



EUROPEAN
COURT
OF AUDITORS

Opinion No 2/19

(pursuant to Article 287 (4), TFEU)

on a proposal for the Financial Regulation of the Single Resolution Board laying down the financial provisions applicable to the Board ('the proposed Financial Regulation')

Contents

	Paragraph
Introduction	01-06
Observations	07-30
Definitions	07
Procurement procedures for the services required under Article 20 of the SRB's constituent act	08-10
Conflict of interest	11-16
Competent authority	11-13
Rules	14-16
Internal Control Framework	17-18
Treasury management	19-21
Internal auditor	22-24
Information on recovery waivers	25-27
Reference to the principle of sound financial management	28-30
Special considerations	31-35
Accountability framework	31-35

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 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 ('the SRB's constituent act')¹, and in particular Article 64 first subparagraph thereof providing for the European Court of Auditors ('the ECA') to be consulted on the Single Resolution Board's ('the SRB's') draft internal financial provisions prior to their adoption;

HAVING REGARD TO Commission Delegated Regulation (EU) 2019/715 of 18 December 2018 on the framework financial regulation for the bodies set up under the TFEU and Euratom Treaty and referred to in Article 70 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council² ('the Framework Financial Regulation');

HAVING REGARD TO the proposal for the Financial Regulation of the SRB laying down the financial provisions applicable to the Board ('the proposed Financial Regulation');

HAVING REGARD TO the request by the Chair of the SRB for an opinion on the proposed Financial Regulation, submitted to the ECA on 20 June 2019;

WHEREAS in its opinion 3/2015 on a proposal for the Financial Regulation of the Single Resolution Board laying down the financial provisions applicable to the Board, the ECA expressed concern about the SRB's budgetary and discharge procedure and considered that the SRB should be subject to the general budgetary and discharge procedure before the European Parliament rather than before the Board in plenary session;

WHEREAS the ECA notes that this concern has not been addressed in the SRB's constituent act;

HAS ADOPTED THE FOLLOWING OPINION:

¹ OJ L 225, 30.7.2014, p. 1.

² OJ L 122, 10.5.2019, p. 1.

Introduction

01 The SRB's mission is to ensure an orderly resolution of failing banks with minimum impact on the real economy, financial system and public finances of the participating Member States and beyond.

02 The SRB is in charge of administering the Single Resolution Fund ('the Fund'), which was established by the SRB's constituent act to support the Single Resolution Mechanism (the 'SRM'). The Fund will be gradually built up during the 2016-2023 period and should reach the target of at least 1 % of the amount of covered deposits of all credit institutions within the Banking Union by 31 December 2023.

03 The SRB has an autonomous budget, which is not part of the EU budget. Contributions are raised from credit institutions established in Member States that are part of the Banking Union.

04 Article 64 of the SRB's constituent act states that the SRB, after consulting the ECA and the Commission, shall adopt internal financial provisions specifying, in particular, the detailed procedure for establishing and implementing its budget. As far as is compatible with the particular nature of the SRB, the financial provisions shall be based on the Framework Financial Regulation.

05 The ECA notes that the proposed Financial Regulation is largely based on the Framework Financial Regulation and that most differences concern clarifications or explanations of terminology and the specific nature of the SRM. However, in the ECA's opinion, some differences are not justified.

06 Furthermore, in the last part of this opinion, the ECA reiterates its concern about the budgetary and discharge procedure that applies to the SRB.

Observations

Definitions

07 Article 2 of the proposed Financial Regulation provides a number of definitions in order to reflect the governance structure of the Board as set out in the constituent act. For the sake of clarity and consistency, we propose that a definition of “the Board in its plenary session” and “the Board in its executive session” should also be included.

Procurement procedures for the services required under Article 20 of the SRB’s constituent act

08 In addition to the provisions set out in the Framework Financial Regulation, Article 82(3) of the proposed Financial Regulation contains a provision to ensure that if a framework contract for the independent valuation of entities fails, the SRB may have recourse to a negotiated procedure without prior publication of a contract notice and without putting at risk the economic interests of the entity and, potentially, of the Member State. This provision is intended to safeguard the economic interests of the institution concerned, as well as the public interest. Where this cannot be guaranteed by other measures, the contract for such services shall be declared secret, as stipulated in paragraph 11.1, letter (i) of Annex 1 to Regulation (EU, Euratom) 2018/1046.

