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2019/C 45/01

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## III

*(Preparatory acts)*

## COURT OF AUDITORS

**OPINION No 10/2018***(pursuant to Article 322(1) TFEU)*

**concerning the proposal for a Regulation of the European Parliament and of the Council  
establishing the Neighbourhood, Development and International Cooperation Instrument  
[COM(2018) 460 final]**

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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 322(1) thereof;

Having regard to the Multiannual Financial Framework (MFF) 2021-2027 as outlined in the communication 'A modern Budget for a Union that Protects, Empowers and Defends – The Multiannual Financial Framework 2021-2027' <sup>(1)</sup>;

Having regard to Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union <sup>(2)</sup>;

Having regard to Court Opinion No 1/2017 concerning the proposal for a Regulation of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union <sup>(3)</sup>;

Having regard to the Commission's proposal for a Regulation of the European Parliament and the Council establishing the Neighbourhood, Development and International Cooperation Instrument <sup>(4)</sup>;

Having regard to the Council's request of 9 July 2018 for an opinion on the abovementioned proposal;

Whereas the object of the proposal is to streamline a number of instruments within one broad instrument, thereby providing an opportunity to rationalise management and oversight systems, and so reduce the administrative burden for stakeholders;

HAS ADOPTED THE FOLLOWING OPINION:

### Summary

I. The Proposal is made in the context of the Multiannual Financial Framework (MFF) 2021-2027 <sup>(5)</sup>. The Proposal envisages a major restructuring of the Union's external action instruments by merging several of them into a broad new one: the Neighbourhood, Development and International Cooperation Instrument, which will apply as of 1 January 2021.

II. The rationale behind the Proposal is to 'simplify ways of working' while increasing the coherence and consistency of its interventions, and to be more flexible in responding to unforeseen challenges and crises. Overall, the Proposal achieves these goals.

III. Integrating the EDF into the NDICI addresses an inconsistency between the EDF budgetary process and accountability process. Through the Proposal, the European Parliament would gain budgetary and legislative power. Consequently, the democratic oversight of EU development aid would improve.

IV. This opinion makes suggestions on how to bring clarity to the Proposal by partly reorganising some provisions and making others more specific.

### Introduction

1. On 14 June 2018, the Commission published a proposal ('the Proposal') for a Neighbourhood, Development and International Cooperation Instrument <sup>(6)</sup> (NDICI), as well as annexes to the Proposal for a Neighbourhood, Development and International Cooperation Instrument <sup>(7)</sup>.

2. The Proposal is made in the context of the Multiannual Financial Framework (MFF) 2021-2027 <sup>(8)</sup>, as outlined in its communication 'A Modern Budget for a Union that Protects, Empowers and Defends – The Multiannual Financial Framework for 2021-2027'. The communication sets the main priorities and overall budgetary framework for EU external action programmes under the heading 'Neighbourhood and the World', including the establishment of the Neighbourhood, Development and International Cooperation Instrument.

<sup>(1)</sup> COM(2018) 321 final, Communication 'A modern Budget for a Union that Protects, Empowers and Defends – The Multiannual Financial Framework for 2021-2027' from the Commission to the European Parliament, the European Council and the Council, the European Economic and Social Committee and the Committee of the Regions.

<sup>(2)</sup> OJ L 193, 30.7.2018, p. 1, 'the Financial Regulation'.

<sup>(3)</sup> OJ C 91, 23.3.2017, p. 1.

<sup>(4)</sup> COM(2018) 460 final.

<sup>(5)</sup> COM(2018) 321 final, as cited above.

<sup>(6)</sup> Proposal for a Regulation of the European Parliament and the Council establishing the Neighbourhood, Development and International Cooperation Instrument, COM(2018) 460 final.

<sup>(7)</sup> Annexes to the Proposal for a Regulation of the European Parliament and the Council establishing the Neighbourhood, Development and International Cooperation Instrument, COM(2018) 460 final, Annexes 1 to 7.

<sup>(8)</sup> COM(2018) 321 final, Communication 'A modern Budget for a Union that Protects, Empowers and Defends – The Multiannual Financial Framework for 2021-2027' from the Commission to the European Parliament, the European Council and the Council, the European Economic and Social Committee and the Committee of the Regions.

3. In the MFF 2014-2020, a number of financing instruments coexist under heading 4 ('Global Europe'), most of which will expire on 31 December 2020. Under the MFF 2021-2027, the Proposal envisages a major restructuring of the Union's external action instruments by merging several of them into a broad new one: the Neighbourhood, Development and International Cooperation Instrument, which will apply as of 1 January 2021. The current instruments/programmes to be merged/integrated are:

- the Development Cooperation Instrument <sup>(9)</sup> (DCI);
- the European Development Fund <sup>(10)</sup> (EDF);
- the European Instrument for Democracy and Human Rights <sup>(11)</sup> (EIDHR);
- the European Neighbourhood Instrument <sup>(12)</sup> (ENI);
- the Partnership Instrument <sup>(13)</sup> (PI);
- the Instrument contributing to Stability and Peace <sup>(14)</sup> (IcSP);
- the Instrument for Nuclear Safety Cooperation <sup>(15)</sup> (INSC);
- the External Lending Mandate <sup>(16)</sup> (ELM);
- a Guarantee Fund for external action <sup>(17)</sup>;
- the European Fund for Sustainable Development (EFSD), its Guarantee and its Guarantee Fund <sup>(18)</sup>;
- Macro-Financial Assistance <sup>(19)</sup> (MFA); and
- the Common Implementing Regulation <sup>(20)</sup> (CIR).

<sup>(9)</sup> Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020. (OJ L 77, 15.3.2014, p. 44).

<sup>(10)</sup> Internal Agreement on the 11th EDF (OJ L 210, 6.8.2013, p. 1); Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th European Development Fund, (OJ L 58, 3.3.2015, p. 1); Council Decision (EU) 2015/334 of 2 March 2015 (OJ L 58, 3.3.2015, p. 75).

<sup>(11)</sup> Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide (OJ L 77, 15.3.2014, p. 85).

