

## EIC Contribution

### EU Consultation on a Targeted Revision of the EU Financial Regulation

REGULATION (EU, Euratom) 2018/1046 of 18 July 2018

**EIC calls upon the EU legislator to embed the concepts of Reciprocity and ‘Team Europe’ collaboration, including a link with European content or interest, in an update version of the Financial Regulation as well as the urgently required policy coherence with the EU Procurement Directive and the upcoming Instrument on Distortive Foreign Subsidies.**

### About EIC

European International Contractors (EIC) is a European industry federation with the mandate to promote the interests of the European construction industry in relation to its international business activities. EIC has as its members national construction associations from fifteen European countries, to which the internationally active European contractors are affiliated, as well as several associated member companies from construction-related industries and professions. The annual turnover of internationally active European contractors associated with EIC’s Member Federations outside their respective home countries amounts to around €170 billion.

### Policy Background

The Financial Regulation (EU, Euratom 2018/1046) is the main point of reference for the principles and procedures governing the **implementation and control of the EU budget**. It also forms an important pillar for EU external actions, since it lays down the rules for **“Blending” operations** which are generally implemented by so-called ‘pillar-assessed’ lead financial institutions under **indirect management**. Based on Art. 62 (1) lit. (c), a European or even **non-European financing institution** may be tasked with the implementation of a (partially) EU-financed operation once it has passed the Commission’s pillar assessment laid down in Art. 154 of the Financial Regulation. All relevant provisions of the Financial Regulation, in particular those on indirect management laid down in Title VI, apply also to the new [EU Neighbourhood and Development Instrument \(NDICI\)](#), under which the EU finances infrastructure investments outside of the European Union. Following the entry into force of the multiannual financial framework (MFF) for 2021-2027, of which the NDICI is an essential element, the Financial Regulation **needs to be aligned to the rules agreed by the legislator as part of the latest MFF package**. Against this background, EIC submits its observations on concrete areas where we believe the Commission should envisage improvements and necessary simplification.

## Proposed Amendments to the EU Financial Regulation with respect to Indirect Management

Under indirect management, the European Commission entrusts the implementation of the EU budget to partners such as national organisations in EU Member States, international organisations, the European Investment Bank or the European Investment Fund. The current Financial Regulation includes an obligation for entrusted entities to comply with applicable Union law and agreed international and Union standards in relation to tax avoidance and non-cooperative jurisdictions for tax purposes as well as to anti-money laundering and terrorism financing. The entrusted entities must have systems, rules and procedures in place that are equivalent to those of the Commission to protect the EU's financial interest. The Commission checks this equivalence ex ante, notably in areas like internal control, accounting or fraud prevention. The Financial Regulation provides that the Commission assesses partners in accordance with the principle of proportionality and considering the nature of the activities and inherent risks involved. If weaknesses are found, the EU budget is protected by including obligations in the agreements the Commission signs with an entrusted entity. These agreements also contain other elements to protect the EU's interests, based on the EU legal framework and standards.

**EIC observes that the provisions of the Financial Regulation concerning due diligence by entrusted entities as regards their fiduciary responsibilities are not sufficient to ensure full compliance with applicable Union law and agreed international and Union standards. Therefore, entrusted entities should be obliged to comply with the full 'acquis communautaire' comprising all relevant EU policy standards and values.**

- **General:** Art. 154 (3) and (4) stipulate that the European Commission shall ensure a level of protection of the financial interests of the Union equivalent to the one that is provided for when the Commission implements the budget under direct management, including recent Union policies on tax avoidance, money laundering and terrorism financing. The Commission Decision of 17 April 2019 on establishing new terms of reference for the pillar assessment methodology to be used under Financial Regulation (2019/C 191/02) specifies that the respective assessments are usually carried out by external auditors on the basis of a set of terms of reference established by the Commission. These terms of reference should cover nine different areas (or pillars) some of which are compulsory for all persons and entities (namely internal control, accounting, external audit) and some of which are determined according to the activities which the person or entity is going to be undertaking (namely, grants, procurement and financial instruments and within those, exclusion from access to funding, publication of information on recipients and protection of personal data). For all applicable pillars, the terms of reference should ensure that the Commission obtains evidence that the level of protection of the financial interests of the Union is equivalent to the one that is provided for when the Commission implements the funds in direct management, taking into account possible supervisory measures taken by the Commission in accordance with Article 154(5) of the Financial Regulation. Moreover, Article 154(6)(c) of the Financial Regulation states that the Commission may decide not to require an ex ante assessment as referred to in paragraphs (3) and (4), for those procedures specifically required by the Commission, including its own and those specified in basic acts.

