

## III

*(Preparatory acts)*

## COURT OF AUDITORS

**OPINION No 3/2013***(pursuant to Article 287(4), TFEU)***on the proposal for a Council Regulation on the Financial Regulation applicable to the 11th European Development Fund***(2013/C 370/01)***CONTENTS**

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THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 287(4) thereof,

Having regard to the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 <sup>(1)</sup>,

Having regard to Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories (OCTs) with the European Community ('Overseas Association Decision') <sup>(2)</sup>,

Having regard to the Internal Agreement between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies, and in particular Article 10(2) thereof <sup>(3)</sup>,

Having regard to the Court's Opinion No 12/2002 on the proposal for a Council Regulation on a Financial Regulation applicable to the ninth European Development Fund under the ACP-EC Partnership Agreement signed at Cotonou on 23 June 2000 <sup>(4)</sup>,

Having regard to the Court's Opinion No 2/2007 on the proposal for a Council Regulation amending the Financial Regulation applicable to the ninth European Development Fund <sup>(5)</sup>,

Having regard to the Court's Opinion No 9/2007 on the proposal for a Council Regulation on a Financial Regulation applicable to the 10th European Development Fund <sup>(6)</sup>,

Having regard to the Court's annual reports on the activities funded by the 8th, 9th and 10th European Development Funds <sup>(7)</sup>,

Having regard to the Court's special reports Nos 9/2013 <sup>(8)</sup>, 4/2013 <sup>(9)</sup> and 11/2010 <sup>(10)</sup>,

Having regard to the Commission's proposal for a Council Regulation on the Financial Regulation applicable to the 11th European Development Fund <sup>(11)</sup>,

Having regard to the request for an opinion on the abovementioned proposal received at the Court from the Commission on 29 September 2013,

HAS ADOPTED THE FOLLOWING OPINION:

### **General observations**

#### **Transparency**

1. The Financial Regulation is an important part of the legal framework applying to each European Development Fund (EDF). Its provisions (necessarily technical and detailed) must be respected if EDF funds are to be properly spent; failure to apply its provisions means that error has occurred in the EDF transaction concerned. It is thus highly desirable that the text of the Regulation should be as transparent and user-friendly as possible.

2. The Commission's explanatory memorandum states that the principal objective in preparing this proposal has been to align the provisions of the EDF Financial Regulation with those of the general Financial Regulation <sup>(12)</sup> and its rules of application <sup>(13)</sup>.

<sup>(1)</sup> OJ L 317, 15.12.2000, p. 3. Agreement as amended by the Agreement signed in Luxembourg on 25 June 2005 (OJ L 287, 28.10.2005, p. 4) and by the Agreement signed in Ouagadougou on 22 June 2010 (OJ L 287, 4.11.2010, p. 3).

<sup>(2)</sup> OJ L 314, 30.11.2001, p. 1 and OJ L 324, 7.12.2001, p. 1, amended by Decision 2007/249/EC (OJ L 109, 26.4.2007, p. 33) and Decision No 528/2012/EU (OJ L 264, 29.9.2012, p. 1). Proposal for a new 'Overseas Association Decision' (COM(2012) 362 final) awaiting adoption.

<sup>(3)</sup> OJ L 210, 6.8.2013, p. 1. Agreement awaiting ratification.

<sup>(4)</sup> OJ C 12, 17.1.2003, p. 19.

<sup>(5)</sup> OJ C 101, 4.5.2007, p. 1.

<sup>(6)</sup> OJ C 23, 28.1.2008, p. 3.

<sup>(7)</sup> OJ C 331, 14.11.2013, p. 261; OJ C 326, 10.11.2011, p. 251; OJ C 303, 9.11.2010, p. 243 and OJ C 269, 10.11.2009, p. 257.

<sup>(8)</sup> 'EU support for governance in the Democratic Republic of the Congo' (<http://eca.europa.eu>).

<sup>(9)</sup> 'EU Cooperation with Egypt in the Field of Governance' (<http://eca.europa.eu>).

<sup>(10)</sup> 'The Commission's management of General Budget Support in ACP, Latin American and Asian Countries' (<http://eca.europa.eu>).