<sup>(12)</sup> Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument (OJ L 77, 15.3.2014, p. 27).

<sup>(13)</sup> Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries (OJ L 77, 15.3.2014, p. 77).

<sup>(14)</sup> Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace (OJ L 77, 15.3.2014, p. 1).

<sup>(15)</sup> Council Regulation (Euratom) No 237/2014 of 13 December 2013 establishing an Instrument for Nuclear Safety Cooperation (OJ L 77, 15.3.2014, p. 109). It is proposed that only a limited number of activities pertaining to the peaceful use of nuclear energy (see Annex II(6)(i)) should come under the NDICI. A complementary instrument will be created in line with the specific procedures of the Euratom Treaty: the European Instrument for Nuclear Safety (EINS). It is proposed that this instrument should cover actions (and financing for nuclear-related activities) pertaining to nuclear safeguards, support for the infrastructure and training, and transfers of EU expertise.

<sup>(16)</sup> Decision (EU) No 2018/412 of the European Parliament and of the Council of 14 March 2018 amending Decision 466/2014/EU granting an EU guarantee to the European Investment Bank against losses under financing operations supporting investment projects outside the Union (OJ L 76, 19.3.2018, p. 30).

<sup>(17)</sup> Council Regulation (EC,Euratom) No 480/2009 of 25 May 2009 establishing a Guarantee Fund for external actions (OJ L 145, 10.6.2009, p. 10).

<sup>(18)</sup> Regulation (EU) 2017/1601 of the European Parliament and of the Council of 26 September 2017 establishing the European Fund for Sustainable Development (EFSD), the EFSD Guarantee and the EFSD Guarantee Fund (OJ L 249, 27.9.2017, p. 1).

<sup>(19)</sup> Except Macro-Financial Assistance grants. Macro-Financial Assistance will be activated on a case-by-case basis, as needed.

<sup>(20)</sup> Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action (OJ L 77, 15.3.2014, p. 95). The CIR applies to a number of instruments under heading 4 'Global Europe' of the MFF 2014-2020.

4. According to recital 8 of the Proposal, the implementation of the NDICI shall be guided by the five priorities established in the Global Strategy for the European Union's Foreign and Security Policy (Global Strategy) <sup>(21)</sup>. Furthermore, recital 9 highlights the importance of the new European Consensus on Development <sup>(22)</sup> (the Consensus), which provides the framework for a common approach to development cooperation by the Union and its Member States. The Consensus aims to implement the 2030 Agenda for Sustainable Development <sup>(23)</sup> and the Addis Ababa Action Agenda <sup>(24)</sup>.

5. The objective of the Neighbourhood, Development and International Cooperation Instrument is 'to uphold and promote the Union's values and interests worldwide in order to pursue the objectives and principles of its external action' <sup>(25)</sup>.

6. The funding proposed for the implementation of the NDICI for the 2021-2027 period is 89,2 billion euros <sup>(26)</sup>.

7. One of the main changes of the NDICI is to integrate the EDF, which is currently outside the budget. With a budget of 30,5 billion euros for the 2014-2020 period, the EDF is the largest external instrument <sup>(27)</sup>. The current EDF(s) <sup>(28)</sup> and the NDICI will run in parallel until the funds are exhausted.

8. The Commission proposes that the Proposal will support the framework for implementing the successor partnership to the current Cotonou agreement <sup>(29)</sup>. This approach is the reverse of the current one, under which the Cotonou agreement has supported the EDFs.

9. Our analysis includes a number of general remarks (Part I), specific remarks (Part II) and a list of specific drafting suggestions (Annex).

#### **PART I: GENERAL REMARKS**

10. The NDICI is an ambitious proposal, which:

- (a) merges several programmes and instruments (budgetary and off-budget) into one instrument;
- (b) includes geographic programmes, thematic programmes and rapid response actions;
- (c) includes many different forms of funding (grants, procurement contracts, budget support, contributions to trust funds, financial instruments, budgetary guarantees, blending and debt relief).

This makes the NDICI a very comprehensive and complex instrument.

11. The rationale behind the Proposal is to 'simplify ways of working' while increasing the coherence and consistency of its interventions, and to be more flexible in responding to unforeseen challenges and crises <sup>(30)</sup>.

12. Overall, the Proposal will simplify the legislative framework in the area of external aid. It will provide greater flexibility for budgetary instruments and similar flexibility for the items previously included in the EDF.

#### **Simplification and coherence**

13. The simplification sought by the Commission essentially entails merging several budgetary instruments and the EDF into a broad instrument.

<sup>(21)</sup> 'Shared vision, Common Action: A Stronger Europe, A global Strategy for the European Union's Foreign and Security Policy', 19.6.2016.

<sup>(22)</sup> 'The New European Consensus on Development: Our World, Our Dignity, Our Future', Joint Statement by the Council and the Representatives of the governments of the Member States meeting within the Council, the European Parliament and the European Commission, 8.6.2017.

<sup>(23)</sup> 'Transforming our world: the 2030 Agenda for Sustainable Development', Resolution adopted by the United Nations General Assembly on 25 September 2015 (A/RES/70/1).

<sup>(24)</sup> 'Addis Ababa Action Agenda on the Third International Conference on Financing for Development', adopted on 16 June 2015 and endorsed by the United Nations General Assembly on 27 July 2015 (A/RES/69/313).

<sup>(25)</sup> Articles 3(5), 8 and 21 of the consolidated version of the Treaty on the European Union (TEU).

<sup>(26)</sup> Article 6(1) of the Proposal.

<sup>(27)</sup> A significant part of the African Peace Facility, which is currently being funded by the EDF, will remain off-budget. In comparison, the budget for heading 4 'Global Europe' for the 2014-2020 period amounts to 66,3 billion euros.

<sup>(28)</sup> For the 8th, 9th and 10th EDFs, the commitment period has expired; the commitment period for the 11th EDF will end in 2020, Article 1(5) of the Internal Agreement on the 11th EDF – (OJ L 210, 6.8.2013, p. 1); Council Regulation (EU) 2015/322 (OJ L 58, 3.3.2015, p. 1).