**EIC recommends that the Financial Regulation should be amended to broaden the scope of pillar assessment in connection with indirect management to refer to the entire spectrum of the Union's comprehensive interests and values.**

- **'Team Europe' approach and European content:** The EU's new trade strategy entitled 'An Open, Sustainable and Assertive Trade Policy' envisages joined up internal and external action, across multiple policy areas, aligning and using all trade tools in support of EU interests and policy objectives. It is envisaged that the European Commission will propose a new sustainable investment initiative to partners or regions in Africa and the Southern Neighbourhood in the form of stand-alone investment agreements or as part of the modernisation of existing trade agreements. To maximise their impact and facilitate implementation, these agreements will be designed together with EU development cooperation tools to support investment and, wherever feasible, with a 'Team Europe' approach to ensure synergies with EU Member States, the private sector, civil society, and all relevant actors. In September 2021, the President of the European Commission has announced a new connectivity strategy called 'Global Gateway' to finance investments in quality infrastructure, connecting goods, people and services around the world. The current rules of indirect management lead to the result that the EU development policy, particularly in relation to transport connectivity, is highly dependent on non-European financial partners. For instance, the African Development Bank (AfDB) acted as pillar-assessed lead financier in 11 out of 21 blended transport and water projects in Africa. EIC is concerned that the European Commission suffers a loss of visibility and control over project implementation by transferring Official Development Assistance for infrastructure projects to non-EU financial actors which have a clear tendency to award projects to state-owned enterprises from a country the EU considers as 'systemic rival' (see below).

**EIC recommends amending the Financial Regulation to prevent that the Union's values and interests, including on strategic autonomy, are jeopardised by entrusting EU budget implementation to non-EU lead financiers. Therefore, the 'Team Europe' approach should be embedded in indirect management, thus restricting 'blending' operations to pillar-assessed financial entities from within the EU. In addition, EU funds should be linked to financing projects involving 'European content' and/ or 'European interest'.**

- **Reciprocity:** Whereas the Regulation (EU) 2021/947 of 09 June 2021 on establishing the 'Neighbourhood, Development and International Cooperation Instrument – Global Europe' limits in Art. 28 (1) the eligibility to certain persons and entities, Art. 28 (5) stipulates that ***"for actions jointly co-financed by an entity, or implemented in direct or indirect management with entities as referred to in points (c)(ii) to (viii) of Article 62(1) of the Financial Regulation, the eligibility rules of those entities shall also apply"*** [our emphasis]. Hence, the procurement process of the lending institutions wins priority over the EU Commission's own eligibility rules. In practice, this means that tenders financed from EU grants, when mixed with loans from financial partners, are open to bidders from all countries and, eventually, EU grants are disbursed to third-country state-owned contractors. Between 2016 – 2018, the AfDB awarded 104 out of 287 transport and water projects to Chinese construction companies, most of them being state-owned. Hence, the indirect management mode contravenes basic EU eligibility rules and undermines the reciprocity principle in the field of untied aid given the huge amounts of Chinese funds flowing into Africa that are not open for international competition but tied via government-to-government contracts to domestic/Chinese companies.

**EIC recommends amending the Financial Regulation by a provision restricting procurement opportunities arising from tenders that are fully or partially financed from the EU budget to companies from EEC countries, ACP countries and from countries that effectively implement the OECD-DAC Recommendation on Untying Official Development Assistance.**

- **Distortive Third-Country Subsidies and State-Owned Enterprises:** In May 2021, the European Commission presented a proposal for a new instrument to address potential distortive effects of foreign subsidies in the Single Market, COM(2021) 223 final. Whilst not explicitly mentioning the term ‘state-owned enterprises’ (instead the draft Regulation speaks of ‘undertakings’ that receive subsidies), the proposed EU Regulation would be an important tool to level the playing-field between private and state-owned enterprises, especially those from socialist market economies. However, if adopted, this instrument will address distorting effects of foreign subsidies relating to EU budget expenditure within the EU Internal Market. By contrast, as currently drafted, such Regulation will not apply to EU budget expenditure under the indirect management mode.

**EIC recommends amending the Financial Regulation by taking into account the impact of foreign subsidies to EU budget expenditure under indirect management. In this context, EIC proposes to anchor an additional obligation to scrutinise the distortive effects of third-country subsidies on competition in the provision regulating the pillar assessment, e.g. in Art. 154 (4) (d). Alternatively, the Financial Regulation could adopt principles and wording anchored in the financing and procurement policies of the U.S. Millennium Challenge Corporation (MCC), which stipulates that government-owned entities are not eligible to compete for MCC-funded contracts for goods or works.**

- **Policy Coherence with EU Procurement Directives:** Art. 67 (1) and (2) of the EU Procurement Directive 2014/24/EU stipulates that contracting authorities shall base the award of public contracts on the most economically advantageous tender (MEAT). The MEAT from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Article 69 (3) provides that the contracting authority may reject a tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed or shall reject the tender where they have established that the tender is abnormally low because it does not comply with applicable environmental, social or labour law obligations. Article 69 (4) stipulates that where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 TFEU.

**EIC recommends amending the Financial Regulation by prescribing Subsection 3 of the EU Procurement Directive 2014/24 EU regarding the award of the contract also for procurement under indirect management of EU funds.**

Berlin, 01<sup>st</sup> October 2021