



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL REGULATION

amending Financial Regulation applicable to the 9th European Development Fund

(presented by the Commission)

EXPLANATORY MEMORANDUM

On 27 March 2003, the Council adopted the Financial Regulation applicable to the 9th European Development Fund¹ which is in many respects coherent with Council Regulation (EC, Euratom) N° 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities² (hereinafter, “General Financial Regulation”).

On 3 May 2005, the Commission adopted a proposal for the tri-annual revision of the General Financial Regulation (COM(2005) 181) introducing simplifications of administrative procedures, in particular in external actions, while maintaining a high level of protection of the Communities’ financial interests in the light of the risks involved. On 18 May 2006, the Commission adopted a modified proposal for revision of the General Financial Regulation (COM(2006) 213).

The following draft proposal for a Regulation amending the Financial Regulation applicable to the 9th European Development Fund aims at transposing a limited number of modifications proposed by the Commission in the context of the revision of the General Financial Regulation.

In particular, in line with amendments to Article 53 of the General Financial Regulation, the use of bodies, including “national agencies”, will be authorised in decentralised management.

The revision also anticipates the envisaged modifications of Annex IV of the revised Cotonou agreement via the addition of an Article 19c which will refer in a more generic way to the Community regulations for the tendering procedures, will lead to deletion of articles 21, 23, 25 and 27 to 30 of Annex IV and is expected to come into force by January 2008.

The proposed amendments are considered necessary and urgent in order to facilitate implementation of the 9th European Development Fund.

¹ OJ L 83, 1.04.2003, p.1.

² OJ L 248, 16.09.2002, p.1.

Proposal for a

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

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 2000³ (hereinafter referred to as the 'ACP-EC Agreement'), as revised by Agreement of 25 June 2005 signed in Luxemburg⁴,

Having regard to the Decision No 5/2005 of the ACP-EC Council of Ministers of 25 June 2005 on transitional measures applicable from the date of signing to the date of entry into force of the revised ACP-EC Partnership Agreement⁵,

Having regard to Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ("Overseas Association Decision")⁶,

Having regard to the Internal Agreement between Representatives of the Governments of the Member States, meeting within the Council, on the Financing and Administration of Community Aid under the Financial Protocol to the Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States signed in Cotonou (Benin) on 23 June 2000 and the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the EC Treaty applies⁷ (hereinafter referred to as the 'Internal Agreement'), and in particular Article 31 thereof,

Having regard to the proposal from the Commission⁸,

Having regard to the opinion of the Court of Auditors⁹,

Having regard to the opinion of the European Investment Bank¹⁰,

³ OJ L 317, 15.12.2000, p. 3.

⁴ OJ L 287, 28.10.2005, p. 4.

⁵ OJ L 287, 28.10.2005, p. 1.

⁶ OJ L 314, 30.11.2001, p. 1.

⁷ OJ L 317, 15.12.2000, p. 355.

⁸ OJ C , , p. .

⁹ OJ C , , p. .

¹⁰ OJ C , , p. .

Whereas:

- (1) Council adopted on 27 March 2003 the Financial Regulation applicable to the 9th European Development Fund¹¹, which lays down the legal framework for the financial management of the 9th European Development Fund (EDF).
- (2) That Regulation takes into account as a cornerstone Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities¹², hereinafter referred to as the 'General Financial Regulation'.
- (3) Decision No 2/2002 of the ACP-EC Council of Ministers of 7 October 2002 regarding the implementation of Articles 28, 29 and 30 of Annex IV to the ACP-EC Agreement¹³ has specified the general regulations and general conditions applicable to works, supply and service contracts financed by the EDF, as well as the rules governing procedure, conciliation and arbitration in relation to such contracts.
- (4) This Regulation should anticipate the envisaged amendments of Annex IV of the revised Cotonou agreement which will refer in a more generic way to the Community regulations for the tendering procedures and which should be reflected by references to Annex IV in Articles 74, 76, 77 and 78 of the Financial Regulation applicable to the 9th EDF.
- (5) It is appropriate to take into account those amendments and the modifications proposed by Council Regulation (EC, Euratom) No .../... of [...] amending Regulation (EC, Euratom) N°1605/2002 on the Financial Regulation applicable to the general budget of the European Communities¹⁴ in order to facilitate the implementation of the 9th EDF.
- (6) Financial Regulation applicable to the 9th European Development Fund should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Financial Regulation of 27 March 2003 applicable to the 9th European Development Fund is amended as follows:

- (1) Article 13(1) is replaced by the following:
 - “1. In the context of decentralised management, the Commission shall undertake the financial implementation of EDF resources in accordance with the detailed rules laid down in paragraphs 2, 3, and 4 without prejudice to delegation of tasks to bodies referred to in Article 14(3).”

¹¹ OJ L 83, 1.4.2003, p. 1.

¹² OJ L 248, 16.09.2002, p 1.

¹³ OJ L 320, 23.11.2002, p. 1.

¹⁴ OJ L, .././....., p...

