Opinion of the European Economic and Social Committee on the 'Proposal for a Council Regulation amending Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities'

(COM(2005) 181 final — 2005/0090 (CNS))

(2006/C 28/17)

On 15 July 2005 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the abovementioned proposal.

Given the urgent nature of the work, the European Economic and Social Committee appointed Mr Burani as rapporteur-general at its 421st plenary session, held on 26 and 27 October 2005 (meeting of 26 October), and adopted the following opinion nem. con. with 82 votes in favour and 1 abstention.

1. **Background**

1.1 The new Financial Regulation (FR) was adopted by the Council in June 2002; this was followed by adoption of the Implementing Rules in December 2002. When it adopted the Implementing Rules the Commission undertook to report to the Council by 1 January 2006 on the implementation of the Regulation and to present possible proposals for amendments. This is the purpose of the document now under consideration, on which the Council and the Court of Auditors are currently in consultation. However, considering the time needed for procedural requirements, it will not be possible to implement the Regulation before 1 January 2007 at best: the Council's Budget Committee will announce the position of the individual Member States at the end of this year, and only then will the consultation procedure — and possible conciliation procedure — with the European Parliament, begin.

1.2 In this opinion on the Commission's proposal the EESC intends to focus *mainly* on aspects of the Regulation that are directly or indirectly relevant to **relations with civil society organisations**. The Committee believes that in principle it should refrain from commenting on provisions governing more strictly technical and 'internal' aspects, on which observations and proposals have already been made by technically qualified EU bodies with *direct* experience in the matter, i.e. the Commission's network of financial units (RUF), the administration of the Council, the Court of Justice, the Court of Auditors, and the accounts departments of the European Parliament, the EESC and the Committee of the Regions.

1.3 The EESC notes a view widely held by civil society organisations, and by NGOs in particular, that the current Financial Regulation and its implementation are too complicated, making it difficult for them to cooperate effectively and damaging their relations with the Commission. They have also complained that the Commission does not consult or discuss with them sufficiently, leading to a feeling of general confusion, frustration and disappointment.

1.4 For its part, the EESC would like to see increasingly close cooperation, in the form of structured consultations, between the EU institutions and civil society organisations. However, it is mindful of the fact that the institutions have responsibilities and prerogatives which must be adhered to, even if this means not being able to meet all demands. At all events, the parties must establish relations of understanding and respect for their respective positions. Amongst other things, it should be clearly specified in the Financial Regulation or elsewhere that interested parties must be notified if a request they have made will not be met, and must be informed of the reasons for this.

2. **General comments**

2.1 The new rules set out in the Financial Regulation and in the implementing rules that were introduced on 1 January 2003 are based on certain general principles. The most important of these is the idea of abolishing centralised *ex ante* controls, which gives more power and responsibility to authorising officers, providing for a series of cross-checks by financial controllers and accounting officers. The system seems to have proved effective, even if a few adjustments are needed in the light of experience.

2.2 The technical bodies mentioned in point 1.2 and the civil society organisations have generally highlighted the need for a better **balance between the required checks and greater flexibility of rules**, especially when smaller amounts are involved. The Commission appears sympathetic to this request; however, the EESC would like to point out that **smaller amounts means something different to the Community institutions** — which together handle huge sums of money — than to **relatively small-scale** civil society players (suppliers, consultants, NGOs, etc.). EUR 10,000 may be a small sum for the EU, but a quite considerable amount for a small- or medium-sized operator.

2.3 In this connection it should be noted that in the explanatory memorandum accompanying the proposal, the Commission states: '*Any proposed amendment should … enhance the protection of the EU's financial interests against fraud and illegal activities*'. In other words, and seen from another perspective, EU accounting rules must (or ought to) **encourage good market practice** by acting as a disincentive against the easy temptation

to take advantage of 'flexible' rules. The EESC is aware that painstaking and complicated audits are onerous for the EU, but it thinks that the legitimate aim of reducing red tape should not encourage slipshod or oversimplistic solutions. As OLAF reports show, fraud is rife at *every* level. Here the Committee would note that the Commission could perhaps have learned valuable lessons — and translated them into appropriate rules — if it had consulted OLAF during the drafting of the new Financial Regulation.

