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EUROPEAN COURT OF AUDITORS
COUR DES COMPTES EUROPÉENNE
CÚIRT INIÚCHÓIRÍ NA HEORPA



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Opinion No 1/2012

on certain proposals for regulations relating to the common agricultural policy
for the period 2014-2020

(presented pursuant to the second subparagraph of Article 287(4) of the Treaty on the
Functioning of the European Union)

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THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union (TEU), and in particular Articles 4 and 5; and the Treaty on the Functioning of the European Union (TFEU), in particular Articles 38 to 44, 287(4), second subparagraph, 317, 318 and 322 thereof;

Having regard to the Commission communication entitled 'The CAP towards 2020: meeting the food, natural resources and territorial challenges of the future'¹;

Having regard to the proposal for a Regulation on the financing, management and monitoring of the common agricultural policy² ('**the Horizontal regulation**');;

Having regard to the proposal for a Regulation establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy³ ('**the Direct payments regulation**');;

Having regard to the proposal for a Regulation on support for rural development by the European Agricultural Fund for Rural Development (EAFRD)⁴ ('**the Rural development regulation**');;

Having regard to the proposal for a Regulation establishing a common organisation of the markets in agricultural products⁵ ('**the Single CMO regulation**');;

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions The CAP towards 2020: meeting the food, natural resources and territorial challenges of the future, COM(2010) 672 final, 18.11.2010.

² European Commission, COM(2011) 628 final/2.

³ European Commission, COM(2011) 625 final/2.

⁴ European Commission, COM(2011) 627 final/2.

Having regard to the Court's annual and special reports, the Opinion No 10/98 on certain proposals for regulations within the Agenda 2000 framework⁶, in particular concerning the common agricultural policy (CAP), the Court's Opinion No 1/2005 on the proposal for the financing of the CAP⁷,

HAS ADOPTED THE FOLLOWING OPINION:

INTRODUCTION

1. The main objectives of the common agricultural policy (CAP) set out in the Treaty have remained the same over a number of years. However, the policy structure of the CAP has been fundamentally reformed several times; specifically, in recent years, in 2003 and as a result of the so-called CAP health check in 2008, to modernise the sector and make it more market-oriented.
2. The common agricultural policy is again due to be reformed by 2013. In October 2011, the Commission published a proposal establishing the main elements of the legislative framework for the CAP during the period 2014-20 which are set out in seven regulations.
3. The above-mentioned legislative framework proposes to maintain the current structure of the CAP in two pillars and the two existing European agricultural financing instruments, namely the European Agricultural Guarantee Fund (hereinafter 'EAGF'), and the European Agricultural Fund for Rural Development (hereinafter 'EAFRD').

⁵ European Commission, COM(2011) 626 final/2.

⁶ OJ C 401, 22.12.1998.

⁷ OJ C 121, 20.5.2005.

4. The following observations relate to the main regulations⁸ and analyse whether and to what extent the Commission's legislative proposals remedy weaknesses already identified by the Court following its audits. Subsequently it presents some further reflections resulting from the Court's analysis of the proposals.

5. The proposed legislative package includes three other more specific proposals⁹ on which the Court does not raise any observation.

KEY POINTS

6. The Court recognises the efforts made by the Commission to simplify the provisions of the common agricultural policy (CAP) (e.g. the abandonment of the different implementing models under the current single payment scheme, the introduction of a simplified scheme for small farmers). Through its

⁸ - Proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy (COM(2011) 628 final/2).

- Proposal for a Regulation of the European Parliament and of the Council establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy (COM(2011) 625 final/2).

- Proposal for a Regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (COM(2011) 627 final/2).

- Proposal for a Regulation of the European Parliament and of the Council establishing a common organisation of the markets in agricultural products (Single CMO regulation) (COM(2011) 626 final/2).

⁹ - Proposal for a Council regulation determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products COM(2011) 629 final.

- Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards the regime of the single payment scheme and support to vine-growers COM(2011) 631 final.

- Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 73/2009 as regards the application of direct payments to farmers in respect of the year 2013 COM(2011) 630 final.

proposals, the Commission has addressed a number of observations made by the Parliament, the Council as well as those of the Court.

7. The arrangements for the common agricultural policy spending continue to be complex. For example, for rural development, there are six layers of rules: (1) common provisions for all structural funds laid down in one regulation, (2) general provisions for the EAGF and EARDF (set out in the general regulation covering the CAP), (3) rules laid down in a fund (EAFRD)-specific regulation, (4) delegated acts, (5) implementing acts, (6) national legislation. The Commission's guidelines will, in some cases, constitute an additional layer (see also paragraph 7 of the Opinion No 7/2011¹⁰). Another example concerns cross compliance. Whilst recognising that the framework for cross compliance has been reorganized the Court considers that it does not yet correspond to a reduction in the level of complexity of this policy for the managing authorities or for the beneficiaries.