<sup>(29)</sup> See recital 20 of the Proposal.

<sup>(30)</sup> Explanatory memorandum to the Proposal, point 1 'Context of the Proposal'.

14. Although the Proposal goes in the right direction and reduces gaps and overlaps <sup>(31)</sup>, coherence and consistency depend on the implementation arrangements that are chosen, as well as on the Commission's supervision and management arrangements. For example, capacity building in the area of peace and security can be financed geographically and thematically under the Proposal and implemented by separate Commission departments, EU delegations or EU trust funds. Furthermore, similar actions might also be financed under the CFSP (CSDP training missions not covered by the 'Athena mechanism') or under the proposed European Peace Facility.

### **Flexibility**

15. The communication on the new MFF 2021-2027 <sup>(32)</sup> stressed that 'it will in addition be essential that the rules governing the Neighbourhood, Development and International Cooperation Instrument include similar flexibility provisions to those in place for the current European Development Fund'.

16. In order to respond more flexibly to unforeseen challenges and crises, the Proposal involves two main measures: introducing an 11 % 'emerging challenges and priorities cushion' (Article 6(3)) and softening the rules on annuality by making it easier to carry over commitments and make decommitments available again to the original budget line (Article 25).

### **Accountability**

17. Our 2017 EDF annual report <sup>(33)</sup> drew attention to an inconsistency between the EDF budgetary process and the accountability process. The European Parliament (EP) does not intervene in the establishment of the EDF budget and its rules, or in the allocation of relevant resources. However, it does decide whether to grant discharge to the European Commission for the way it has managed the EDF as part of a specific annual discharge procedure. Integrating the EDF into the NDICI addresses this inconsistency and strengthens the European Parliament's democratic oversight of EU development aid. Consequently, the democratic control of EU development aid has improved. By means of the Proposal, the European Parliament will gain budgetary and legislative power.

18. Recital 44 stresses the obligation for the Commission to include in '(...) agreements with third countries and territories and with international organisations, and any contract or agreement resulting from the implementation of the Regulation should contain provisions expressly empowering the Commission, the Court of Auditors and OLAF to conduct such audits, on-the-spot checks and inspections, according to their respective competences and ensuring that any third parties involved in the implementation of Union funding grant equivalent rights'. The Commission and legislators should consider reinforcing in such agreements the obligation to forward to the Court of Auditors, at its request, any document or information it needs to carry out its task.

### **EDF specific arrangements**

19. Several material points relating to the EDF, such as the use of remaining funds, special reserves and decommitted amounts, the future of the Cotonou agreement and of the ACP Investment Facility, are not covered by the Proposal and will depend on a decision by the Member States when the current Cotonou agreement expires in 2020 and on any subsequent agreement with the ACP countries. This creates uncertainty for partner countries.

## **PART II: SPECIFIC REMARKS**

### **Title I — General provisions (Articles 1-9)**

20. The recitals stress the importance of gender equality and women's empowerment, climate change, migration and civil society organisations. However, gender equality and climate change are not explicitly mentioned in the specific objectives in Article 3(2).

### **Chapter I — Programming (Articles 10-15)**

21. As regards programming, other than a chapter on Neighbourhood-related issues (Chapter II) that is inspired by the respective provisions for the ENI <sup>(34)</sup>, the Proposal is mostly based on the DCI Regulation <sup>(35)</sup>. This is the case of the geographic programmes in particular.

<sup>(31)</sup> The impact assessment of the Proposal (SWD(2018) 337 final) identifies fewer gaps and overlaps between instruments as one justification for the change in the architecture of the external instruments, page 19.

<sup>(32)</sup> COM(2018) 321 final, A Modern Budget for a Union that Protects, Empowers and Defends. The Multiannual Financial Framework for 2021-2027, footnote 16.

<sup>(33)</sup> Annual report on the activities funded by the 8th, 9th, 10th and 11th European Development Funds for the financial year 2017, paragraph 45 (OJ C 357, 4.10.2018, p. 315).

<sup>(34)</sup> Regulation (EU) No 232/2014, as cited above.

<sup>(35)</sup> Regulation (EU) No 233/2014, as cited above.

22. As regards thematic programmes, the Proposal also takes on board programming provisions from other existing instruments (e.g. the IcSP <sup>(36)</sup>, and the PI <sup>(37)</sup>). As these instruments are mainly of a thematic nature and in certain respects include very similar provisions, the Proposal results in a significantly simpler set of provisions (particularly as far as programming documents are concerned).

23. Article 11 of the Proposal introduces a number of programming principles, which exclusively address geographic programmes. Although by their very nature it is clear that some principles apply only to this type of programmes (e.g. as regards synchronising the programming period with the partner countries' strategy cycles), others do not apply exclusively to geographic programmes. An example of this is the principle that programming documents for geographic programmes should be results-based (Article 11(5)); in our view, this should also apply to thematic programmes.

24. ***The Commission and legislators should consider:***

*applying the principle that programming documents for geographic programmes should be results-based to thematic programmes as well.*

25. Article 11(1) of the Proposal calls for dialogue between the Union, the Member States and the partner countries with a view to programming action. However, we find no reference to this dialogue either in the description of the process of adopting, approving, amending and/or reviewing the multiannual indicative programmes (MIPs) (Article 14), or in the definition of the contents of programming documents (Articles 12 and 13), e.g. the inclusion of a reference to the main stakeholders consulted during the programming procedure.

26. ***The Commission and legislators should consider:***

*including in the Proposal the missing reference to the dialogue between the Union, Member States and partner countries.*

27. The wording of numbers 3 and 4 of Article 14 only differs insofar as one addresses geographic programmes (number 3), while the other addresses thematic programmes (number 4), as does the final part of number 3 (which also includes 'following a crisis or post-crisis situation'). The Annex contains a suggestion for re-formulation.

28. Article 15 deals with the 'emerging challenges and priorities cushion'. It is not clear why this article comes under 'Programming' (Chapter I).

