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"I/A" ITEM NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 2)/Council
No. prev. doc.:	13033/15, 13035/15
Subject:	Draft Council conclusions on Special Report No 10/2015 by the European Court of Auditors: "Efforts to address problems with public procurement in EU cohesion policy expenditure should be intensified" - Adoption

1. On 17 September 2015, the General Secretariat of the Council received Special Report No 10/2015 "Efforts to address problems with public procurement in EU cohesion policy expenditure should be intensified" adopted by the Court of Auditors at its meeting on 16 July 2015.
2. Pursuant to the rules laid down in the Council conclusions on improving the examination of special reports drawn up by the Court of Auditors¹, the Permanent Representatives Committee (Part II), at its meeting on 21 October 2015, instructed the Working Party on Structural Measures to examine this report according to the rules laid down in the above-mentioned conclusions.

¹ Doc. 7515/00 FIN 127 + COR 1.

3. The Working Party on Structural Measures examined the Special Report on 5 November, 3 and 16 December 2015 and on 12 January 2016 and an agreement on draft Council conclusions was reached on 25 January 2016 following a silence procedure.
 4. The Permanent Representatives Committee is therefore invited to recommend to the Council to adopt, as an "A" item, these draft Council conclusions as set out in the Annex to this document.
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**Draft Council conclusions on Special Report No 10/2015 by the European Court of Auditors
"Efforts to address problems with public procurement in EU cohesion policy
expenditure should be intensified"**

THE COUNCIL OF THE EUROPEAN UNION:

- (1) WELCOMES the special report from the European Court of Auditors (hereinafter referred to as "the Court") and TAKES NOTE of its observations;
- (2) ACKNOWLEDGES that EU public procurement rules are essential to the good functioning of the Single Market, contributing to the efficiency of public spending and achieving value for money;
- (3) HIGHLIGHTS that public procurement rules have a significant impact on the delivery of cohesion policy, especially with regard to infrastructure and equipment investments;
- (4) NOTES that the audit focused on the period from 2009 to 2013 and took account of actions taken to address the problem of non-compliance with public procurement rules by the Commission and Member States until 2014, whereas the new EU legal frameworks for European Structural and Investment Funds (ESIF) and Public Procurement are expected to considerably improve the situation for the programming period 2014-2020;
- (5) NOTES furthermore that the audit results are based notably on a survey of 115 national audit authorities in 27 Member States (not including Croatia) responsible for structural and cohesion funds' operational programmes, 69 of which replied, visits to four Member States (the Czech Republic, Spain, Italy and the United Kingdom), a visit to Cyprus focusing on the use of e-procurement, and a short survey sent to the 28 Supreme Audit Authorities, 18 of which replied;

Court's findings

- (6) TAKES NOTE of the finding that errors relating to public procurement were detected in around 40% of the 700 projects audited by the Court in the area of cohesion policy and that serious errors accounted for an average of 29% of these errors;
- (7) AGREES with the finding that the level of complexity of EU public procurement rules, high volume of legislation and/or guidelines and differences in their interpretation can account for a large part of the errors observed by the Court;
- (8) HIGHLIGHTS that only a marginal share of errors affecting public procurement rules were reported to be linked to fraud, which should be taken into consideration by the competent audit authorities; though SUPPORTS a zero tolerance towards fraud and CONSIDERS that any level of fraud should be robustly dealt with by the relevant authorities;
- (9) CONCURS that the share of serious errors is particularly high in the case of:
 - a. the European Regional Development Fund (ERDF), where the nature of projects frequently requires public procurement,
 - b. the pre-tendering phase;
- (10) QUESTIONS the terminology used by the Court for assessing the level of seriousness of public procurement errors;
- (11) NOTES the finding that most errors in the pre-tendering phase concerned incorrect direct award procedures or the artificial split of contracts into smaller tenders to avoid exceeding thresholds, whilst most errors in the tendering phase concerned the specification and application of selection and award criteria, and in the contract management phase modifications or extensions of scope of contracts without using public procurement;