09 We consider that Article 82(3) of the proposed Financial Regulation is redundant, as the SRB may already use the negotiated procedure without prior publication of a contract notice, as stipulated in paragraph 11.1(i) of Annex 1 to Regulation (EU, Euratom) 2018/1046. According to the well-established case-law of the Court of Justice of the European Union (the “CJEU”), exemptions from the procurement procedures must be interpreted strictly, and the burden of proof lies with the party seeking to apply them. The SRB’s decision to declare a contract secret cannot be automatic, and requires thorough analysis and justification on a case-by-case basis. It is based on the principle of proportionality, a general principle of EU law, which means that keeping contracts secret is a last-resort measure that cannot be deployed as long as the duty of confidentiality required by such contracts makes it possible to achieve the same objective.

10 Furthermore, according to constant case-law of the CJEU, economic interests may not be used as justification for placing restrictions on the EU's principles of free movement. "Safeguarding of the economic interests of the institution concerned", as stipulated in Article 82(3) of the proposed Financial Regulation, does not constitute valid justification for the SRB's decision to declare a contract secret and, consequently, for using a negotiated procedure without prior publication of a contract notice. In any event, such a broad notion is not prone to the narrower interpretation, which is required in the event of exemptions from the procurement procedures.

Conflict of interest

Competent authority

11 Article 42(3) on conflict of interest in the Framework Financial Regulation states that "The competent authority referred to in paragraph 1 shall be the director. If the member of staff concerned is the director, the competent authority shall be the management board or, where the constituent act allows it, the executive board. In case of a conflict of interest involving a member of the management board, the competent authority shall be the management board, exclusive of the member concerned".

12 We note that the proposed Financial Regulation departs significantly from the Framework Financial Regulation. Article 40(3) of the proposed Financial Regulation states that "The competent authority referred to in paragraph 1 shall be the Chair or, in case of a conflict of interests involving the Chair, the Vice Chair".

13 Given the significance of managing conflict of interest, the SRB should be aligned with the Framework Financial Regulation as far as this is compatible with its particular nature. The ECA proposes the following paragraph: "The competent authority referred to in paragraph 1 shall be the Chair. In case of a conflict of interest involving the Chair, it shall be the Board in plenary session. In the event of a conflict of interest involving a member of the Board, the competent authority shall be the Board in plenary session, not including the member concerned".

Rules

14 Article 42(4) of the Framework Financial Regulation states that "The Union body shall adopt rules on the prevention and management of conflict of interests".

According to Article 40(4) of the proposed Financial Regulation, “The Board shall apply the provisions on the prevention and management of conflict of interests in accordance with the rules adopted under point (j) of Article 50(1) of the constituent act”.

15 However, the mentioned Article 50(1)(j) refers only to members of the Board: “In its plenary session, the Board shall ... adopt rules for the prevention and management of conflicts of interest in respect of its members ...”. It does not refer to other persons (staff and non-staff) who may experience a conflict of interest in the context of the SRB and SRM.

16 The rules for preventing and managing conflict of interest should cover all relevant individuals (e.g. staff members and interim workers), not just members of the Board. We, therefore, propose that the text should be aligned with the Framework Financial Regulation, e.g.: “The Board in plenary session shall adopt rules on the prevention and management of conflict of interest”. We have consistently stressed the principles for managing conflict of interest, as in its special report 15/2012 “Management of conflict of interest in selected EU Agencies”.

Internal Control Framework

17 Article 30(3) of the Framework Financial Regulation states that “Effective internal control shall be based on best international practices and on the Internal Control Framework laid down by the Commission”.

18 According to Article 28(3) of the proposed Financial Regulation, “Internal control shall be based on best international practices and on the Internal Control Framework laid down by the Board”. In our view, this departure from the Framework Financial Regulation, where the reference to the Commission’s Internal Control Framework is replaced, is not justified by the specific nature of the SRB. The reference to the Commission’s Internal Control Framework should still be retained, with the internal control framework being adapted to the specific governance arrangements and needs of the SRB.

Treasury management

19 Article 47(f) of the proposed Financial Regulation echoes the Framework Financial Regulation, stating that the accounting officer shall be responsible for treasury management.

20 However, as far as the administration of the Fund is concerned, the SRB is different from other European agencies. By way of example, Section 2 (*Administration of the Fund*) of Chapter 2 of the SRB's constituent act stipulates arrangements (with limited involvement of the accounting officer) which could appear to be part of treasury management. ECA special report 5/2009 ("The Commission's treasury management") contains a definition of treasury management.