2.3.1 That said, the Committee notes the need, highlighted by civil society organisations, to strike a balance between efficiency, efficacity and responsibility, so as not to jeopardise the principle of partnership between those granting funding and those receiving it, the aim being not to impede either possible innovative developments or the prudent use of public funds. The Committee agrees with this need, but stresses that under no circumstances must the principles underpinning the use of public funds — transparency, efficacity of use, and reporting obligation — be violated.

2.4 Another statement worth commenting on is that '**changing the rules** too often, or without adequate justification, can have **a negative impact** on such beneficiaries and on the image of the European Union'. Obviously the Committee agrees with this position, but it should be qualified by the consideration that **new rules** could be **justified in the sectors where abuses most often occur**. In this case too, consultation of OLAF reports could provide useful suggestions.

3. **Specific comments**

3.1 With regard to **recovery of amounts receivable** (Articles 72-73a), the new FR stipulates that the Community's claims are also to benefit from the instruments adopted with relevant Directives on *judicial cooperation*, and requires that the Member States **treat Community claims in the same way as national *fiscal* claims**. While the EESC is aware that a regulation has direct force in each Member State, it wonders whether this rule might require a **change in national legislation**, in particular bankruptcy laws, which normally grant a **right of pre-emption** to (national) fiscal claims but do not mention debts towards the EU. To be binding on third parties, **every form of pre-emption right should be provided for under *national* law**.

3.2 Adoption in 2004 of the latest EU Directive on **public procurement** means that the FR proposal must be brought into line with the new rules; in 2002 the Union had already adopted a Directive on procurement to apply the same standards as those in force in the Member States. The EESC does not feel any need to comment on rules that have already been adopted, which can only be judged and if necessary modified on the basis of experience.

3.2.1 The Committee would draw attention to the paragraph added to Article 95. This states that a '***common database***' may be set up by '***two or more institutions***' in order to identify candidates finding themselves in situations of exclusion (Articles 93 and 94). Setting up a *centralised* database (i.e. one that is not limited to a single institution) is a good idea, but the Commission says only that *two or more* institutions *may* share their data. The EESC agrees about the usefulness of databases in general, but thinks that in this specific case the costs of integration might outweigh the benefits: the systems of each individual institution are quite different and data-gathering criteria are not always the same.

3.3 The Committee is also concerned about the **grounds for exclusion** (Article 93), which include (in Article 93(1)(a)) **judgments having the force of *res judicata*.** This provision was drafted in accordance with laws and principles enshrined in the constitutions of the majority of Member States, and as such it is irreproachable; however, the EESC notes that in some Member States appeals procedures against a judgment delivered by a court of first instance may have to pass through two other levels of the judicial system (appeals court and cassation court), and that a judgment is not considered final until all the possibilities of appeal have been exhausted. There can be long time lapses between one judicial level and another, during which **a first- or second-instance judgment, even if clearly well founded, cannot be considered legally valid grounds for exclusion**. At a practical level, it will be up to those responsible to **exercise the utmost caution** when awarding contracts, but it will not always be easy — especially in certain cases — to take decisions that comply with the law and are at the same time duly prudent.