<sup>(11)</sup> COM(2013) 660 final.

<sup>(12)</sup> Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union (OJ L 298, 26.10.2012, p. 1).

<sup>(13)</sup> Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).

3. The proposal contains many references to the general Financial Regulation, indicating which of its articles are to apply. However, it frequently adds further provisions or references to provisions in the general Financial Regulation that are not to apply (see for example the articles discussed under 'Specific observations', paragraphs 8 to 24). Certain provisions of the general Financial Regulation are to apply not directly but '*mutatis mutandis*' and certain terms must be read as having a different meaning from that which applies in the general Financial Regulation (see the list in Article 2(4) of the proposal).

4. The resulting draft Financial Regulation is far from user-friendly. It is not a standalone document. It is impossible to understand without reference to the general Financial Regulation and its rules of application. This complexity leads to a significant risk of legal uncertainty. The document as currently presented would be difficult for managers, beneficiaries and auditors to use. Thus there is a significant risk that its provisions will be misinterpreted and that errors will occur.

5. The Court regrets that the Commission has not produced a transparent stand-alone draft regulation designed to be of maximum clarity to users and to minimise the risk of error through misunderstanding.

6. The Court also regrets that, despite the Court's suggestions in its Opinions Nos 12/2002, 2/2007 and 9/2007, the Commission has not taken the opportunity to propose a single Financial Regulation, applicable to all present and future EDFs, which, like the general Financial Regulation, could be amended whenever there was felt to be a need. A measure of this type would ensure continuity, without the risk of interrupting the implementation of the EDFs, and could be expected to simplify management.

### Simplification

7. Complexity in spending rules is a source of administrative burden and of errors to legality and regularity. Article 11 contains one potentially beneficial simplifying measure: for grants, consideration should be given to the use lump sums, flat rates and unit costs.

### Specific observations

#### Modes of implementation

8. Article 17 provides, inter alia, that the provisions of the general Financial Regulation on 'indirect management' shall apply. However, paragraphs 3 and 4 of Article 17 introduce elements going beyond those provisions.

9. Paragraph 3 provides that the 'entrusted entities' can further entrust budget-implementation tasks to other organisations in the same way, thus, in effect, creating a cascade of trust relationships. The power is very widely drawn, permitting ACP states and OCTs to entrust budget implementation tasks to bodies governed by private law on the basis of a service contract. It is not clear why this provision has been inserted into the proposal. There is a significant risk that it will obscure and potentially frustrate the application of the provisions of Article 60(1) of the general Financial Regulation. These state, inter alia, that entities and persons entrusted with budget implementation tasks '*shall guarantee a level of protection of the financial interests of the Union equivalent to that required under this Regulation when they manage Union funds...*'.

10. The text of recital 9 of the proposal makes reference to this provision, justifying it by reference to 'the Common Implementing Rules regulation'. A review of the proposal for the 11th EDF Implementing Regulation<sup>(1)</sup> has however revealed no explicit justification for such variations from the provisions of the general Financial Regulation.

11. The Court recommends that the Council examine the justification for the inclusion of paragraph 3: in particular whether any advantages from its inclusion would outweigh the risks of obscuring where responsibility lies for the proper spending of EDF monies.

### Procurement

12. Article 36 of the draft regulation provides, broadly, that the public procurement provisions of the general Financial Regulation will apply to public purchasing supported by the EDF. The first two lines of paragraph 5 provide that in the event of failure to comply with these procedures, expenditure shall not be eligible for EDF financing.

13. However the last six words of Article 36(5) qualify this principle by a reference to the principle of proportionality.

14. The proposed provision weakens the general rule that, in order to be eligible, expenditure must be incurred in compliance with procurement provisions. The principle of proportionality is relevant at the stage of determining the consequences of non-respect of procurement rules (for example recovery of financial

<sup>(1)</sup> Proposal for a Council Regulation on the implementation of the 11th EDF (COM(2013) 445 final). It is not clear whether the reference in square brackets in recital 9 relates to the draft regulation or rather to the rules of application of the general Financial Regulation.

assistance). As the principle of proportionality is a general principle of law, it is not necessary to refer to it in the provisions of Article 36.