29. ***The Commission and legislators should consider:***

*moving Article 15, 'emerging challenges and priorities cushion', to section 'General provisions', after Article 6. This modification would make the order of the articles more logical as Article 15 refers to Article 6.*

## **Chapter II — Specific provisions for the Neighbourhood (Articles 16-18)**

30. The Proposal dedicates a separate chapter to 'Specific provisions for the Neighbourhood', consisting of three articles related to programming. The proposed structure makes the Proposal more difficult to read.

31. Article 16(2) relates to the programming principles for 'Neighbourhood'. Although the content of this paragraph is about programming principles, the Article is entitled 'Programming documents'. This is not in keeping with the structure applied in Chapter I, where Programming Principles (Article 11) and Programming Documents (Article 12) come under separate Articles.

32. Article 16(2) states 'By way of derogation from Article 11(2) ...'. However, the content of the two paragraphs and the partner country's criteria used for programming are partly similar.

33. In Article 17, the Commission proposes a 'performance-based approach'. However, this relates only to 'Neighbourhood' countries, insofar as only they have characteristics that could be compared using performance indicators.

34. Although a similar mechanism was also included under the 11th EDF <sup>(38)</sup> 'in order to provide incentives for result-oriented reforms', this is not the case under the current Proposal.

<sup>(36)</sup> Regulation (EU) No 230/2014, as cited above.

<sup>(37)</sup> Regulation (EU) No 234/2014, as cited above.

<sup>(38)</sup> Regulation (EU) 2015/322, as cited above, Article 7(2).



35. Furthermore, the mid-term review report of the ENI <sup>(39)</sup> stated that: 'The implementation of the incentive-based approach defined in the ENI provided significantly higher financial resources to those partners that have made the strongest progress on political reforms but its impact on leveraging further reforms, in particular in other countries, still needs to be demonstrated. The ENI has not been able to provide sufficient incentives to those countries reluctant to engage in political reforms.' The Proposal has not changed the existing mechanism of the performance-based approach.

**36. The Commission and legislators should consider:**

*applying a similar mechanism for the 'performance based-approach' to the whole Proposal. This modification would ensure that the 'performance based-approach' is not limited to 'Neighbourhood' countries.*

37. The concept of the performance-based approach in Article 17 is the same as the incentive-based approach for the ENI <sup>(40)</sup>; only the terminology differs. The concept has not been adjusted to reflect the Financial Regulation's focus on performance and results <sup>(41)</sup>.

**38. The Commission and legislators should consider:**

*deleting Chapter II, 'Specific provisions for the Neighbourhood', and including the articles under Chapter I, 'Programming', keeping the specific provisions for the Neighbourhood to a strict minimum. This modification would make the proposal easier to read.*

### **Chapter III — Action plans, measures and implementing methods (Articles 19-25)**

39. As regards implementation, the Proposal is mainly based on the CIR <sup>(42)</sup> and takes on board the implementation provisions of some of the existing instruments.

40. Compared to the existing framework, the Proposal includes a significantly simpler list of the types of measures that can be adopted (individual, special, support and exceptional assistance measures). In our opinion, a description of (some of) the situations in which individual measures are to be adopted would make the proposal clearer.

41. Article 19(4) concerns exceptional assistance measures. By analogy with the support measures, which are governed by one specific article (Article 20) exceptional assistance measures should be treated in a separate article, by virtue of their being exceptional.

42. In Article 21, the Commission proposes ceilings (10 million euros and 20 million euros, respectively), below which action plans and measures do not need to be adopted 'by means of implementing acts adopted in accordance with the examination procedure'. These ceilings are double those of the 11th EDF <sup>(43)</sup>. In the case of programmes already financed under the budget, the ceilings have also doubled. Increasing the thresholds for those exceptions where an implementing act is not required weakens oversight arrangements.

43. Article 25 of the Proposal goes beyond the Financial Regulation by:

- (a) allowing unused commitment and payment appropriations to be automatically carried over and committed up to 31 December of the following financial year;
- (b) making available again those commitment appropriations that correspond to the amount of decommitments made as a result of total or partial non-implementation of an action;
- (c) not applying the third subparagraph of Article 114(2) of the Financial Regulation <sup>(44)</sup>;

<sup>(39)</sup> SWD(2017) 602, Commission staff working document - Evaluation of the European Neighbourhood Instrument Accompanying the document – Report from the Commission to the European Parliament and the Council – Mid-term review of External Financing Instruments.

<sup>(40)</sup> Regulation (EU) No 232/2014 as cited above, Article 4(2) and (3).

<sup>(41)</sup> 'The concept of performance as regards the budget should be clarified. Performance should be linked to the direct application of the principle of sound financial management. The principle of sound financial management should also be defined, and a link should be established between objectives set and performance indicators, results and economy, efficiency and effectiveness in the use of appropriations. For reasons of legal certainty, while avoiding conflicts with existing performance frameworks of the different programmes, performance terminology - in particular output and results- should be defined' (Financial Regulation, Recital 9).

<sup>(42)</sup> Regulation (EU) No 236/2014, as cited above.

<sup>(43)</sup> Article 9(4) of Regulation (EU) 2015/322, as cited above.

<sup>(44)</sup> 'In external actions, where the global budgetary commitment gives rise to a financing agreement concluded with a third country, the financing agreement shall be concluded by 31 December of year n+1. In that case, the global budgetary commitment shall cover the total costs of legal commitments implementing the financing agreement entered into within a period of three years following the date of conclusion of the financing agreement.'

- (d) introducing a derogation from Article 209(3) of the Financial Regulation concerning the repayments and revenues generated by a financial instrument.

44. In the explanatory memorandum, the Commission states that these provisions are needed to import the flexibilities of the EDF, i.e. unallocated funds and multiannuality. Making exceptions to the Financial Regulation introduces an element of additional complexity when applying legislation.

45. Article 25(1) includes the provision that the 'carried-over amount shall be used first in the following financial year. However, Article 12(2) of the Financial Regulation states that the institution 'shall first use the appropriations authorised for the current financial year and shall not use the appropriations carried over until the former are exhausted'.