8. Despite the claimed focus on results, the policy remains fundamentally input-based (expenditure oriented), and therefore oriented more towards compliance than performance. In particular, the objectives established for direct payments to farmers within the framework of the CAP are not disclosed in the articles of the regulation, nor are their expected results, impacts and indicators. For rural development, a disparate and wide ranging set of objectives are laid down in the regulation which does not include either their expected results and impacts or relevant indicators. Similarly, the objectives and expected results of cross compliance and the 'greening' component of direct payments are not

¹⁰ Opinion No 7/2011 on the proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006.

adequately defined. The disclosure of these elements would help to focus and target the policy on delivering the desired results.

9. The Court notes the Commission's goal of focussing the payment of CAP subsidies to 'active farmers' and its attempt towards a more balanced distribution of direct payments between beneficiaries. However, the Court has doubts as to whether the measures proposed can be implemented effectively without imposing an excessive administrative burden on managing agencies and farmers. The Court considers that the solution may be found in a combination of general principles laid down in the regulation along with a systematic supervision and guidance of its implementation by the Commission. It notes that the effect of the so called 'capping' (reduction of aid above certain aid levels) on the redistribution of aid will be limited.

10. The administrative costs of the CAP reform, in particular of the direct payments scheme, will mainly be borne by the Member States. The limited simplification and additional administrative burdens introduced will have an effect on the costs of the reform which the Commission estimates are likely to represent an increase of 15 % overall. Member States consider that the percentage increase in costs may be even bigger. The Court notes that no information is available to show to what extent these additional costs will be offset by increased management effectiveness or efficiency in delivering the policy.

11. The Court points out that for several aspects the regulatory requirements are deferred to a later stage, through delegated and implementing acts under Articles 290 and 291 TFEU. Thus, it is not yet possible to take a position on those provisions.

12. Finally, the conditions for an effective and efficient implementation of the reform are that the Commission present clear and unambiguous implementing regulations (which would reduce the need for additional guidance by the Commission) and provide sufficient time for the paying agencies to adapt

procedures and systems which may require between 12 and 24 months following the adoption of the implementing provisions by the Commission.

1. THE HORIZONTAL REGULATION

13. The Horizontal regulation brings together various relevant rules for all the CAP instruments. Accordingly, this regulation lays down the rules on financing, the farm advisory system, management and control systems (to be put in place by the Member States), cross compliance and clearance of accounts.

14. The Court has reported on the management and control systems in previous annual reports and on the clearance of accounts, recoveries and cross compliance provisions in its special reports¹¹ on the respective subjects.

General provisions on agricultural funds (Title II)

Accreditation and withdrawal of accreditation of paying agencies and coordinating bodies (Article 7)

15. The proposals (Article 7(2)) provide that, in principle, there should be only one paying agency per Member State or per region, taking into account the respective constitutional provisions of the Member States. In cases where Member States set up several regional paying agencies, it is proposed that there has to be one national paying agency for measures to be managed at national level. It is no longer permitted to have separate paying agencies for EAGF and EAFRD expenditure.

16. The Commission's initiative to restrict the number of accredited paying agencies can be expected to simplify and consolidate management and

¹¹ Special Report No 7/2010 'Audit of the clearance of accounts procedure' (hereinafter 'Clearance report'), Special Report No 8/2011 'Recovery of undue payments made under the common agricultural policy' (hereinafter 'Recoveries report') and Special Report No 8/2008 'Is cross compliance an effective policy?' (hereinafter 'Cross compliance report').

supervisory procedures. The Court notes however that the mandate of paying agencies is no longer disclosed in the regulation.

17. The Member states shall accredit as paying agencies departments or bodies which fulfil the accreditation criteria to be laid down by the Commission. The Court is of the opinion that the Commission, as holder of the ultimate responsibility in the budget implementation, should have a supervisory role in this process to mitigate the risk of leaving the detection of any failure to subsequent checks, which may lead to more frequent checks and financial corrections. Such a role would require for the Commission to confirm, for example in the Directors-General annual activity reports, that management and control bodies satisfy the conditions for a national accreditation as provided for in the relevant delegated act. This would require, at the start of the programmes, the Commission to assess the documentary evidence provided by the Member States and subsequently to review the functioning of the systems, for example on a risk basis (see also paragraph 25 of the Court's Opinion No 7/2011).