21 The ECA therefore proposes that the proposed Financial Regulation's definition in point (f) of Article 47 of treasury management responsibilities should be reassessed, as this concerns the Fund.

Internal auditor

22 Article 80(1) of the Framework Financial Regulation states that "The purpose, authority and responsibility of the internal audit capability shall be provided for in the internal audit charter and shall be subject to the approval of the management board or, where the constituent act allows it, of the executive board".

23 According to Article 74(2) of the proposed Financial Regulation, "The internal auditor shall be appointed by the Board in accordance with Article 62 of the constituent act". In addition, according to Article 75 of the proposed Financial Regulation, "Special rules applicable to the internal auditor shall be laid down by the Board".

24 The ECA believes that if the SRB appoints the internal auditor in executive session, this runs the risk of appearing to be a conflict of interest, as the Board's activities in executive session are subject to internal audits. The ECA therefore proposes that the internal auditor should be appointed by the Board in plenary session.

Information on recovery waivers

25 Article 66 concerning rules on recovery in the Framework Financial Regulation states that "Paragraphs 1 to 6 of Article 101 of Regulation (EU, Euratom) 2018/10461 shall apply *mutatis mutandis*". According to Article 62 of the proposed Financial Regulation, paragraph 5 shall not apply to the SRB.

26 Article 101(5) of Regulation (EU, Euratom) 2018/1046 lays down rules on the information requirement where recoveries are waived: “Each Union institution shall send to the European Parliament and to the Council each year a report on the waivers granted by it pursuant to paragraphs 2, 3 and 4 of this Article. Information on waivers below 60 000 euros shall be provided as a total amount. In the case of the Commission, that report shall be annexed to the summary of the annual activity reports referred to in Article 74(9)”.

27 In our view, this departure from the Framework Financial Regulation is not justified by the specific nature of the SRB.

Reference to the principle of sound financial management

28 Article 73(1) on expenditure operations in the Framework Financial Regulation states that “When executing operations, the authorising officer shall ensure that the expenditure complies with the Treaties, the budget, this Regulation and other acts adopted pursuant to the Treaties as well as with the principle of sound financial management”.

29 We note that in the proposed Financial Regulation, in Article 69(1) , the reference to the principle of sound financial management has been omitted on the grounds that “The additional reference to sound financial management is redundant as it is one of the main principles in ‘this Regulation’”.

30 Although the ECA agrees with the SRB’s statement that sound financial management is “one of the main principles in ‘this Regulation’”, Article 73(1) identifies an individual who is responsible for implementing the principle, as opposed to the SRB in its capacity as a collective body. Omitting an express reference to the principle of sound financial management in Article 73(1) creates uncertainty as to whether the authorising officer is bound by the principle and whether their decisions can be assessed against it. The ECA is of the opinion that the SRB should include the reference to the principle of sound financial management in Article 73(1) of the proposed Financial Regulation.

Special considerations

Accountability framework

31 In opinion 3/2015, we expressed special concern about the SRB's budgetary and discharge procedure. It argued that although the SRB is financed by contributions from the banking sector, and its budget is not part of the Union's general budget, its revenue stems from exercising public authority on the basis of EU law.

32 We have consistently stated that the same principles of accountability and transparency should be applied to all EU-related bodies, most recently in its Briefing Paper on the Commission's proposal for the 2021-2027 Multiannual Financial Framework in July 2018³.

33 We are therefore of the opinion that the SRB should be subject to the general budgetary and discharge procedure before the European Parliament. Provision for discharge by the SRB is made in the SRB's constituent act, a high-level instrument about which no opinion from the ECA was formally requested. We recognise that any changes would need to be reflected at that level.

34 The SRB should work with the Commission and co-legislators to develop and apply a more adequate accountability framework.

35 If the SRB were subject to the general budgetary and discharge procedure before the European Parliament, the provisions contained in the proposed Financial Regulation on changes in the establishment plan for staff, building projects and reporting to the European Parliament and the Council would have to be adapted in order to reflect this framework.

³ See also ECA landscape review 2014 "Gaps, overlaps and challenges: a landscape review of EU accountability and public audit arrangements"; ECA opinion 2/2018: The audit and accountability considerations concerning the proposal of 6 December 2017 for the establishment of a European Monetary Fund within the Union legal framework.

This opinion was adopted by Chamber IV, headed by Alex Brenninkmeijer, Member of the Court of Auditors, at its meeting of 3 September 2019.

For the Court of Auditors

Klaus-Heiner Lehne
President