III

(Preparatory acts)

COURT OF AUDITORS

OPINION No 3/2014

(pursuant to Article 287(4) TFEU)

on the proposal for a Council Regulation amending Regulation (EC) No 215/2008 on the Financial Regulation applicable to the 10th European Development Fund for the implementation of the Bridging Facility

(2014/C 124/01)

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THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), 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 ([1]),

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') ([2]),

Having regard to the Internal Agreement between the Representatives of the Governments of the Member States, meeting within the Council, on the financing of Community aid under the multiannual financial framework for the period 2008 to 2013 in accordance with the ACP-EC Partnership Agreement, and on the allocation of financial assistance for the overseas countries and territories to which Part Four of the EC Treaty applies ([3]), and in particular Article 10(2) thereof,

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 ([4]), and in particular Article 10(2) thereof,

Having regard to Council Decision 2013/759/EU of 12 December 2013 regarding transitional EDF management measures from 1 January 2014 until the entry into force of the 11th European Development Fund ([5]),

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 ([6]),

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 ([7]),

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 ([8]),

Having regard to the Court's opinion No 3/2013 on the proposal for a Council Regulation on the Financial Regulation applicable to the 11th European Development Fund ([9]),

Having regard to the Court's annual reports on the activities funded by the 8th, 9th and 10th European Development Funds ([10]),

([1]) 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).
([2]) 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).
([3]) OJ L 247, 9.9.2006, p. 32.
([4]) OJ L 210, 6.8.2013, p. 1. Agreement awaiting ratification.
([5]) OJ L 335, 14.12.2013, p. 48.
([6]) OJ C 12, 17.1.2003, p. 19.
([7]) OJ C 101, 4.5.2007, p. 1.
([8]) OJ C 23, 28.1.2008, p. 3.
([9]) OJ C 370, 17.12.2013, p. 1.
([10]) 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.

Having regard to the Court's special reports Nos 9/2013 [1] and 11/2010 [2],

Having regard to the Commission's proposal for a Council Regulation on the Financial Regulation applicable to the 11th European Development Fund [3],

Having regard to the Commission's proposal for a Council Regulation amending Council Regulation (EC) No 215/2008 of 18 February 2008 on the Financial Regulation applicable to the 10th European development Fund for the implementation of the Bridging Facility [4],

Having regard to the request for an opinion on the above mentioned proposal received at the Court from the Council of the European Union on 28 January 2014, completed by the transmission of its annex, containing the provisions of the draft Financial Regulation, received at the Court on 25 February 2014,

HAS ADOPTED THE FOLLOWING OPINION:

Introduction

1. The Internal Agreement establishing the 11th European Development Fund (EDF) was signed by the Member States in June 2013. The Internal Agreement only enters into force after ratification by all the Member States. This process will probably be concluded in 2014.

2. To make funds available between January 2014 and the entry into force of the Internal Agreement of the 11th EDF, the Council has established transitional measures ('Bridging Facility') which will be financed from funds of previous EDFs and accounted for under the 11th EDF.

3. The financial rules applicable to the 11th EDF cannot be adopted by the Council before the entry into force of the 11th EDF Internal Agreement. Therefore, the Commission proposes that the Council Regulation on the Financial Regulation applicable to the 10th EDF be modified in such a way that the financial rules which will apply to the 11th EDF also apply to the Bridging Facility.

4. The Court was requested for an opinion on the proposal for a Council Regulation on the Financial Regulation applicable to the 11th European Development Fund. The Opinion was published in December 2013 (opinion No 3/2013).

5. The Court welcomes that a number of observations formulated in its opinion No 3/2013 on the financial rules applicable for the 11th EDF have been addressed in the present proposal and in particular the following points:

— the provisions on procurement (in particular Article 36(5) of the proposal) have been improved;

— the cooperation of national audit authorities with the Court is clarified (Article 48(6) of the proposal);

— the application of the draft Financial Regulation is generalized to all areas of EDF expenditure, except the Investment Facility (Article 60 of the proposal).

6. In its opinion No 3/2013, the Court made other observations which remain relevant and are described hereafter (see paragraphs 7 to 20).

(1) 'EU support for governance in the Democratic Republic of the Congo' (http://eca.europa.eu).
(2) 'The Commission's management of General Budget Support in ACP, Latin American and Asian Countries' (http://eca.europa.eu).
(3) COM(2013) 660 final.
(4) COM(2014) 9 final.

General observation on transparency

7. The proposal contains many references to the general Financial Regulation ([1]), 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. 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).

8. The resulting draft Financial Regulation is far from user-friendly. It is not a stand-alone document. It is impossible to understand it 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 may be misinterpreted and that errors may occur.

9. 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.

10. 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 yet proposed 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.

Specific observations

Modes of implementation

11. Article 17 provides, inter alia, that the provisions of the general Financial Regulation on 'indirect management' shall apply. However, paragraph 3 of Article 17 introduces elements going beyond those provisions.

12. 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…*'.

13. The Court recommends that the Council examines 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.

Grants

14. 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 EDF Financial Regulation for the Bridging Facility when there appears to be no equivalent provision in the general Financial Regulation.

15. 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.

([1]) 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).

Budget support

16. 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).

17. 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).

18. The text thus appears to go beyond what is appropriate in a Financial Regulation ([1]). 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.

19. The Court has made a number of recommendations in recent reports regarding the use of budget support ([2]), 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.

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

This Opinion was adopted by Chamber III, headed by Mr Karel PINXTEN, Member of the Court of Auditors, in Luxembourg at its meeting of 1 April 2014.

For the Court of Auditors
Vítor Manuel da SILVA CALDEIRA
President

([1]) Defined in recital 2 of the draft Council Regulation as 'the implementing rules of the 10th EDF for the operational and financial management'.

([2]) 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'.