Management declaration of assurance by accredited paying agencies
(Articles 7, 8 and 9)

18. This declaration shall cover the completeness, accuracy and veracity of the accounts, the proper functioning of the internal control systems, the legality and regularity of the underlying transactions and the respect of the principle of sound financial management.

19. Whether these declarations provide useful information to the Commission for assurance purposes will depend on the scope and quality of the work that underlies them. The latter should be clarified in the implementing act adopting the model for the management declaration. The Court draws attention to the weaknesses found in the past¹² (insufficient basis for paying agencies'

¹² Paragraphs 39 to 52 of Special Report No 7/2010.

statement of assurance) which, if unresolved, will limit the assurance the Commission can take from these declarations.

20. The Court also notes that the extent to which this declaration may meaningfully cover the sound financial management of CAP spending will depend on a shift from the current focus on compliance and financial implementation towards a performance-based system, with clear objectives and criteria against which performance is to be measured. In this respect, as noted earlier (see paragraph 8) the CAP remains fundamentally input-based and while the paying agency has in principle a day-to-day responsibility for ensuring the sound financial management, the description of its tasks basically relates to compliance requirements only.

Certification bodies (Article 9)

21. The current regulations (Council Regulation (EC) No 1290/2005¹³ and Commission Regulation (EC) No 885/2006¹⁴) though focusing the work required of certification bodies on the reliability of the accounts, have extended it to cover certain aspects related to legality and regularity¹⁵.

¹³ OJ L 209, 11.8.2005, p. 1.

¹⁴ OJ L 171, 23.6.2006, p. 90.

¹⁵ Article 5 of Regulation (EC) No 885/2006:
3. The certification body shall draw up a certificate stating whether it has gained reasonable assurance that the accounts to be transmitted to the Commission are true, complete and accurate and that the internal control procedures have operated satisfactorily. [...] 4. The certification body shall draw up a report of its findings [...]. The report shall state whether: the paying agency's procedures are such as to give reasonable assurance that the expenditure charged to the EAGF and the EAFRD was effected in compliance with Community rules and which recommendations for improvements, if any, have been made and followed-up [...]. The report shall be accompanied by: [...] (b) an opinion on the statement of assurance referred to in Article 8(1)(c)(iii) of Regulation (EC) No 1290/2005.

22. In its Clearance report the Court found that insufficient work was carried out by certification bodies to support the assurance those bodies were expected to provide in respect of legality and regularity of underlying transactions.

23. In the draft regulation the Commission proposes that certification bodies will, in future, have to provide an opinion on the management declaration (of the paying agency) covering the completeness, accuracy and veracity of the annual accounts of the paying agency, the proper functioning of the internal control system and on the regularity and legality of the underlying transactions and the respect of the principles of sound financial management.

24. The Court stresses that providing an opinion on a management declaration is very different from providing a certificate on the reliability of the accounts or on the legality and regularity of the underlying transactions.

25. If the certification body would provide, not only an opinion on the accounts (as is currently the case) but also the legality of underlying transactions, it would be a significant and useful extension of their role.

26. Furthermore, since the tasks of the certification body (and the paying agency, see paragraph 20) currently relate to compliance requirements only, its opinion on the soundness of the financial management of the paying agency would need clarification.

27. The draft regulation foresees that certification bodies are designated by Member States. The Court considers that since the Commission is using the work of these bodies as a source of assurance, it should review (by systematic on-the-spot visits) their systems and their performance in order to ensure that their work is reliable (see also paragraph 26 of the Court's Opinion No 7/2011).

Farm advisory system (Title III)

28. Currently, Member States have an obligation to establish a system for advising farmers on land and farm management practices, referred to hereinafter as the farm advisory system (FAS). The use of the FAS by farmers

is on a voluntary basis. The FAS is a component of the 2003 CAP reform and had to be introduced by the Member States by 2007.

29. The draft regulation does not introduce major changes to the FAS.

30. In its Cross compliance report the Court highlighted that the framework of cross compliance poses considerable difficulties for farmers, notably because of its complexity and that FAS provides them with useful assistance in this context.

Financial management of the funds (Title IV)

Compliance with payment deadlines (Article 42)

31. The proposals (Article 42(2)) provide for default interests to be paid to the beneficiary in cases where the paying agency fails to meet EU payment deadlines. The default payments shall be borne by national budgets

32. The introduction of default interests to be paid to the beneficiary can be expected to encourage respect for EU payment deadlines.