15. The Court recommends the Council to delete the last six words of Article 36(5).

### Grants

16. According to Article 37 of the proposal the provisions of the general Financial Regulation on grants broadly apply to financial contributions from the EDF. Paragraph 3 however contains an additional provision emphasising the need for the Commission to take into account specific needs and contexts when defining modalities. It is not clear why it is thought necessary to include this provision in the new EDF Financial Regulation when there appears to be no equivalent provision in the general Financial Regulation.

17. The Court recommends that the Council examine whether there is good justification for the inclusion of such a provision and whether the provision is sufficiently clearly defined.

### Budget support

18. The first paragraph of Article 39 of the proposal provides that Article 186 of the general Financial Regulation shall apply to EDF budget support payments. That Article of the general Financial Regulation provides that financing decisions under which budget support is paid shall detail its objectives and expected results, and that payment will depend on progress in fulfilling conditions (paragraph 2); that financing agreements must provide for reimbursement of irregular expenditure (paragraph 3); and that the Commission shall support in beneficiary countries the development of parliamentary control and audit capabilities and shall increase transparency and public access to information (paragraph 4).

19. The second to seventh paragraphs of Article 39 of the proposal consist of a series of principles and practices relating to budget support from the EDF. They include general statements of policy (second and fourth paragraphs), restatements or paraphrased versions of some of the provisions of Article 186 of the general Financial Regulation (third, fifth and sixth paragraphs) and an obscure reference to links between OCTs and the Member States concerned (seventh paragraph).

20. The text thus appears to go beyond what is appropriate in a Financial Regulation (defined in recital 3 as 'the detailed rules for financial implementation'). It is also a source of potential confusion in that, on the one hand, it claims to apply the corresponding provisions in the general Financial Regulation while, on the other, it paraphrases some of those provisions.

21. The Court has made a number of recommendations in recent reports regarding the use of budget support <sup>(1)</sup>, including in particular the need to set objectively verifiable, and wherever possible, quantified criteria and to monitor progress against them. The text could usefully be strengthened in this sense. Some of the text included in the present draft (for example the references to 'differentiation' and 'key determinants' in the fourth paragraph) could on the other hand be interpreted as a justification for taking a relatively relaxed view of the need for budget support payments to be rigorously conditional.

22. The Court recommends that the Council examine this article of the proposal in the light of the considerations set out above.

### External audit and discharge

23. Article 48(6) stipulates that the 'national audit authorities of the ACP States and the OCTs shall be encouraged to participate in the work of the Court of Auditors'. The Court notes that the general Financial Regulation does not contain any similar provisions applying to external actions financed from the general budget. The Court follows international auditing standards when carrying out its work, including standards regarding the use of the work of other auditors. Whilst the Court may wish to invite national audit authorities to observe its work, it is not appropriate for the EDF Financial Regulation to create an obligation for the Court to encourage, in general, their participation in its work.

24. The Court recommends the Council to amend this paragraph so that it encourages the national audit authorities of ACP States and OCTs to cooperate with the Court, at its invitation.

<sup>(1)</sup> Paragraph 51 of the Court's 2012 EDF annual report, paragraph 64 of the Court's 2010 EDF annual report, paragraph 54 of the Court's 2009 EDF annual report, paragraph 56 of the Court's 2008 EDF annual report, Special Report No 9/2013 'EU support for governance in the Democratic Republic of the Congo', Special Report No 4/2013 'EU Cooperation with Egypt in the Field of Governance', Special Report No 11/2010 'The Commission's management of General Budget Support in ACP, Latin American and Asian Countries'.

**Other observations**

25. Article 62 of the proposal lists a number of aspects of previous EDFs to which the proposed Financial Regulation for the 11th EDF would apply. The Court recommends that the Council consider whether it is appropriate to limit the application of the future EDF Financial Regulation to the areas mentioned in the list (thus excluding its application to items that are not mentioned, such as budget support).

This Opinion was adopted by Chamber III, headed by Mr Karel PINXTEN, Member of the Court of Auditors, in Luxembourg on 20 November 2013.

*For the Court of Auditors*  
Vitor Manuel da SILVA CALDEIRA  
*President*

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