The EAGGF Guarantee Section also enjoys substantial exemption from the normal rules of annuality and specificity. Budgetary constraints have already obliged the Council to abandon the concept of automatic 100 % pre-funding of agricultural expenditure. Consequently, expenditure in the Member States is not, at present, preceded by commitments. In the

<sup>(1)</sup> OJ C 342,31.12.1981.

Court's view, a strict procedure for the commitment of expenditure, payments after inspection and the observance of the annual nature of the budget should be applied.

### Independence of the Court of Auditors

5. By virtue of Article 206 of the Treaty, the independence of members of the Court of Auditors 'must be beyond doubt'. Paragraph 5 of the Article says, *inter alia*, that in the performance of their duties the members of the Court shall not 'take instructions from any government or from any other body'. Accordingly, the Court considers that the limitation imposed on its independence by Articles 89 and 91 of the draft new regulation are unacceptable.

### Conclusion

6. The Court is of the opinion that the proposals made by the Commission to the Council should be substantially amended or withdrawn and replaced by a new proposal which would take into account the fundamental points raised above and the other amendments suggested by the Court in Parts 2 and 3 of the annex hereto.

## PART 2

### SPECIFIC OBSERVATIONS

#### 1. DRAFTING PRINCIPLES

1.1. If the general principle of the hierarchical ranking of legal acts is to be observed, the text of the Financial Regulation may not incorporate, except in the form of quotations or references, legal acts of a rank which is higher (such as the Treaties) or lower (such as implementing regulations). Partial incorporation of higher-ranking legislation or detailed incorporation of lower-ranking legislation is likely either to give a misleading impression of the exact scope of higher ranking acts or make the respective amendments to the said Regulation and its implementing texts unnecessarily difficult and frequent.

1.2. The same principle of the hierarchical ranking of legal acts and the principle of the security of legal rules mean that the scope and cases of application of derogations introduced to provisions that are general in nature must be explicitly defined, which thus excludes the use of vague or declaratory wordings.

#### 2. STRUCTURE OF THE BUDGET

2.1. Articles 19 and 20 of the proposal introduce a reform of the budgetary structure of expenditure by creating sections which are each devoted to an area of budgetary intervention, and by entering a section for expenditure of an inter-institutional nature. The Court notes, however, that the management of the headings thus grouped together is not clearly determined with regard to the responsibilities of the authorizing officer, the accountant and the Financial

Controller of the various Institutions and, consequently, would like the proposal to be completed in this respect.

2.2. The Court finds that, despite the substantive objections which it expressed in its Opinion No 1/88 <sup>(1)</sup> with regard to the very principle of the creation of a 'negative reserve', the proposal seeks, in Article 19(5), to perpetuate this notion, which was introduced by Council Regulation (ECSC, EEC, Euratom) No 2049/88 <sup>(2)</sup> of 24 June 1988. It observes, moreover, that neither in its text nor in its explanatory memorandum does the proposal give adequate justification for the creation of this negative reserve or for the conditions of its use, thus allowing the budgetary authority to act virtually at its own discretion with regard to the constitution of such a reserve, whilst at the same time the proposal has nothing specific to say on the subject of its management. The Court observes, furthermore, that the procedure concerning transfers provided for in Article 26(5)(a) and (b) allows transfers relating to the said 'negative reserve' (Article 19(5), at the end) to be deemed to have been approved in the absence of any explicit contrary decision by the budgetary authority within the six-week time-limit stipulated by the transfer procedure laid down in Article 26(5). The Court cannot therefore see that these provisions are anything more than a legalization of a budgetary device intended to circumvent political difficulties, and must ask for them to be quite simply deleted since they are incompatible with due observance of fundamental budgetary principles.

2.3. The Court regrets, moreover, that the proposed reform is confined to expenditure alone and hopes that the opportunity will be taken to establish a clearer presentation of revenue in the budget, thus ensuring that the structure proposed for revenue and expenditure is uniform and symmetrical.

2.3.1. The Court in fact notes that, according to the present wording of Articles 19(1) and 20(1), the proposal seeks to keep, in addition to a general statement of revenue, a statement of revenue and expenditure in which the revenue accruing to each Institution is entered, by section, against its expenditure; the Court considers that this presentation does not meet the need — based on the principle of universality, which is, nevertheless, reaffirmed in Article 4 of the proposal — for the revenue and expenditure of the Communities' general budget to be clearly separated. This principle means, moreover, that the practice of negative entries, for revenue and expenditure alike, must be definitively abandoned.