46. Article 25(2) of the Proposal adds an exception to the provisions of Article 15 of the Financial Regulation <sup>(45)</sup> by allowing decommitments made as a result of total or partial non-implementation of an action to be made available again to the original budget line.

47. The provisions of Article 25 provide more flexibility in the implementation of the NDICI's budget. However, the impact of greater flexibility on the management of the funds needs to be assessed given the potential loss of accountability, i.e. less responsibility for the proper management of appropriations.

48. Funds decommitted from previous EDFs can be re-committed under the ongoing EDF, subject to a specific decision by the Council. If no specific decision is taken, the funds are allocated to a special reserve, pending allocation <sup>(46)</sup>. Under the general budget, decommitted funds from the previous programming period are cancelled. It is not clear if Article 25(2) also applies to funds decommitted after the MFF expires <sup>(47)</sup>. If this is the case, a specific provision should be included in the Proposal.

#### **Chapter IV — EFSD+, budgetary guarantees and financial assistance to third countries (Articles 26-30)**

49. Chapter IV focuses on EFSD+ and External Action Guarantee.

50. We note that the budgetary guarantee can be managed more efficiently with a common provisioning fund.

51. Although the EIB was the only bank in charge of the ELM and the main partner in the EFSD, it is not clear what its future role will be <sup>(48)</sup>.

52. Article 27(2) lists three conditions with which the External Action Guarantee needs to comply. Necessary achievement of a leverage and a multiplier effect based on a target range of values specified in an ex-ante evaluation for the budgetary guarantee is not stated as one of the criteria <sup>(49)</sup>.

#### **53. The Commission and legislators should consider**

*adding leverage to the list of conditions with which the External Action Guarantee needs to comply. This modification would make the list of conditions for the External Action guarantee more complete.*

54. According to Article 26(4), the provisioning rate shall range between 9 % and 50 %. Although it is specified when a provisioning rate of 9 % is applied, no information is provided when a higher rate (up to a maximum of 50 %) is applied.

<sup>(45)</sup> Article 15(3) allows decommitments to be made available again only when they relate to research projects.

<sup>(46)</sup> Article 1(4) of the Internal Agreement on the 11th EDF (OJ L 210, 6.8.2013, p. 1), as cited above.

<sup>(47)</sup> Similar to the special reserve mechanism of the EDF, Article 1(4) of the Internal Agreement on the 11th EDF (OJ L 210, 6.8.2013, p. 1), as cited above.

<sup>(48)</sup> Recital 33 of the Proposal: 'The EFSD+ should support the External Investment Plan and combine blending and budgetary guarantee operations covered by the External Action Guarantee, including those covering sovereign risks associated with lending operations, previously carried out under the external lending mandate to the European Investment Bank. Given its role under the Treaties and its experience over the last decades in supporting Union policies, the European Investment Bank should remain a natural partner for the Commission for the implementation of operations under the External Action Guarantee.'

<sup>(49)</sup> See Articles 209(2)(d) and 219(3) of the Financial Regulation.

55. The instruments listed in Article 27(3) entail various risks. Loans in local currency and equity participation have a very high inherent risk. For example, the ACP Investment Facility had rules that limited equity participation to non-controlling minority holdings. In addition, there were also exposure limits for equity participation and loans in local currency (no more than 20 % of the total endowment). Operational agreements should contain similar provisions.

56. Recital 35 of the Proposal states that the guarantee should be priced in order to avoid market distortions. Similarly, Article 209(2)(c) of the Financial Regulation states that the remuneration of external action guarantees shall not distort competition in the internal market. Article 29(3)(d) of the Proposal stipulates that External Action Guarantee agreements should contain 'the remuneration of the guarantee', but clarification could be included to stress that market distortions should be avoided. Furthermore, the Proposal does not include any information on how the guarantee should be priced and under what circumstances it could be subsidised. In operational agreements, further clarification is needed about how the guarantee should be priced and under what circumstances it could be subsidised.

57. Terminology is used inconsistently, e.g. financial assistance, macro-financial assistance, and macro-financial assistance loans.

#### **Chapter V — Monitoring, reporting and evaluation (Articles 31-32)**

58. Article 31, 'Monitoring and reporting', refers mainly to the instrument; Article 32, 'Evaluation', deals only with how it is evaluated. The Proposal does not distinguish between evaluation of the instrument and evaluation of actions.

59. Article 31(2) of the Proposal stipulates that 'progress with respect to expected results should be monitored on the basis of clear, transparent and, where appropriate, measurable indicators'. Indicators may be quantitative or qualitative, but should always be measurable in order to be useful. 'Where appropriate' should therefore be deleted.

**60. The Commission and legislators should consider:**

*clearly distinguishing between evaluation of actions and the NDICI Regulation. This modification would make the Proposal clearer by specifying which articles apply to actions as opposed to those which apply to the NDICI Regulation itself.*

61. Annex VII of the Proposal provides a list of key performance indicators to 'help measure the Union's contribution to the achievement of its specific objectives'.

62. Some key performance indicators refer to several specific objectives, while for other indicators, it is not clear to which specific objective they apply. In the case of other specific objectives, there are no indicators at all.

**63. The Commission and legislators should consider:**

*linking specific objectives and key performance indicators better. When key performance indicators are clearly linked to specific objectives, the achievement of those objectives can be followed up more effectively.*

64. Article 32(1) envisages an interim evaluation of the Proposal, but does not provide any details about its purpose and content.

**65. The Commission and legislators should consider:**

*extending the requirements of Article 32(2) concerning the final evaluation of the Regulation to the interim evaluation, where relevant. This modification would clarify the requirements which an interim evaluation needs to satisfy.*

**Conditions for attestation by the Court**

66. In our Strategy for 2018-2020, we signalled our aim to move towards an 'attestation engagement' for our Statement of Assurance.

67. We acknowledge that the objective of the Proposal is not to define or describe the management and control system, or the overall internal control framework and its mandatory components <sup>(50)</sup>.