Clearance of accounts (Articles 53, 54 and 55)

33. This section of the proposals contains provisions on clearance of accounts of expenditure financed by EAGF and EAFRD. The Court notes that the CSF draft regulation¹⁶, for which the Court issued an opinion (No 7/2011), also contains common provisions applicable to EAFRD as regards clearance of accounts and financial corrections.

¹⁶ COM(2011) 615 final – Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund covered by the Common Strategic Framework and laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1083/2006, called 'CSF draft regulation'.

34. In its Clearance report the Court highlighted a number of weaknesses of the clearance of accounts procedure and recommended that it be reviewed in order to address, in particular, the following recommendations:

- the objectives set for the various phases of the clearance of accounts procedure and for the procedure as a whole, as well as the respective roles and responsibilities of the different parties involved should be more clearly defined;
- the Commission should, at the end of the conformity clearance procedure (the time limit for which should be defined), recognise the amount of expenditure chargeable to the accounts of a given financial year and inform the discharge authorities accordingly: the financial statements of the Commission should identify, for each Member State, the amounts by budget area and by budget year which may be subject to further verification;
- the Commission should consider a more widespread use of statistically valid samples in cases where significant systems weaknesses are found rather than the current practice of making extensive use of flat-rate corrections and the power for the Commission to sanction Member States for control weaknesses, currently exercised through the conformity decisions, should be separated from the clearance of accounts procedure which is of a different nature.

35. The draft horizontal regulation limits the clearance of accounts to an annual clearance decision which provides that a 'clearance decision' shall cover the completeness, accuracy and veracity of the annual accounts submitted and shall be without prejudice to any subsequent financial correction decision (following a conformity clearance – Article 54). Thus, it does not cover the compliance of expenditure with applicable EU and national laws and therefore the purpose of the clearance of accounts procedure still differs from the objective and definition of this same procedure laid down in the Financial

Regulation (Article 53b)¹⁷ and its implementing rules (Article 42)¹⁸. In its Clearance report, the Court observed that the overall objective of the clearance of accounts is to enable the Commission to assume final responsibility for the implementation of the budget in a situation where agricultural expenditure is executed by Member States under 'shared management'. For this purpose it is incumbent on the Commission to recognise that part of the expenditure that has been made in accordance with the applicable rules and is chargeable to the EU budget and to exclude from financing by the Union that part which does not comply with the rules.

36. Furthermore, no changes have been proposed which would reduce the Commission's recourse to flat-rate corrections, notably by making more extensive use of statistically valid samples.

37. The Court notes that the system for financial corrections differs from that proposed for the ERDF, ESF and CF¹⁹. For the latter, when the Commission proposes a financial correction based on a flat rate or extrapolation, the Member States are given an opportunity to demonstrate that the actual extent of irregularity is less than the Commission's assessment.

38. Overall, the Court considers that its principal recommendations contained in the Clearance report have not been addressed in the current Commission's proposals.

¹⁷ Council Regulation (EC, Euratom) No 1605/2002 (OJ L 248, 16.9.2002, p. 1).

¹⁸ Commission Regulation (EC, Euratom) No 2342/2002 (OJ L 357, 31.12.2002, p. 1).

¹⁹ Article 137(2) of the CSF draft regulation.

Irregularities (Articles 56 to 59)

39. In 2006, the Council introduced the so called '50/50 rule'²⁰ by which the financial consequences of non-recovered debt are equally shared between the EU budget and the respective Member State. The rule helps protect the financial interests of the Union. Member States are charged for 50 % of amounts not recovered more than four years after the date the debt was recognised, or more than eight years if the recovery process is being pursued in the courts. The date on which the debt is recorded in the debtors' accounts is therefore a key element for the application of the rule.

40. In its Recoveries report the Court observed that the date of the PACA²¹ continues to be interpreted differently in the Member States, meaning that an irregularity detected can be accounted for and be the subject of a Commission correction in different years, depending upon the policy adopted by the Member State concerned, and invited the Commission to introduce a uniform time limit between the discovery of a potential irregularity and the notification of the recovery order to the debtor.

41. In the draft regulation (Article 56(1)) the Commission clarified and specified the provisions by proposing that Member States shall request recovery from the beneficiary within one year of the first indication that such an irregularity has taken place and shall record the corresponding amounts in the debtors' ledger of the paying agency.

²⁰ Article 32(5) of Regulation (EC) No 1290/2005.

²¹ The current regulation (Regulation (EC) No 1290/2005) defines this date as, 'the first written assessment of a competent authority, either administrative or judicial, concluding on the basis of actual facts that an irregularity has been committed, without prejudice to the possibility that this conclusion may subsequently have to be adjusted or withdrawn as a result of developments in the course of the administrative or judicial procedure.' The date of initial recording of debts is thus governed by the concept of the primary administrative or judicial finding more commonly known by its French acronym PACA (Premier Acte de Constatation Administrative).