<sup>(1)</sup> OJ C 166, 25.6.1988.

<sup>(2)</sup> OJ L 185, 15.7.1988, p. 3.

2.3.2. This is why the Court considers that Articles 19(1) and 20(1) should be revised in order to provide for, on the one hand, a general statement of expenditure, from which all revenue has been removed, and on the other, a general statement of revenue, detailing, in particular, for the part devoted to operating revenue, several sections corresponding to each category of revenue, whether own resources or miscellaneous revenue, and especially revenue arising from the implementation of the various instruments for regulating the agricultural markets ('negative expenditure').

2.3.3. In the past, and on a number of occasions <sup>(1)</sup>, the Court has raised objections not to the legality of creating such revenue but to its treatment in the accounts, which leads to a reduction in the apparent overall volume of operations financed by the EAGGF-Guarantee and effectively allows an increase, compared with what is authorized in the budget, in the gross expenditure of the latter up to the amount of the increase in the 'negative expenditure' (revenue). The amendment proposed in the preceding paragraph would, from this point of view, have the advantage of establishing true transparency in the presentation in the accounts of the financial movements concerned.

2.3.4. Furthermore, the Court considers that, with regard to the rules for laying down the budgetary nomenclature (Article 19(3)), the proposal must be made more specific in order to take account of the changes in the legislation which were introduced by the Council Decision of 24 June 1988 on the system of the Communities' own resources <sup>(2)</sup>.

2.4. Lastly, the Court notes with regret that, with regard to the Communities' borrowing and lending operations, the proposal, in the words of its explanatory memorandum, gives 'no formal place' to these operations and that, consequently, the earlier proposal for including these operations in the budget <sup>(3)</sup> has been abandoned. The proposal in fact confines itself to stipulating that 'factual information' will be presented in an annex to the budget (Article 20(5)).

Whilst deploring the premises on which such action was based, the Court considers that a document drawn up on the basis of the information provided for in Article 20(5) of the proposal is not likely to provide the budgetary authority with a complete view of all the categories of these operations, which nevertheless receive, to varying degrees, Community budgetary guarantees. The Court would therefore like Article 20(5) to be amended along the lines it has set out in the table in Part 3 of this opinion.

<sup>(1)</sup> The most recent of which was the annual report on the financial year 1986, paragraphs 2.16 to 2.18, OJ C 336, 15.12.1987, p. 24.

<sup>(2)</sup> Decision 88/376/EEC, Euratom, OJ L 185, 15.7.1988.

<sup>(3)</sup> Proposal of 5 March 1984, OJ C 97, 9.4.1984.

### 3. PRESENTATION AND ENTRY OF APPROPRIATIONS

3.1. With regard to the definition of the notion of a commitment, the Court regrets that Article 37 of the proposal shows no change from the current wording of the Financial Regulation, despite the fact that Articles 1 and 71 introduce the concept of a 'legal obligation to third parties', which it seems necessary, for reasons of consistency, to transpose to Article 37. The Court consequently considers that Article 37 should be supplemented by the introduction of a new second sentence worded as follows: 'A commitment proposal must cover the total cost of foreseeable expenditure, including the amount corresponding to the legal liabilities with regard to third parties which arise for the Communities from the operation in question.'

### 4. TRANSFER SYSTEM

4.1. Before setting out its objections to the proposed provisions on the system governing transfers, the Court would like to point out that, in the past <sup>(4)</sup>, it has taken the view that the principle of the annuality of the budget means that appropriations should be requested and authorized only where there is a high probability that they will be used; in this context, the Court also considered that the volume of the transfers carried out in previous financial years gave significant proof of the unreliable nature of the estimates on which the budget is drawn up. Consequently, the Court considers that the objective defined by the proposal's explanatory memorandum should be pursued not only by making the transfer procedure more flexible but also, and preferably, by improving the quality of the budgetary forecasting, which the proposal does not seem to want either to strengthen or to organize.

4.2. The general arrangements for transfers tend to confer on the institution managing the budget, the Commission, (and, for the other sections, the Institutions), the power of deciding on transfers of payment appropriations (Article 26(2) and (3)).