68. However, we note that the current Proposal does not make sufficient provision for the management and control systems to include an internal control framework whose design would allow the Court to pursue the move towards an attestation engagement.

This Opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 13 December 2018.

*For the Court of Auditors*

Klaus-Heiner LEHNE

*President*

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<sup>(50)</sup> Section 2 of the annexed 'Legislative Financial Statement' indicates how the Commission intends to put management measures in place.

## ANNEX

## Analysis of the Commission's proposal and the Court's suggestions

The following drafting suggestions reflect some - but not all - considerations raised in this Opinion. It is the legislators' responsibility to take account of these points and incorporate them in the appropriate articles of the proposed Regulation.

Text in the proposal	Court's suggestion	Comments
<p><b>Article 8</b> <i>General Principles</i></p> <p>3. The Union shall support, as appropriate, the implementation of bilateral, regional and multilateral cooperation and dialogue, partnership agreements and triangular cooperation.</p>		<p>3. The term 'triangular cooperation' should be specified.</p>
<p><b>TITLE II</b> <b>IMPLEMENTATION OF THIS REGULATION</b></p> <p><b>Chapter I</b> <b>Programming</b></p> <p><b>Article 14</b> <i>Adoption and amendment of multiannual indicative programmes</i></p> <p>3. Multiannual indicative programmes for geographic programmes may be reviewed where necessary for effective implementation, in particular where there are substantive changes in the policy framework referred to in Article 7 or following a crisis or post-crisis situation.</p> <p>4. Multiannual indicative programmes for thematic programmes may be reviewed where necessary for effective implementation, in particular where there are substantive changes in the policy framework referred to in Article 7.</p>	<p><b>TITLE II</b> <b>IMPLEMENTATION OF THIS REGULATION</b></p> <p><b>Chapter I</b> <b>Programming</b></p> <p><b>Article 14</b> <i>Adoption and amendment of multiannual indicative programmes</i></p> <p>3. Multiannual indicative programmes <del>for geographic programmes</del> may be reviewed where necessary for effective implementation, in particular where there are substantive changes in the policy framework referred to in Article 7 or, <u>in the case of geographic programmes</u>, following a crisis or post-crisis situation.</p> <p>4. <del>Multiannual indicative programmes for thematic programmes may be reviewed where necessary for effective implementation, in particular where there are substantive changes in the policy framework referred to in Article 7.</del></p>	<p><b>TITLE II</b> <b>IMPLEMENTATION OF THIS REGULATION</b></p>

Text in the proposal	Court's suggestion	Comments
<p>5. On duly justified imperative grounds of urgency, such as crises or immediate threats to democracy, the rule of law, human rights or fundamental freedoms, the Commission may amend multiannual indicative programmes referred to in Articles 12 and 13 of this Regulation by implementing acts adopted in accordance with the urgency procedure referred to in Article 35(4).</p>	<p><del>5.4.</del> On duly justified imperative grounds of urgency, such as crises or immediate threats to democracy, the rule of law, human rights or fundamental freedoms, the Commission may amend multiannual indicative programmes referred to in Articles 12 and 13 of this Regulation by implementing acts adopted in accordance with the urgency procedure referred to in Article 35(4).</p>	
<p><b>Chapter II</b> <b>Specific provisions for the Neighbourhood</b></p> <p><b>Article 17</b> <i>Performance-based approach</i></p> <p>1. Indicatively 10 % of the financial envelope set out in Article 4(2)(a) to supplement the country financial allocations referred to in Article 12 shall be allocated to partner countries listed in Annex I in order to implement the performance-based approach. The performance-based allocations shall be decided on the basis of their progress towards democracy, human rights, rule of law, cooperation on migration, economic governance and reforms. The progress of partner countries shall be assessed annually.</p>	<p><b>Chapter II</b> <b>Specific provisions for the Neighbourhood</b></p> <p><b>Article 17</b> <i>Performance-based approach</i></p> <p>1. Indicatively 10 % of the financial envelope set out in Article <del>4(2)(a)</del><b>6(2)(a)</b> to supplement the country financial allocations referred to in Article 12 shall be allocated to partner countries listed in Annex I in order to implement the performance-based approach. The performance-based allocations shall be decided on the basis of their progress towards democracy, human rights, rule of law, cooperation on migration, economic governance and reforms. The progress of partner countries shall be assessed annually.</p>	
<p><b>Chapter III</b> <b>Action Plans, measures and implementing methods</b></p> <p><b>Article 23</b> <i>Forms of EU funding and methods of implementation</i></p> <p>Budget support as referred to in point (c) of paragraph 1, including through sector reform performance contracts, shall be based on country ownership, mutual accountability and shared commitments to universal values, democracy, human rights, the rule of law, and aims at strengthening partnerships between the Union and partner countries. It shall include reinforced policy dialogue, capacity development, and improved governance, complementing partners' efforts to collect more and spend better in order to support sustainable and inclusive economic growth and jobs and poverty eradication.</p>	<p><b>Chapter III</b> <b>Action Plans, measures and implementing methods</b></p> <p><b>Article 23</b> <i>Forms of EU funding and methods of implementation</i></p> <p>4. Budget support as referred to in point (c) of paragraph 1, including through sector reform performance contracts, shall be provided in accordance with Article 236 of the Financial Regulation. <del>It</del> shall be based on country ownership, mutual accountability and shared commitments to universal values, democracy, human rights, the rule of law, and aims at strengthening partnerships between the Union and partner countries. It shall include reinforced policy dialogue, capacity development, and improved governance, complementing partners' efforts to collect more and spend better in order to support sustainable and inclusive economic growth and jobs and poverty eradication.</p>	



