



EUROPEAN
COURT
OF AUDITORS

Opinion No 1/2019

(pursuant to Article 287 (4), TFEU)

concerning the proposal for regulation BC-01-2019 of the Budget Committee of the European Intellectual Property Office laying down the financial provisions applicable to the 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 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark ('EUIPO Regulation') and in particular its Article 177,

Having regard to the Commission Delegated Regulation C(2018) 8599 on the Framework Financial Regulation for the bodies referred to in Article 70 of the Financial Regulation adopted on 18 December 2018 by the Commission and communicated to Council and Parliament (Framework Financial Regulation),

Having regard to Regulation CB-1-15 and to Regulation CB-2-15 of the Budget Committee of the Office of 17 July 2009 laying down the financial provisions currently applicable to the European Union Intellectual Property Office ("the Office"),

Having regard to the proposal for regulation BC-01-2019 of the Budget Committee of the European Intellectual Property Office laying down the financial provisions applicable to the Office ("the proposed Financial Regulation"),

Having regard to the request of the Executive Director of the Office for an opinion on this proposal which was submitted to the European Court of Auditors ('ECA') on 7 March 2019,

Whereas in its opinions 5/2014¹ and 5/2015² on a proposal for an amended Regulation of the Budget Committee of the Office for Harmonisation in the Internal Market laying down the financial provisions applicable to the Office, the ECA expressed particular concern about the Office's budgetary and discharge procedure and considered that the Office should be subject to the general budgetary and discharge procedure before the European Parliament rather than before the Budget Committee,

Whereas the ECA notes that that concern has not been addressed in the EUIPO Regulation,

HAS ADOPTED THE FOLLOWING OPINION:

¹ https://www.eca.europa.eu/lists/ecadocuments/op14_05/op14_05_en.pdf.

² https://www.eca.europa.eu/Lists/ECADocuments/OP15_05/OP15_05_EN.pdf.

Introduction

01 Article 177 of the EUIPO Regulation states that the Budget Committee of the Office is to consult the ECA before adopting the Office's internal financial provisions specifying, in particular, the procedure for establishing and implementing the Office's budget.

02 According to the same article of the EUIPO Regulation, the Office's financial provisions, as far as compatible with the particular nature of the Office, shall be based on the Framework Financial Regulation.

03 Following the adoption of the Framework Financial Regulation in December 2018 by the Commission with a view to aligning its provisions with the new Financial Regulation 2018 applicable to the general budget of the Union³, the Office has prepared a proposal for its new Financial Regulation.

04 The ECA notes that the proposed Financial Regulation is largely based on the Framework Financial Regulation and that most deviations are related to clarifications or the specific nature of the Office. However, in the ECA's opinion, some deviations are not justified.

³ 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, OJ L 193, 30.7.2018, p. 1–222.

Specific Observations

Definitions

05 Article 2 of the proposed Financial Regulation provides a number of definitions in order to reflect the governance structure of the Office as set out in the EUIPO Regulation. However, some of the terms which are not specific to the Office (e.g. Staff Regulations, Union) have different definitions from those contained in Article 2 of the Financial Regulation 2018 applicable to the general budget of the Union, to which the proposed Financial Regulation refers as applying *mutatis mutandis*. We recommend removing the definitions of those terms that are already contained in Article 2 of the Financial Regulation 2018 applicable to the general budget of the Union and aligning, as much as possible, the definition of “basic act” in order to also include the terms “other than a recommendation or an opinion”.

Assigned revenue

06 Article 7 deals with specific tasks for which the Office will receive assigned revenue under grant or delegation agreements with the European Commission. The Office also included some provisions on service level agreements in this article. Service level agreements are different in nature as they can lead to both revenue and expenditure. Provisions for service level agreements should be included in a separate article.

Benchmarking exercise

07 In Articles 28(4) and 38(1)(c) of the proposed Financial Regulation, the Office deviates from the mandatory requirement set out in the Framework Financial Regulation to take part in a benchmarking exercise with other Union bodies and institutions. That requirement mirrors the requirement provided in Article 53 of the Financial Regulation 2018 applicable to the general budget of the Union. The Office limits that obligation to only those cases where the Office receives a Union subsidy. In the ECA’s view, this deviation from the Framework Financial Regulation is not justified by the nature of the Office as a self-financing body.

External service providers

08 The ECA notes the modification of Article 43(3) stipulating: “Technical expertise tasks and administrative, preparatory or ancillary tasks not involving the exercise of public authority or the use of discretionary powers of judgement may be entrusted by contract to external private-sector entities in compliance with the principle of sound financial management.” However, the ECA considers that the Framework Financial Regulation’s more restrictive requirement to use external service providers “only when indispensable” is more appropriate for the implementation of public mandates.