4.2.1. Thus, the Court takes the view that, with regard to transfers of provisional appropriations to a particular budget heading, it is up to the budgetary authority to ascertain, according to its own decision-taking criteria, that the conditions which it stipulated when drawing up the budget have in fact been fulfilled. This is why the Court asks for Article 26(3)(d) to be deleted.

4.2.2. Similarly, the Court objects to the present wording of Article 26(2), which grants the Institutions power to make transfers within their own section of the budget without limiting this power to transfers within each Title of

<sup>(4)</sup> — Annual report on the financial year 1986, paragraphs 1.21 and 2.5; OJ C 336, 15.12.1987, p. 13 and 19.

— Annual report on the financial year 1987, paragraphs 1.13 and 2.6; OJ C 316, 12.12.1988, p. 12 and 27.

the said sections (as is the case for the Commission, Article 26(3)(b)). The proposed wording would in fact allow the administrators of the said sections to transfer appropriations between the Titles devoted to staff expenditure and operating expenditure respectively, thus calling into question the essential choices made by the budgetary authority with regard to balancing the budget for the financial year and for each Institution. Such transfers can be decided only at the discretion of the budgetary authority itself.

4.3. The Court points out, moreover, that the proposal, in Article 9(6) to (8), allows for the possibility of making transfers of appropriations under the provisional twelfths arrangements. As soon as it came to make its analysis of the management of the budget for the financial year 1985 under the provisional twelfths arrangements <sup>(1)</sup>, the Court clearly set its face against any such possibility, firstly, because this practice constitutes a technique for implementing a budget which has not yet been adopted (and on which, consequently, the budgetary authority has not yet decided), and, secondly, because the provisional twelfths arrangements allow the budgetary authority to authorize, at the Commission's request, expenditure representing two or more twelfths in the event of the allocations of the various chapters proving inadequate. Accepting the present text of the proposal would not only be contrary to the principle of careful and conservatory management of appropriations in the absence of a budget, but would also have the effect of prejudging the final decision of the budgetary authority on the amount of the various budget headings.

The Court therefore considers that the arrangements provided for in Article 9(6) to (8) do nothing more than allow the legalization of practices previously criticized by it and requests that they be deleted.

## 5. CONDITIONS FOR IMPLEMENTING THE GENERAL BUDGET AND PRESENTING THE ACCOUNTS

5.1. As regards Section II 'Budgetary revenue, management of available funds' of the proposal (Articles 28-32), the Court notes that the proposal does not specify the different phases of budgetary implementation as precisely in the case of revenue as it does in the case of expenditure.

In the Court's opinion, this omission should be remedied by describing each phase of the procedure (proposal for establishment, recovery order or proposal for a cancellation, recovery or cancellation) on the pattern established for expenditure, whilst at the same time taking into account the implications of the Decision of 24 June 1988 on the system of own resources. Articles 28 to 31 should be amended for this reason.

5.2. As regards Section III 'Accounts' (Articles 70-73) of the proposal, the Court notes that whilst the proposed wording is in line with its opinion concerning the first proposal for revision of the Financial Regulation <sup>(2)</sup>, it is unlikely to remedy the deficiencies brought to light by the Court's recent analysis <sup>(3)</sup> of the confusion which persists in Community accounting systems between advances, payments on account, final payments and payments in settlement. This is why the Court must insist on the need to set up accounting systems which ensure that movements of funds of a like nature are treated identically. These systems must also allow direct identification of the status of every movement of funds and make it possible, at every stage and for every operation, to identify the commitment, any advances or payments on account, the payments which actually correspond to services rendered and the final movement which makes it possible to regard the operation as settled. In the Court's opinion the accounting systems should also make it possible to provide consolidated statements of this information, so that the persons concerned (managers, auditors, discharge authority) can immediately identify the amounts which correspond to final expenditure and those which correspond to unsettled items.

5.2.1. Thus, in the particular case of the repayment of advances and payments on account (Article 27(6)), the Court considers that this provision must be adapted so as to make a clear distinction between these two concepts: advances must be entered in and paid from non-budget accounts and payments on account in and from budgetary accounts. By the same token, the distinction between payments on account and advances must be reflected in the accounts, which means that Article 72 needs to be amended.