Text in the proposal	Court's suggestion	Comments
<p>Any decision to provide budget support shall be based on budget support policies agreed by the Union, a clear set of eligibility criteria and a careful assessment of the risks and benefits.</p>	<p>Any decision to provide budget support shall be based on budget support policies agreed by the Union, a clear set of eligibility criteria and a careful assessment of the risks and benefits.</p>	
<p>4. Budget support shall be differentiated in such a way as to respond better to the political, economic and social context of the partner country, taking into account situations of fragility.</p>	<p>4. Budget support shall be differentiated in such a way as to respond better to the political, economic and social context of the partner country, taking into account situations of fragility.</p>	
<p>When providing budget support in accordance with Article 236 of the Financial Regulation, the Commission shall clearly define and monitor criteria for budget support, including progress in reforms and transparency, and shall support the development of parliamentary control, national audit capacities and increased transparency and public access to information.</p>	<p><del>When providing budget support in accordance with Article 236 of the Financial Regulation, the Commission shall clearly define and monitor criteria for budget support conditional, including progress in reforms and transparency, and shall support the development of parliamentary control, national audit capacities and increased transparency and public access to information.</del></p>	
<p>5. Disbursement of the budget support shall be based on indicators demonstrating satisfactory progress being made towards achieving the objectives agreed with the partner country.</p>	<p><del>5. Disbursement of the budget support shall be based on indicators demonstrating satisfactory progress being made towards achieving the objectives agreed with the partner country.</del></p>	
<p>6. Financial instruments under this Regulation may take forms such as loans, guarantees, equity or quasi-equity, investments or participations, and risk-sharing instruments, whenever possible and in accordance with the principles laid down in Article 209(1) of the Financial Regulation under the lead of the EIB, a multilateral European finance institution, such as the European Bank for Reconstruction and Development, or a bilateral European finance institution, such as bilateral development banks, possibly pooled with additional other forms of financial support, both from Member States and third parties.</p>	<p><del>6. 5. Financial instruments under this Regulation may take forms such as loans, guarantees, equity or quasi-equity, investments or participations, and risk-sharing instruments, whenever possible and in accordance with the principles laid down in Article 209(1) of the Financial Regulation under the lead of the EIB, a multilateral European finance institution, such as the European Bank for Reconstruction and Development, or a bilateral European finance institution, such as bilateral development banks, possibly pooled with additional other forms of financial support, both from Member States and third parties.</del></p>	
<p>Contributions to Union financial instruments under this Regulation may be made by Member States as well as any entity referred to in Article 62(1)(c) of the Financial Regulation.</p>	<p>Contributions to Union financial instruments under this Regulation may be made by Member States as well as any entity referred to in Article 62(1)(c) of the Financial Regulation.</p>	

Text in the proposal	Court's suggestion	Comments
<p>7. Those financial instruments may be grouped into facilities for implementation and reporting purposes.</p> <p>8. The Union's funding shall not generate or activate the collection of specific taxes, duties or charges.</p> <p>9. Taxes, duties and charges imposed by partner countries may be eligible for financing under this Regulation.</p>	<p>7. Those financial instruments may be grouped into facilities for implementation and reporting purposes.</p> <p>8. <u>6.</u> The Union's funding shall not generate or activate the collection of specific taxes, duties or charges.</p> <p>9. <u>7.</u> Taxes, duties and charges imposed by partner countries may be eligible for financing under this Regulation.</p>	
<p><b>Chapter IV</b></p> <p><b>EFSD+, budgetary guarantees and financial assistance to third countries</b></p> <p><b>Article 26</b></p> <p><i>Scope and financing</i></p>	<p><b>Chapter IV</b></p> <p><b>EFSD+, budgetary guarantees and financial assistance to third countries</b></p>	<p><b>Chapter IV</b></p> <p><b>EFSD+, budgetary guarantees and financial assistance to third countries</b></p> <p>6. There is a lack of information regarding what will be done with e.g. revenues and any payments received by the Union in accordance with guarantee or loan agreements, amounts recovered from defaulting debtors, returns on investments of the resources held in the common provisioning fund. There is also no information regarding any costs involved.</p>
<p>7. The provisioning referred to in Article 211(2) of the Financial Regulation shall be constituted on the basis of the Union's total outstanding liabilities arising from each operation, including operations signed before 2021 and guaranteed by the Union. The annual amount of provisioning required may be constituted during a period of up to seven years.</p>	<p>7. The setting of a provisioning rate referred to in Article 211(2) of the Financial Regulation shall be <del>constituted on the basis of</del> based on the Union's total outstanding liabilities arising from each operation, including operations signed before 2021 and guaranteed by the Union. That amount shall exclude the contributions referred to in Article 208(2) of the Financial Regulation (see Article 211(1) FR). The annual amount of provisioning required may be constituted during a period of up to seven years.</p>	<p>7. It seems that Article 211(6) and Article 211(7) of the Financial Regulation have not been taken into account, even though they are very important. We believe that the Commission should immediately inform the European Parliament and the Council, and should propose adequate replenishment measures where a country in receipt of EU financial assistance fails to pay on a maturity.</p>



Text in the proposal	Court's suggestion	Comments
<p>8. The balance of assets by 31 December 2020 in the EFSD Guarantee Fund and in the Guarantee fund for external actions established respectively by Regulation (EU) No 2017/1601 of the European Parliament and the Council and Council Regulation (EC, Euratom) No 480/2009 shall be transferred into the common provisioning fund for the purpose of provisioning its respective operations under the same single guarantee provided for in paragraph 4 of this Article.</p>	<p>8. The balance of assets by 31 December 2020 in the EFSD Guarantee Fund and in the Guarantee fund for external actions established respectively by Regulation (EU) No 2017/1601 of the European Parliament and the Council and Council Regulation (EC, Euratom) No 480/2009 shall be transferred into the common provisioning fund for the purpose of provisioning its respective operations under the same single guarantee provided for in paragraph <b>45</b> of this Article.</p>	<p>Have the provisions of Article 209(3) and Article 209(4) of the Financial Regulation been correctly taken into account in the proposal? See also Article 29(6) below.</p>
<p><b>Article 27</b> <i>Eligibility and selection of operations and counterparts</i></p> <p>2. The External Action Guarantee shall support financing and investment operations compliant with the conditions set out in points (a) to (c) of Article 209(2) of the Financial Regulation and that:</p> <ul style="list-style-type: none"> <li>(a) ensure complementarity with other initiatives;</li> <li>(b) are economically and financially viable, with due regard to the possible support from, and co-financing by, private and public partners to the project, while taking into account the specific operating environment and capacities of countries identified as experiencing fragility or conflict, Least Developed Countries and heavily indebted poor countries which may benefit from concessional terms;</li> <li>(c) are technically viable and are sustainable from an environmental and social point of view.</li> </ul>		<p>2. Please note that this is not in accordance with Article 219(3) of the Financial Regulation, as point (d) mentioning leverage and the multiplier effect of budgetary guarantees is not included. Was it omitted by accident?</p>