- (12) REGRETS the finding that the lack of sufficiently detailed, robust and coherent data on the nature and extent of public procurement errors has precluded a comprehensive analysis by Member States' authorities, as well as the Court, of the underlying causes for these public procurement errors;
- (13) WELCOMES the finding that Member States have started to address the problem through a variety of measures and that some Member States have in particular started to collect data in a more systematic way;
- (14) HIGHLIGHTS the finding that most preventive actions by audited Member States started to be implemented towards the end of the 2007-2013 programming period and could therefore not fully be taken into account in the Court's observations;
- (15) UNDERLINES that the EU public procurement directives stipulate minimum value thresholds below which contracts are subject to national rules, which however must comply with the Treaty principles;
- (16) NOTES the finding that only 40% of the 69 audit authorities which responded to the survey expressed the view that the new public procurement directives could help to reduce the errors;
- (17) WELCOMES the Court's assessment that the revised EU public procurement directives, which have to be transposed by Member States by 18 April 2016, will provide more legal certainty, make public procurement more accessible for practitioners and provide for a better monitoring of irregularities, but that some new provisions such as the introduction of a new regime for certain services such as health, education and social services may on the other hand bring new elements of complexity;
- (18) IS CONCERNED by the finding that the extent to which EU public procurement rules are used differs significantly across Member States, with an average total value of tenders falling within the scope of EU directives found at 3.1% of the EU's GDP in 2012, whilst in some Member States this value is considerably lower, and CONSIDERS that this aspect merits further analysis;

(19) NOTES furthermore the finding that about 38% of the irregularities reported by Member States to OLAF relate to public procurement, whilst some Member States do not report to OLAF any public procurement irregularities, which should also be further analysed;

Court's recommendations

(20) Following the Court's recommendations, CALLS on the Commission to:

- a. develop a database on irregularities capable of providing data for a meaningful analysis of public procurement errors and analyse in a comprehensive way the frequency, seriousness and causes of public procurement errors in the area of cohesion policy,
- b. use its powers to suspend payments to Member States concerned by public-procurement-related ex-ante conditionalities unfulfilled by the end of 2016, until they have rectified the shortcomings,
- c. update and publish its internal action plan on public procurement,
- d. improve coordination across its departments dealing with related public procurement issues,
- e. set up an internal group at political level to provide leadership in tackling the problem of public procurement errors,
- f. impose financial corrections wherever it finds that Member States' first-level checks are insufficiently effective and, where necessary, pursue infringement procedures,
- g. exploit further the opportunities provided by e-procurement and data mining tools and good practices;

(21) REITERATES that preventive measures by the Commission and Member States (capacity building, early warning mechanism, sharing of information on interpretations and repetitive errors, etc.) are a very important part of simplification;

- (22) EMPHASIZES that the Commission, auditors at European and national level, as well as managing authorities and other coordinating bodies, are well positioned to contribute to the simplification effort and better implementation of cohesion policy by detecting redundant processes and procedures, whether or not resulting from the regulation, and suggesting more effective solutions based on good practices;
- (23) Following the Court's recommendations, CALLS on the relevant authorities in Member States to:
- a. analyse their own irregularities in the area of cohesion policy in order to identify where and how public procurement errors are occurring,
 - b. consider how to exploit further the opportunities provided by e-procurement and data-mining tools in order to reduce the number of these errors;

Policy actions

- (24) SUPPORTS the Court's call for further simplification of public procurement rules and strengthening of the administrative capacity of both the contracting and control authorities, and NOTES that the Commission's "Better Regulation" initiative inter alia covers public procurement related issues;
- (25) ASKS the Commission, following the "only once" principle, to ensure that the design of reporting and information systems enable an effective use of the public procurement data already submitted by Member States, as far as their quality and completeness allows it, and to provide for a homogeneous and reliable representation of the situation across Member States;
- (26) ENCOURAGES the Commission, where certain public procurement errors occur repetitively across most Member States, to analyse to what extent the source can be traced back to the lack of clarity of the corresponding EU rules and inform the Council about its assessment;

- (27) RECALLS at the same time that the new 2014-2020 ESIF legal framework introduces ex ante conditionalities of direct relevance for limiting the amount of public procurement errors and thereby leading to a better implementation of cohesion policy, REITERATES its commitment towards the strict implementation of these ex ante conditionalities, CALLS on the Commission to actively monitor progress and support Member States in the process of fulfilling their related obligations by the end of 2016, and therefore INVITES the Court to update its assessment by mid-2019 in the light of these changes;
- (28) STRESSES that preventive measures should be intensified in order to avoid ambiguous interpretations of the new rules and procedures and ASKS the Commission to play a more active role in this area, ensure full coordination across its services during all phases of the management of funds, and guarantee transparency with regard to the method for choosing Member States to be audited, the actions undertaken in the field of public procurement, and their results;
- (29) RECALLS the Council Conclusions on Simplification: Priorities and expectations of Member States with respect to European Structural and Investment Funds²; and
- (30) INVITES in this regard the High Level Group of Independent Experts on 'Monitoring Simplification for Beneficiaries of the European Structural and Investment Funds' to provide support in tackling the public procurement errors that result from overly complex legislation and/or guidelines.

² Doc. 14266/15.