5.2.2. The Court must also ask for the statements referred to in Article 71 to be forwarded to the Financial Controller for approval (amendment of Article 71, final sub-paragraph, Article 73, second sentence and Article 82, paragraph 2).

5.3. Finally, the Court wishes to point out that when the list of the various items of information prescribed for entry on the revenue side of the revenue and expenditure account (Article 79) was drawn up, it did not take account of the new system of own resources introduced by the Council Decision of 24 June 1988. The Court therefore considers it necessary for the proposal to be supplemented as shown in the table which follows.

The Court also wishes to emphasise that the revenue amounts still to be collected at the end of the financial year must be entered on the assets side of the financial statement and draws attention to the amendment of Article 82 (1) which must accordingly be made.

<sup>(1)</sup> Annual report on the financial year 1985, paragraphs 1.30 to 1.35; OJ C 321, 15.12.1986, p. 18-19.

<sup>(2)</sup> OJ C 232, 11.9.1981.

<sup>(3)</sup> Annual report concerning the financial year 1987, paragraphs 2.40 - 2.54, 2.61 - 2.64, p. 37 - 41.

5.4. As regards the submission of supporting documents to the Court under Article 85, the Court considers that financial data stored on electronic data-carriers should be assimilated to supporting documents and that, as a result, data of this kind should be kept and forwarded to the Court. The Court therefore asks for Articles 23, 85 and 88 to be amended accordingly.

## 6. EXTERNAL CONTROL

6.1. In Articles 89, 90 and 91, the proposal introduces an amended version of Articles 83-85 of the current version of the Financial Regulation. In the explanatory memorandum to the proposal, these amendments are described as 'additional details on relations between the Court of Auditors and the other institutions'.

6.2. The Court notes that apart from the introduction of provisions concerning the bilateral discussion procedure involving the Court and the Institutions and the generalization of the principle — already established in fact by means of inter-institutional agreements — that the Institutions' comments on the Court's special reports are to be published (Article 91(2)), the proposal has nothing in the nature of the 'additional details' referred to by the author of the proposal.

6.3. In particular, the Court considers that the provisions which seek to rationalize the presentation and structure of the annual report (Article 89 subparagraph 3), to limit the Court's freedom to publish its work (Article 91 subparagraph 3) and to specify the basis of the discharge resolution adopted by the Parliament (Article 90 subparagraph 2) are unacceptable and undermine the powers which the Treaties have conferred on these two Institutions by means of provisions which are hierarchically superior, clear and self-contained. Consequently, the Court calls for the deletion of the Commission's proposals in this regard.

## 7. PROVISIONS CONCERNING THE INSTITUTIONS' OPERATING EXPENDITURE

7.1. As regards the management of operating expenditure, the Court notes that Article 27(2)(d) of the proposal seeks to allow the re-use of revenue from the sale of buildings or sums paid over in connection with lettings. The Court considers that the nature and amount of this revenue are such that they are outside the scope of re-use, particularly in the case of sales of buildings. Disposals of this kind should, in the Court's opinion, be envisaged sufficiently well in advance for the application of the amount in question to be explained clearly to the budgetary authority and, therefore, treated as revenue and expenditure in the budget. The Court therefore asks that Article 27(2)(d) be deleted.

7.2. As regards the provisions relating to the awarding of contracts (Articles 57-69), the Court notes, firstly, that the proposed Article 57 would tend to eliminate the obligation to issue invitations to tender in respect of expenditure on

buildings. Following on from its previous comment, the Court considers that expenditure of this kind must be as transparent as possible and asks for the deletion of this text, which tends to legalize a practice which the Court considers is not in accordance with the principles of budgetary implementation.

7.3. Article 130 of the proposal introduces an update of the thresholds and amounts concerning contracts. Whilst the Court recognizes the need for updating of this kind, it considers that the update proposed is excessive in that it releases the Institutions — and especially those which have a smaller budget — from issuing invitations to tender, consulting the ACPC or making preliminary guarantees for a large number of contracts. In the Court's opinion, lower limits should be set: 10 000 ECU (private treaty), 35 000 ECU (ACPC) and 250 000 ECU (guarantee).

