



EUROPEAN  
COURT  
OF AUDITORS

## Opinion No 3/2019

(pursuant to Article 287 (4), TFEU)

on a proposal for the Financial Regulation of the Community Plant Variety Office ("the proposed Financial Regulation")

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THE COURT OF AUDITORS OF THE EUROPEAN UNION,

HAVING REGARD TO the Treaty on the Functioning of the European Union, and in particular Article 287(4) thereof;

HAVING REGARD TO Regulation (EU) No 2100/94 of the Council of 27 July 1994 on establishing Community plant variety rights ('the CPVO's constituent act')<sup>1</sup>, and in particular Article 112 providing for the European Court of Auditors ('the ECA') to be consulted on the Community Plant Variety Office's (hereinafter "the Office", or "CPVO") draft internal financial provisions prior to their adoption;

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, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012<sup>2</sup> ("the general Financial Regulation");

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 Council<sup>3</sup> ('the Framework Financial Regulation');

HAVING REGARD TO the proposed Financial Regulation of the CPVO;

HAVING REGARD TO the request by the President of the CPVO for an opinion of the ECA on the proposed Financial Regulation, submitted to the ECA on 24 July 2019;

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<sup>1</sup> OJ L 227, 1.14, p. 1.

<sup>2</sup> OJ L 193, 30.7.2018, p. 1.

<sup>3</sup> OJ L 122, 10.5.2019, p. 1.

WHEREAS in its opinion 2/2015 on a proposal for an amended Financial Regulation of the CPVO, the ECA expressed concern about the CPVO's budgetary and discharge procedure and considered that the CPVO should be subject to the general budgetary and discharge procedure before the European Parliament rather than before the Administrative Council (the management board);

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

HAS ADOPTED THE FOLLOWING OPINION:

# Introduction

**01** The CPVO which is located in Angers (France), was created by Council Regulation (EC) No 2100/94. Its main task is to register and examine applications for the grant of Union industrial property rights for plant varieties and to ensure that the necessary technical examinations are carried out by the competent offices in the Member States. CPVO is fully financed by fees. The Office does not receive contributions from the EU general budget.

# Observations

## Reserve fund

**02** Article 17 of the proposed Financial Regulations makes provision for the establishment of a reserve fund: “The management board can authorise the establishment of a reserve fund, the use of which is subject to its agreement”. It retains the provision of the current Financial Regulation of the CPVO. On 31 December 2018, the treasury amount (i.e. 18.7 million euros) exceeded the outstanding budgetary commitments (i.e. 17.4 million euros) by 1.3 million euros. This amount formed the free reserve.

**03** In order to avoid a future excessive accumulation of fund, and to keep it proportional to the outstanding budgetary commitments, we consider that the proposed Financial Regulation should provide limits on the size of the reserve fund (e.g. the level of outstanding commitments) and contain provisions for fees to be adjusted annually, if necessary.

## Entrustment of new tasks

**04** Article 33(5) of the Framework Financial Regulation, used by the CPVO as the basis for the proposed Financial Regulation, states: “When proposing to entrust new tasks to a Union Body, the Commission shall, without prejudice to the legislative procedures for the modification of the constituent act, submit to the European Parliament and to the Council the necessary information to assess the impact of the new tasks on the resources of the Union body so as to review, where necessary, its financing and its staffing level.”

**05** However, according to Article 33(5) of the proposed Financial Regulation, the information would be submitted only to the management board, and not to the European Parliament and to the Council. In our view, this departure from the Framework Financial Regulation is not justified by the specific nature of the CPVO, and it decreases transparency and accountability. (See also paragraph 13).

## Internal Auditor

**06** Title and other paragraphs of Article 80 should refer to “the internal auditor” rather than to “the internal audit capability” and should be aligned with Articles 117 - 123 of the general Financial Regulation. It is necessary to establish rules on the establishment and functioning of an internal audit capability when the internal audit function is performed by the Commission's internal auditor. This does not apply to CPVO.