Special Considerations

Reserve fund and other accumulated surpluses

09 Title IX of the proposed Financial Regulation provides for a *reserve fund* to hold budget surpluses. The Office justifies this derogation, on the grounds that it is a fully self-financing body. Article 172(10) of the EUIPO regulation stipulates that “the Office shall provide for a reserve fund covering one year of its operational expenditure to ensure the continuity of its operations and the execution of its tasks.” On 31 December 2018, the reserve fund amounted to €243 million.

10 In addition to the reserve fund, on 31 December 2018 the Office retained *accumulated surpluses* amounting to €299 million. In previous opinions on the Office’s Financial Regulation, the ECA has drawn attention to the continuing high level of accumulated surpluses.

11 Moreover, a large part of the reserve and the other accumulated surpluses (*budgetary surpluses*) is held in cash (cash at banks as at 31 December 2018: €493 million) for which the Office currently pays negative interest (€1.4 million in 2018).

12 According to Article 172(8) of the EUIPO regulation “where a substantive surplus is generated over five consecutive years, the Budget Committee, upon a proposal from the Office and in accordance with the annual work programme and multiannual strategic programme [...], shall decide by a two-thirds majority on the transfer to the budget of the Union of a surplus generated from 23 March 2016.” As pointed out by the ECA in its Opinion No 5/2015, the mechanism triggering the transfer of a surplus is subject to a number of cumulative conditions which need to be satisfied, some of them being vague, e.g. the surplus having to be “substantive” (with no definition at that time of what is meant by this) or the reference to the annual and multi-annual strategic programmes (with no explanation what this implies).

13 The proposed new Financial Regulation already contains in Article 104(9) a definition of a “substantive” surplus. According to this provision, a surplus is considered substantive “when the positive result in each of the five years of reference is equivalent to or higher than 15 % of the executed yearly revenue of the affected financial year.” However, according to the ECA’s analysis, this condition was not fulfilled in any of the financial years 2012 to 2018, but in every year in the period from

2007 to 2011. The proposed Financial Regulation does not contain any provision on the use of surpluses generated before 23 March 2016.

14 In our view, considering the current mechanism for transferring a substantive surplus to the budget of the Union, it seems highly unlikely that the surplus or a part of it will ever be transferred.

15 The current financial rules of the Office and the proposed Financial Regulation contain some general provisions on the use of the reserve fund. However, they do not even specify for what purpose the other accumulated surpluses should be used. That is in contradiction with the budgetary principle of specification. The ECA considers that currently the budget surpluses are not assigned to any productive use, either at the level of the Office or at the level of the European Union. That is not in line with the principle of sound financial management and more specifically the principle of effectiveness.

16 The ECA considers that the budget surpluses should be used in a productive manner. The Office, together with the Commission, should explore for example the possibility of using the budget surpluses to back up financial instruments supporting European enterprises' research and innovation activities (R&I) and growth. This could in turn give rise to new Intellectual Property Rights and create a leverage effect while safeguarding the funds.

Accountability framework

17 In its Opinions No 5/2014 and No 5/2015, the ECA expressed special concern about the Office's budgetary and discharge procedure. It argued that although the Office is a self-financing agency whose budget does not form part of the general budget of the Union, its revenue stems from the exercise of a public authority on the basis of EU law.

18 Moreover, the EUIPO Regulation formally provides for the transfer of a surplus to the Union budget. In its Opinion No 5/2014, the ECA pointed out that such a transfer would constitute revenue in the meaning of Article 287(1) of the Treaty.

19 The ECA has 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 2018⁴.

20 The ECA therefore considers that the Office should be subject to the general budgetary and discharge procedure before the European Parliament. The provision for discharge by the Office is made in the EUIPO Regulation, an instrument for which no opinion from the ECA was formally requested. The ECA recognises that any changes would need to be reflected at that level.

21 The Office should work together with the Commission and the co-legislators to develop and apply a more adequate accountability framework.

This Opinion was adopted by Chamber IV headed by Mr Neven MATES, Member of the Court of Auditors, in Luxembourg at its meeting of 30 April 2019.

For the Court of Auditors

Klaus-Heiner Lehne
President

⁴ See also ECA 2014 "Landscape Review - Gaps, overlaps and challenges: a landscape review of EU accountability and public audit arrangements"; ECA Opinion No 3/2015 on a proposal for the Financial Regulation of the Single Resolution Board laying down the financial provisions applicable to the Board; ECA Opinion No 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.