## 8. PROVISIONS APPLICABLE TO RESEARCH AND TECHNOLOGICAL DEVELOPMENT APPROPRIATIONS

8.1. Articles 92-98 of the proposal contain a recasting of Title VII of the Financial Regulation, which deals with the management of research and development appropriations. The Court considers that, on the stated grounds of simplifying and rationalizing the Financial Regulation, the proposal will jeopardise the survival of the system of management by objectives. This system in fact implies that all expenditure, including staff expenditure, must be covered by objectives and that the means employed and the objectives themselves must from time to time be adjusted, using the analytical accounts as the tool for making this adjustment.

8.2. The Court also considers that the reform according to which the logic of the market economy is to apply in part to the Joint Research Centre (JRC) has not been adequately translated into strict financial provisions. It is thus envisaged that, in application of that view, the Joint Research Centre (JRC) may create *de facto* financial reserves (Article 97), the budgetary arrangements for which are inadequately defined.

8.3. The Court hereinafter puts forward a number of amendments to the proposal in tabular form, with the aim of correcting the weaknesses set out above.

## 9. PROVISIONS APPLICABLE TO EXTERNAL AID

9.1. In the Court's opinion the provisions relating to external aid are capable of improvement, particularly:

- (a) as regards their scope, which cannot be confined only to measures covered by financing agreements, and

(b) as regards Article 121, which is concerned with the Court's audits in recipient States, by providing for:

- on the one hand, extension of the field of application of these audits, in accordance with the EEC Treaty, not only to investment projects but also to other forms of aid (food aid, NGOs etc);
- on the other hand, the Court's audit powers to be exercised on records and on the spot;
- and, finally, for the Court's audit powers to be exercised not 'in agreement' but 'in liaison' with the recipient States and to cover both the legality/regularity aspects of projects undertaken in respect of applicable regulations and the contractual

obligations binding the recipient State to the Community, as well as assessing the effectiveness of financing operations that have been carried out.

The Court has set out its proposals for the amendment of the provisions in question in the following table.

### PART 3

#### Introductory note

The Court sets out below the text of its proposed amendments as a complement to the detailed comments given above. The grounds for these amendments have been explained in the preceding section of the opinion.

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#### COMMISSION'S PROPOSAL

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##### *Article 20, paragraph 5*

(...)

- a) — (...)
- b) — in a document annexed to the part concerning operating expenditure, as an indication:
  - current capital operations and current debt management,
  - the capital operations and debt management for the financial year in question.

##### *Article 79*

(...)

1. a table of revenue comprising:
  - estimated revenue for the financial year;
  - amendments to the revenue estimates as a result of supplementary or amending budgets and additional revenue as specified in the second subparagraph of Article 4(2);
  - entitlements established in the course of the financial year;
  - entitlements still to be collected from the preceding financial year.

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#### COURT'S PROPOSED AMENDMENTS

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##### *Article 20, paragraph 5*

(...)

- a) — (unchanged)
- b) — **In the general statement of revenue, the corresponding budget headings carrying a token entry, together with the relevant remarks.**
- c) — In a document annexed to the part concerning operating expenditure:
  - current capital operations and current debt management **for the financial year in question and subsequent financial years,**
  - **the capital operations and debt management for the financial year in question and subsequent financial years, including loans granted against budget appropriations.**

##### *Article 79*

1. A table of revenue, comprising...:

- (unchanged)
- (unchanged)
- (unchanged)
- (unchanged)



## COMMISSION'S PROPOSAL

*Article 79 (cont.)*

- revenue collected during the financial year and revenue carried over pursuant to Article 7(4);
- amounts still to be collected at the end of the financial year.

Statements shall be attached to this table showing revenue carried over pursuant to Article 7(4) and, where appropriate, the balance and gross amounts of the operations referred to in Article 27(2);

*Article 85*

Each Institution shall forward to the Court of Auditors every three months and at the latest within the month which follows the end of the quarter, and, in the case of the fourth quarter, at the latest within the month which follows the close of the financial year, the documents supporting the accounts, in particular the documents and certificates in respect of the correct application of the provisions which govern the implementation of the budget and relating to commitments and payments, to the establishment and collection of revenue, subject to Article 18 of Council Regulation (EEC, Euratom, ECSC) No 2891/77 and to Article 86 of this Financial Regulation. The Court of Auditors may question each Institution on the subject of the said supporting documents.

*Article 88*

(...)