(2) In Article 14(1), the following subparagraph is added:

“Indirect implementation, in accordance with paragraphs 2 to 7 of this Article and with Articles 15 and 16 also applies in the case of delegation of tasks to bodies referred to in paragraph 3 of this Article in the case of decentralised management.”

(3) In Article 54(3), the first subparagraph is amended as follows:

“The Commission shall be under an obligation to effect payment from EDF resources whenever the responsible authorising officer:

- (a) endorses contracts and programme estimates, as provided for in Article 80(4);
- (b) endorses grant agreements.”

(4) In Article 74(1), the first subparagraph is replaced by the following:

“The procedures for the award of contracts relating to operations financed by the EDF to assist ACP States shall be those defined in Annex IV to the ACP-EC Agreement.”

(5) Articles 76, 77 and 78 are replaced by the following:

“Article 76

Within the limits of the powers conferred on it by the ACP-EC Agreement and in accordance with the conditions laid down in Annex IV thereto, the Commission shall ensure the broadest possible participation, on equal terms, in tendering procedures for contracts financed by the EDF and shall ensure compliance with the principles of transparency, proportionality, equal treatment and non-discrimination.”

“Article 77

Within the limits of the powers conferred on it by the ACP-EC Agreement the Commission shall take steps to establish, by analogy with the relevant rules of the general financial regulation, a central database containing details of candidates and tenderers who are, according to the rules defined in Annex IV to the ACP-EC Agreement, in a situation that excludes them from participation in procedures for the award of contracts relating to operations financed by the EDF.”

“Article 78

Within the limits of the powers conferred on it by the ACP-EC Agreement and in accordance with the conditions laid down in Annex IV thereto, the Commission shall take the necessary steps to have international tendering procedures published in the Official Journal of the European Union and on the Internet.”

(6) Title V is replaced by the following:

“DIRECT LABOUR AND INDIRECT DECENTRALISED OPERATIONS”.

(7) Article 80 is replaced by the following:

"Article 80

1. This Title shall govern the direct labour and indirect decentralised operations provided for in Article 24 of Annex IV to the ACP-EC Agreement. It shall apply mutatis mutandis to financial cooperation with the OCT.
2. In the case of direct labour operations, projects and programmes shall be implemented directly through public departments of the ACP State or States concerned.

The Community shall contribute to the costs of the departments involved by providing the equipment and/or materials that they lack and/or the resources to acquire any additional staff required, such as experts from within the ACP States concerned or other ACP States. The Community's participation shall cover only costs incurred by supplementary measures and temporary expenditure relating to execution that are strictly confined to the requirements of the project in question.

The financial management of a project implemented by direct labour in accordance with the first and second subparagraphs shall be carried out by imprest accounts administered by an imprest administrator and an accounting officer, appointed by the National Authorising Officer with the prior approval of the Commission's responsible authorising officer.

3. In the case of indirect decentralised operations, the contracting authority within the meaning of Article 73(1)(a) shall entrust tasks relating to the implementation of projects or programmes to bodies governed by public laws of the ACP State or States concerned or bodies governed by private law that are legally distinct from the ACP State or States concerned. In such cases, the body concerned shall assume responsibility for the management and implementation of the programme or project in place of the National Authorising Officer. Tasks so delegated may include the power to conclude contracts and manage contracts and the supervision of works on behalf of or for the account of the ACP State or States concerned.
4. Direct labour operations and indirect decentralised operations shall be implemented on the basis of a programme of measures to be carried out and an estimate of their cost, hereinafter referred to as the 'programme estimate'. The programme estimate is a document laying down the human and material resources required, the budget and the detailed technical and administrative implementing arrangements for execution of a project over a specified period by direct labour and, possibly, by means of public procurement and the award of specific grants. Each programme estimate shall be prepared by the imprest administrator and the accounting officer referred to in paragraph 2, in the case

of direct labour operations, or by the body referred to in paragraph 3, in the case of indirect decentralised operations, and shall then be approved by the National Authorising Officer and the Commission's responsible authorising officer before the activities it provides for commence.

5. In the context of the implementation of the programme estimates referred to in paragraph 4, the procurement and grant award procedures shall comply with those laid down in Titles IV and VI respectively.
6. The financing agreements referred to in Article 51(3) must make provision for the implementation of direct labour operations or indirect decentralised operations."

(8) Article 81 is amended as follows:

- (a) The introductory part is replaced by the following:

"In the case of indirect decentralised operations the contracting authority referred to in Article 73(1) (a) shall conclude a delegation agreement when entrusting implementation tasks to a body governed by public laws of the ACP State or States concerned or by private law with a public service mission and a service contract when entrusting those tasks to bodies governed by private law. The Commission shall ensure that the delegation agreement or service contract sets out:"

- (b) Point (b) is replaced by the following:

"(b) a clear definition and precise delimitation of the powers delegated to the body concerned and the powers retained by the National Authorising Officer;"

- (c) Point (d) is replaced by the following:

"(d) the possibility of *ex post* review and financial penalties where the granting of funds or award of contracts by the body concerned does not correspond to the procedures laid down at point (c);"

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall be applicable for the same period as the Internal Agreement.

Done at Brussels,

*For the Council
The President*