3.3.1 The above-mentioned provision, though incontestable, thus leaves much room for confusion. It also seems inconsistent with the following article, 93(1)(b), which provides for exclusion from procurement procedures of candidates who are **'are *currently subject to* an administrative penalty**, referred to in Article 96'. Administrative or legal recourse against the application of an administrative penalty is still allowed, but the proposed text seems to imply that an administrative penalty is *final*, even if the candidate is only currently 'subject to' it. Comparison of the two provisions raises doubts as to the logical and legal criteria behind them: on the one hand, Article 93(1)(a) allows *presumed* perpetrators of serious crimes to be presumed innocent until a *definitive* judgment is delivered, while under Article 93(1)(b) administrative penalties to which a candidate is currently subject (and can therefore appeal against) constitute a reason for *immediate* exclusion. The EESC **does not ask that Article 93(1)(b) be made more flexible, but rather that a criterion be added to make Article 93(1)(a) less open-ended.**

3.4 The section on **grants** (Article 108 ff.) deserves particular attention, not just because it is such a tricky issue, but also because paying public funds to a large number of different beneficiaries may, for very different reasons, invite public criticism. Such criticism might be justified in some cases, but it often arises from a real or supposed **lack of transparency**, which also means **difficulty understanding the rules** and **the criteria for applying them**. Admittedly it is anything but easy to draft provisions to cover such a varied and heterogeneous range of cases that cannot easily be reduced to precise patterns. Transparency (understood here above all as clarity of concepts and language) thus represents the best guarantee that the administration will use its wide discretionary powers responsibly.

3.4.1 Article 109 is a prime example of poor comprehensibility: paragraph 2 states ***'Grants may not have the purpose or effect of producing a profit***', but paragraph 3(c) notes that paragraph 2 does not apply to *'actions the objective of which is the reinforcement of the financial capacity of a beneficiary or the generation of an income'*. It is not obvious what the difference between 'profit' and 'income' is in practice: the EESC would like the wording of this rule to be clarified both in form and in substance.

3.4.2 Under Article 109(3)(d), **exemption from the requirement that grants should not produce a profit** also applies to **low-value grants** which take the form of **lump sums** or **flat-rate financing** (Article 113(1)(c) and (d)). The EESC would make the same point as in 2.2 above regarding the concepts of 'low-value' and 'small', namely that a balance must be struck between the concept of 'low-value' for the EU and what 'small' means for the beneficiaries of grants. In any case, the question should be resolved and the changes incorporated into the FR, not the IR.

3.4.3 Still on the subject of grants, and particularly low-value grants, nowhere does the FR mention any **accountability requirement**, or any obligation at all to present a report on how the sums received are actually used. The EESC has taken note of the Commission's wish to reduce administrative costs, but it cannot accept that public money should be disbursed without any idea of how it will subsequently be employed. **Spot checks** on accounting records should be provided for, and penalties should be imposed for non-compliance, if only to uphold the principle of sound public administration.

3.4.4 Article 114 also merits comment. Paragraph 4 states: '**Administrative and financial penalties** which are effective, proportionate and dissuasive may be imposed on applicants by the authorising officer …'. However, it seems reasonable to ask what guarantees grant beneficiaries (who in many cases are very different from contract holders, also in terms of their financial situation) provide that they are able, or willing, to meet their penalty obligations. In the EESC's view it is necessary — in the case of applicants established in the territory of a Member States — for the Member State itself to channel applications and guarantee that obligations arising from any administrative or financial penalties are met.

4. **Conclusions**

4.1 The EESC endorses the approach adopted by the Commission in its proposal, especially regarding the abolition of centralised *ex ante* controls and their replacement by controls to be carried out *before* authorising payments for projects that have already been approved.

4.2 On the other hand, the EESC advises caution when it comes to meeting the requests made by the financial departments of many institutions to simplify or scrap various formalities and controls for contracts and 'modest' grants. Although it agrees that controls are costly and time-consuming, it feels that the worthy intention to contain costs should be qualified by a countervailing concern, namely the need not to give the impression to Europe's citizens and stakeholders that 'small' amounts are treated in an oversimplified and perfunctory manner.

4.3 For their part, civil society organisations ask that any revision of the Financial Regulation be conducted in consultation with the Commission, in a spirit of mutual understanding and taking account of the need for sound financial management on both sides. The Committee supports this request, but points out that all decisions adopted must respect the imperative need for sound, transparent management of public funds.

Brussels, 26 October 2005

The President
of the European Economic and Social Committee
Anne-Marie SIGMUND