The grant of Community funds to beneficiaries outside the institutions shall be subject to the agreement in writing by the recipients to an audit being carried out by the Court of Auditors on the utilization of the amounts granted.

*Article 89*

1. (...)
2. (...)
3. The annual report shall comprise a section for each institution. Each section shall contain all the comments of the Court of Auditors on the relevant institution. The replies of each institution shall be published immediately following the comments relating to that institution.
4. (...)

## COURT'S PROPOSED AMENDMENTS

*Article 79 (cont.)*

- (unchanged)
- **cancellations of entitlements established.**
- (unchanged)

Statements shall be attached to this table showing:

- **the breakdown of the sums still to be recovered at the end of the financial year, according as they correspond to debts covered by a recovery order, to own resources covered by a recovery order or to own resources which have been established but which are not covered by a recovery order, details of the latter two categories being given for each Member State.**
- revenue carried over... (unchanged).

*Article 85*

Each institution shall take the necessary steps to safeguard all documents supporting its accounts as well as all financial data stored on an electronic data-carrier. The Court shall have free access to these documents and data-carriers and may question each Institution on them. The Institutions shall submit all supporting documents for examination by the Court of Auditors. This shall be on a quarterly basis, at the latest during the month following the end of the quarter and, as regards the fourth quarter, at the latest during the month following the operations closing the financial year.

*Article 88*

Any grant of Community funds or **other aid from budgetary resources** to beneficiaries outside the Institutions shall be subject to the **recipient's** agreeing, in writing, to an audit by the Court of Auditors of the utilization of **the funds** thus granted.

*Article 89*

1. (unchanged)
2. (unchanged)
3. **Delete 3.**
4. **Amend the numbering.**

## COMMISSION'S PROPOSAL

*Article 90*

1. (...)
2. Parliament shall deliver its opinion on the discharge, in particular on the basis of the accounts of all revenue and expenditure of the Communities audited by the Court of Auditors.
3. (...)
4. (...)
5. (...)
6. (...)
7. (...)

*Article 91*

1. (...)
2. (...)
3. If the opinions referred to in paragraph 1 do not relate to proposals for legislation or draft legislation on which it has been consulted, the Court of Auditors shall not publish them unless the institution which has requested the opinion and the institution concerned agree. In this case, these opinions shall be accompanied by the replies of the institution or institutions concerned.

*Article 93*

1. The appropriations relating to the activities covered by this Title shall be entered in a special section in the part of the budget devoted to operating appropriations. This Section shall contain the appropriations intended for the realization of research and technological development objectives through the implementation of the following:

- a) — (...)
- b) — (...)
- c) — (...)
- d) — (...)

*Article 94*

1. (...)
2. However, staff appropriations for the Joint Research centre shall be entered separately in a single chapter.

## COURT'S PROPOSED AMENDMENTS

*Article 90*

1. (unchanged)
2. **(Delete this paragraph, which duplicates Article 206b of the EEC Treaty. The latter is a higher-ranking piece of legislation and the paragraph restricts its scope.**
3. to 7. **Change the numbering.**

*Article 91*

1. (unchanged)
2. (unchanged)
3. **Delete 3.**

*Article 93*

1. The appropriations relating to the activities covered by this Title shall be entered in a special section in the part of the budget devoted to operating appropriations. This section shall contain the appropriations, **including staff appropriations**, intended for the realization of research and technological development objectives through the implementation of the following:

- a) — (unchanged)
- b) — (unchanged)
- c) — (unchanged)
- d) — add at the end: **'participation in joint undertakings as provided for in Article 130 (o) of the EEC treaty'**.

*Article 93a*

**The sums authorized each year under the budgetary procedure with a view to meeting research and investment expenditure shall include commitment appropriations and payment appropriations.**

*Article 94*

1. (unchanged)
2. **Delete paragraph 2.**

COMMISSION'S PROPOSAL

COURT'S PROPOSED AMENDMENTS

*Article 95*

*Article 95*

The following shall be annexed to the special section referred to in Article 93:

(unchanged)

— a table of equivalence giving the breakdown by purpose and type of expenditure of the appropriations made available in the section, as specified in the implementing rules provided for in Article 128.