## Procurement procedures

**07** In addition to the common provisions for procurement, Article 90 on procurement procedures in the proposed Financial Regulation states that “The Union body may contract with competent offices of the Member States entrusted with the responsibility for the technical examination of varieties of species by the management board without having recourse to a public procurement procedure to cover duly justified operational needs related to supply of goods, provision of services or performance of work that the latter provide within the framework of its constituent act”.

**08** The wording “duly justified operational needs” can lead to a broad interpretation. Considering that the provision in question introduces an exception from the application of public procurement rules and that the exceptions require a restrictive interpretation, we are of the view that CPVO should further clarify the scope of application of that exception. This can be done, for example, by referring to Articles 55 and 56 the CPVO’s constituent act.

**09** Furthermore, Article 90 of the proposed Financial Regulation of the CPVO should be complemented with an explicit reference to the principles of transparency, proportionality, equal treatment and non-discrimination as stated in Article 160(1) of the general Financial Regulation.

## Other comments

**10** We would like to draw the attention to some inconsistencies noted in the following Recital and Articles:

- The wording of Recital 4 of the proposed Financial Regulation is not clear. It refers to Article 112 of CPVO's constituent act as requiring the alignment of the proposed Financial Regulation to the rules of the Framework Financial Regulation. However, according to Article 112 the Financial Regulation of CPVO must correspond, as far as possible, to the provisions of the Financial Regulation applicable to the general budget of the Union. We therefore propose to include in the Recital the correct reference to the provisions of the Financial Regulation applicable to the general budget, i.e. Regulation (EU, Euratom) 2018/1046.
- We also noted that the Office opted for the Framework Financial Regulation to serve, where appropriate, as a model for the proposed Financial Regulation and this should be also reflected in the Recital.
- Paragraph 4 of Article 33 on establishment of the budget in the proposed Financial Regulation is redundant. It states that "After adoption of the draft budget, the single programming document shall be adopted by the management board". However, paragraph 3 of the same Article already provides that "The budget of the Union body and the establishment plan together with the single programming document shall be adopted by the management board".
- Article 48(2) on consolidated Annual Activity Report in the proposed Financial Regulation states that "... the consolidated annual activity report ... shall be sent by the management board to ... the management board." No submission of the consolidated annual activity report by the management board to itself is necessary.
- The several references in Article 31, 48, 86, 101, 102, 103, 104, 106, 107, 108 and in Recital 34 to "the Court of Auditors" should be changed in line with the correct name of the institution: "the European Court of Auditors".
- In line with the terminology used in Article 1 of the proposed Financial Regulation, the wording "the Union body" should be replaced throughout the text with "CPVO".

# Special considerations

## Accountability framework

**11** In opinion No 2/2015, we expressed special concern about the CPVO's budgetary and discharge procedure. We observed that although the CPVO is financed by fees from the industry, and the Office's budget is not part of the Union's general budget, its revenue stems from exercising public authority on the basis of EU law.

**12** We have consistently stated that the same principles of accountability and transparency should be applied to all EU-related bodies, most recently in our Briefing Paper on the Commission's proposal for the 2021-2027 Multiannual Financial Framework in July 2018<sup>4</sup>.

**13** We are therefore of the opinion that the CPVO should be subject to the general budgetary and discharge procedure before the European Parliament. Provision for discharge by the CPVO is made in the CPVO's constituent act. We recognise that any changes would need to be reflected in the CPVO's constituent act. The CPVO should work with the Commission and co-legislators to develop and apply a more adequate accountability framework.

**14** If the CPVO 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.

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<sup>4</sup> See also ECA Landscape review 2014 "Gaps, overlaps and challenges: a landscape review of EU accountability and public audit arrangements".

This Opinion was adopted by Chamber IV headed by Alex Brenninkmeijer, Member of the Court of Auditors, in Luxembourg at its meeting of 24 September 2019.

*For the Court of Auditors*

Klaus-Heiner Lehne  
*President*