Text in the proposal	Court's suggestion	Comments
<p>5. Eligible counterparts shall comply with the rules and conditions provided for in Article 62(2)(c) of the Financial Regulation. In the case of bodies governed by the private law of a Member State or a third country which have contributed to the External Action Guarantee in accordance with Article 28 of this Regulation, preference shall be given to those bodies that disclose information related to environment, social and corporate governance criteria.</p>	<p>5. Eligible counterparts shall comply with the rules and conditions provided for in Article <del>62(2)(c)</del><b>62(1)(c)</b> of the Financial Regulation. In the case of bodies governed by the private law of a Member State or a third country which have contributed to the External Action Guarantee in accordance with Article 28 of this Regulation, preference shall be given to those bodies that disclose information related to environment, social and corporate governance criteria.</p>	
<p><b>Article 28</b> <i>Contribution from other donors to the External Action Guarantee</i></p> <p>1. Member States, third countries and other third parties may contribute to the External Action Guarantee.</p> <p>By derogation from the second sub-paragraph of Article 218(2) of the Financial Regulation, the contracting parties to the Agreement on the European Economic Area may contribute in the form of guarantees or cash.</p> <p>Contribution from third countries other than the contracting parties to the Agreement on the European Economic Area and from other third parties shall be in the form of cash and subject to approval by the Commission.</p> <p>The Commission shall inform the European Parliament and the Council without delay of the contributions confirmed.</p> <p>At the request of the Member States, their contributions may be earmarked for the initiation of actions in specific regions, countries, sectors or existing investment windows.</p> <p>2. Contributions in the form of a guarantee shall not exceed 50 % of the amount referred to in Article 26(2) of this Regulation.</p>	<p>2. Contributions in the form of a guarantee shall not exceed 50 % of the amount referred to in Article <del>26(2)</del><b>26(3)</b> of this Regulation.</p>	<p>1. The relevant article of the FR uses the word 'may', so it is unclear why it is a derogation.</p>

Text in the proposal	Court's suggestion	Comments
<p><b>Article 29</b> <i>Implementation of External Action Guarantee agreements</i></p> <p>5. The External Action Guarantee may cover:</p> <p>(a) for debt instruments, the principal and all interests and amounts due to the selected eligible counterpart, but not received by it in accordance with the terms of the financing operations after an event of default has occurred;</p> <p>(a) for equity investments, the amounts invested and their associated financing costs;</p> <p>(b) for other financing and investment operations referred to in Article 27(2), the amounts used and their associated funding costs;</p> <p>(c) all relevant expenses and recovery costs related to an event of default, unless deducted from recovery proceeds.</p> <p>6. (b) the outstanding financial obligation for the Union arising from the EFSD+ operations provided to the eligible counterparts and their financing and investment operations, broken down by individual operations.</p>	<p><b>Article 29</b> <i>Implementation of External Action Guarantee agreements</i></p> <p>5. The External Action Guarantee may cover:</p> <p>(a) for debt instruments, the principal and all interests and amounts due to the selected eligible counterpart, but not received by it in accordance with the terms of the financing operations after an event of default has occurred;</p> <p>(<del>a</del>b) for equity investments, the amounts invested and their associated financing costs;</p> <p>(<del>b</del>c) for other financing and investment operations referred to in Article <del>27(2)</del><u>27(3)</u>, the amounts used and their associated funding costs;</p> <p>(<del>e</del>d) all relevant expenses and recovery costs related to an event of default, unless deducted from recovery proceeds.</p> <p>6. (<del>b</del>) Article 219(6) of the Financial Regulation is not fully complied with.</p>	
<p><b>Chapter V</b> <b>Monitoring, reporting and evaluation</b></p> <p><b>Article 31</b> <i>Monitoring and reporting</i></p> <p>2. The Commission shall regularly monitor its actions and review progress made towards delivering expected results, covering outputs and outcomes.</p>	<p><b>Chapter V</b> <b>Monitoring, reporting and evaluation</b></p> <p><b>Article 31</b> <i>Monitoring and reporting</i></p> <p>2. The Commission shall regularly monitor its actions and review progress made towards delivering expected results, covering outputs and outcomes.</p>	

Text in the proposal	Court's suggestion	Comments
<p>Progress with respect to expected results should be monitored on the basis of clear, transparent and, where appropriate, measurable indicators. Indicators shall be kept at a limited number to facilitate timely reporting.</p> <p>6. The annual report prepared in 2021 shall contain consolidated information from annual reports concerning the period from 2014 to 2020 on all funding from the Regulations referred to in Article 40(2), including external assigned revenues and contributions to trust funds, and offering a breakdown of spending by country, use of financial instruments, commitments and payments. The report shall reflect the main lessons learnt and the follow-up to the recommendations of the external evaluative exercises carried out in previous years.</p>	<p>Progress with respect to expected results should be monitored on the basis of clear, transparent and, <del>where appropriate</del>, measurable indicators. Indicators shall be kept at a limited number to facilitate timely reporting.</p> <p>6. The annual report prepared in 2021 shall contain consolidated information from annual reports concerning the period from 2014 to 2020 on all funding from the Regulations referred to in Article <del>40(2)</del> 39(2), including external assigned revenues and contributions to trust funds, and offering a breakdown of spending by country, use of financial instruments, commitments and payments. The report shall reflect the main lessons learnt and the follow-up to the recommendations of the external evaluative exercises carried out in previous years.</p>	







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