— (unchanged)

For management purposes, the Commission may create appropriation accounts corresponding to the instruments of implementation;

For management purposes, the Commission **shall open** appropriation accounts corresponding to the instruments of implementation;

— a provisional schedule of commitments and payments showing the planned utilization of the commitment appropriations and the corresponding payment appropriations. The schedule shall be reviewed annually.

— a **forward** schedule of commitments and payments... (unchanged).

*Article 95 a*

1. **Movements of funds from one appropriation account to another and movements within appropriation accounts shall be notified to the Financial Controller for information purposes.**

2. **If the Financial Controller considers that he cannot ascertain in advance the effects of a transfer on the financial balance of the appropriation accounts for the financial plans, notwithstanding Article 26(9), he shall deliver an opinion.**

*Article 96*

*Article 96*

Notwithstanding Article 26, the Commission may, within the special section referred to in Article 93, transfer appropriations from one chapter to another within a limit of 15% for the commitment appropriations relating to the activities referred to in Article 93(1)(a) and (e), provided that these activities fall under the framework programme.

(unchanged)

These transfers may not have the effect of increasing the appropriations earmarked for exploratory research by more than 5% of the initial allocation for the total appropriations in respect of the JRC under the framework programme.

(unchanged)

This special provision does not concern staff appropriations for the JRC.

**Delete the third paragraph.**

## COMMISSION'S PROPOSAL

*Article 98*

With regard to the award of contracts in the fields falling under this Title, the implementing rules provided for in Article 128 may lay down special provisions on:

- the limit values determining the conditions for concluding contracts,
- the operation and the determination of the powers of the advisory committee on procurements and contracts.

*Article 106*

1. (...)
2. (...)
3. The appropriations may be earmarked for grant aid, special loans, risk capital or interest rate subsidies, and shall be used by the Commission, which may confer authority on behalf of the Community to administer a part thereof, either on the European Investment Bank or, under its responsibility, on other organizations.

This provision shall not prejudice the audit powers of the Court of Auditors under Article 206a of the EEC Treaty.

4. (...)
5. (...)

*Article 107*

1. Any cooperation project adopted by the Commission may be covered by:
  - a financing agreement drawn up between the Commission, acting for the Community, and the Government of the recipient State or the governing bodies of the recipient organizations or institutions, hereinafter referred to as the recipient.
  - or a contract with international organizations, or natural or legal persons responsible for carrying out the project.

## COURT'S PROPOSED AMENDMENTS

*Article 98*

1. (unchanged)
2. (Add a new paragraph)  
Notwithstanding Article 67(1), scientific and technical equipment may be sold without prior publication, by decision of the authorizing officer, which decision shall be taken after the opinion of the Advisory Committee on Procurements and Contracts has been obtained.

*Article 106*

1. (unchanged)
2. (unchanged)
3. The appropriations may be earmarked in particular for grant aid, special loans, risk capital, interest rate subsidies, **and loan guarantees**; they shall be used by the Commission, which may, **under its own responsibility**, confer authority to administer a part thereof, either, on behalf of the Community, on the European Investment Bank, or on other organizations.

This provision shall not prejudice the audit powers of the Court of Auditors under Article 206a of the EEC Treaty.

4. (unchanged)
5. (unchanged)

*Article 107*

1. Any cooperation project **shall give rise to the drawing up of:**
  - a financing agreement between.... (unchanged)
  - a contract... (unchanged)

Depending on the type of project adopted by the Commission, the financing agreement and the contract or contracts are either supplementary to each other or mutually exclusive. If it is necessary to conclude both a financing agreement with the recipient government and one or more contracts with organizations carrying out the project, the Commission shall ensure that the provisions laid down in the various documents concerning the implementation of one and the same project are closely coordinated.

## COMMISSION'S PROPOSAL

*Article 107 (cont.)*

2. The financing agreement or contract shall determine the financial commitment of the Community for the measure concerned. No expenditure in excess of this amount may be charged to the budget without an additional commitment.

3. In addition, a loan contract shall be drawn up between the Commission, acting for the Community, and the borrower in respect of any investment project financed by a special loan.

*Article 109*

1. The function performed by the Commission may be referred to in the preferential agreements or the financing agreements as those of chief authorizing officer.

2. The Commission, in close cooperation with the recipient, shall ensure that participants in tendering procedures can compete on an equal footing, that there is no discrimination and that the tender selected is economically the most advantageous. In particular, it shall approve the terms of the invitation to tender before it is issued, be apprised of the results of the examination of the tenders, and approve the proposal for the award of the contract.

*Article 110*

1. (...)

2. The recipient shall submit invitations to tender to the Commission for agreement before issuing them. On the basis of the decisions thus endorsed and in close cooperation with the Commission, the recipient shall issue invitations to tender, receive tenders, preside over the examination of tenders and establish the results of the tendering procedure.

3. (...)

4. (...)

## COURT'S PROPOSED AMENDMENTS

*Article 107 (cont.)*

2. The financing agreement... an additional commitment **and the inclusion of a supplementary clause in the agreement or contract.**

3. (unchanged).

*Article 109*

1. The function performed by the Commission **shall be** referred to.... (unchanged)

The Commission... shall approve the terms of the invitation to tender before it is issued, **shall, if it so wishes, be represented at the opening of the tenders,** be apprised of the results.... (unchanged).

*Article 110*

1. (unchanged)

2. The recipient shall submit invitations to tender to the Commission for agreement before issuing them. On the basis of the decisions thus endorsed and in close cooperation with the Commission, the recipient shall issue invitations to tender, receive tenders, preside over the **opening** of tenders and establish the results of the tendering procedure. **The Commission shall, if it so wishes, be represented at the opening of tenders.**

3. (unchanged)

4. (unchanged)

## COMMISSION'S PROPOSAL

## COURT'S PROPOSED AMENDMENTS

*Article 112**Article 112*

1. For payments in a currency other than that of the recipient State, the Commission shall make payment direct for services provided in connection with projects financed with grant aid.

1. For payments... the Commission shall make payment direct, **in ECUs, for services... (remainder unchanged).**

2. (...)

2. (unchanged)

3. (...)

3. (unchanged)

4. (...)

4. (unchanged)

5. (...)

5. (unchanged)

6. (...)

6. (unchanged)

7. (...)

7. (unchanged).

*Article 117**Article 117*

In urgent cases or where the nature, small scale or particular characteristics of certain works or supplies so warrant, the Commission or the recipient may, by agreement with the Commission stating the reasons therefor, exceptionally authorize:

In urgent cases or where the nature, small scale or particular characteristics of certain works or supplies so warrant, the Commission or, **where appropriate, the recipient may authorize, by way of exception:**

— the award of contracts after open invitations to tender, confined to a specific geographical area;

— (unchanged)

— the award of contracts after restricted invitations to tender;

— (unchanged)

— the conclusion of contracts by private treaty;

— (unchanged)

— the performance of contracts through public works departments.

— (unchanged).

**In cases where authorization is given by the recipient, the latter shall be required to obtain a reasoned statement of its agreement from the Commission beforehand.**

*Article 119**Article 119*

1. (...)

1. (unchanged)

2. (...)

2. (unchanged)

3. Contracts for services and technical cooperation shall, as a rule, be prepared, negotiated and concluded by the Commission.

3. **Contracts for services and technical cooperation shall be prepared, negotiated and concluded by the Commission.**

4. (...)

4. (unchanged)

5. **No payment shall be made unless it is covered by a contract or a supplementary clause to a contract.**

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COMMISSION'S PROPOSAL

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*Article 121*

1. Each agreement shall make express provision for the Court's power of audit.

2. Should the Court of Auditors wish to carry out audits on the territory of recipient States, or States in which recipients are located, it shall do so by agreement with the relevant authorities of the State concerned. Such audits shall be limited to the inspection agreements implemented pursuant to the provisions governing Community aid and shall not apply in respect of the execution arrangements which are the responsibility of the national authorizing officer.

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COURT'S PROPOSED AMENDMENTS

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*Article 121*

1. Each agreement on the financing of an investment project, **each development project contract and each food aid delivery agreement** shall make express provision for the Court's power of audit **on the basis of records and on the spot.**

2. Should the Court of Auditors wish to carry out audits on the territory of recipient States, it shall do so **in liaison** with the relevant authorities of the State concerned. Such audits shall be limited to **ensuring observance of the relevant Community legislation and the contractual undertakings entered into with the Community and assessing the efficiency of Community financing.**

This opinion was adopted by the Court of Auditors at its meeting of 9 February 1989

*For the Court of Auditors*

Marcel MART

*President*

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