42. These new provisions respond to the Court's criticisms by attempting to harmonise the date of recognition of debts, although the concept of 'first indication of an irregularity' may still be open to different interpretations by the Member States.

43. The Court also highlighted that the 50/50 rule introduces a risk that Member States 'manage' the reporting and write-off process to their advantage, notably to avoid or postpone its application (and resultant charge to the national budget).

44. The Court notes that the draft regulation (Article 56(2)) provides that the financial consequences of non recovery shall no longer be borne under the 50/50 rule but entirely by the Member State concerned. As a consequence, the risk mentioned in the previous paragraph has become even greater than before.

45. Furthermore, the Court notes that under the new proposals (Article 57) the share of recoveries (in cases of irregularity or negligence) that the Member States are allowed to retain is reduced from 20 % to 10 % for EAGF expenditure.

46. Finally, in its report the Court observed an inconsistent application of interest on outstanding debt leading to financial loss²² and invited the Commission to issue clear and unambiguous rules in relation to the application of interest on those debts. The Court notes that no modification has been proposed by the Commission in this regard.

²² Paragraphs 32 to 35 of the Recoveries report.

Control systems and penalties (Title V)General principles of checks (Article 61) and Commission powers (Article 64)

47. The draft regulation provides that general principles of checks remain broadly unchanged as they encompass a systematic administrative checking supplemented by on-the-spot checks carried out on a sample of applicants.

48. Relevant detailed rules applicable to checks may be established by the Commission when adopting further delegated acts. According to the current legal provisions²³, the Member States shall, each year, carry out on-the-spot checks covering at least 5 % of all beneficiaries (and more than 5 % if significant irregularities are revealed).

49. The Court notes that the draft regulation (Article 64(2)(b)) includes the possibility for the Commission to establish, via implementing acts, relevant rules authorising Member States with properly functioning control systems and a history of low error rates to reduce the minimum level of on-the-spot checks .

50. The Court acknowledges the fact that reducing the number of controls would represent a simplification for the Member States concerned and may allow for a more effective use of resources. However, it considers that, given the importance of on-the-spot checks, the criteria for justifying a reduction of those checks should be carefully assessed. Such criteria will be established by the Commission²⁴. Therefore, the Court is not in a position to give an opinion on this issue.

²³ Article 12 of Commission Regulation (EC) No 1975/2006 (OJ L 368, 23.12.2006, p. 74) and Article 30 of Commission Regulation (EC) No 1122/2009 (OJ L 316, 2.12.2009, p. 65).

²⁴ In accordance with Article 64(2).

Withdrawals, reduction and exclusion of aid (Article 65)

51. The first paragraph of this new article provides that if a beneficiary does not comply with the eligibility criteria or the commitments relating to the conditions for granting the aid, the aid shall be withdrawn in full or in part.

52. The second paragraph provides that where the EU law so provides, the Member states shall also impose penalties by way of reduction or exclusion of the payment granted or to be granted in respect of which the eligibility criteria or the commitments have been met.

53. In respect of this article, the Court has the following observations :

- The juxtaposition of these two paragraphs of Article 65 results in a very confusing situation. Both of these paragraphs deal with infringements to 'eligibility criteria' or 'commitments' imposed on beneficiaries. But in the first case, such infringements result in the aid being 'withdrawn in full or in part' while in the second case, they result in 'penalties by way of reduction or exclusion' of the payment granted or to be granted.
- However the difference between a partial withdrawal of a payment and 'a penalty by way of reduction of the payment' is not explained anywhere, in particular because no definition of a penalty is provided in the regulation contrary to the principle of penal law. Moreover, the objective or impact of this artificial differentiation is not disclosed in Article 65. Article 97(4) however shows that the reductions of payments (penalty) do 'not affect the legality of the payments'. Thus these errors will not enter into the control statistics, which correspond to errors in underlying transactions, presented by the Commission and the Member States (see also paragraphs 69, 71 and 72).
- In addition, while the first paragraph of Article 65 does not indicate whether 'withdrawals' will be made by the Commission or by the Member States,

the second paragraph imposes on Member States the specific obligation of 'penalising' in certain cases.

- Finally, the Court notes that the current wording of the second paragraph of Article 65 is inconsistent (most likely the word 'not' has been omitted before 'been met').

54. In view of the above, the Court concludes that the provisions should be simplified by ensuring a coherent use of a well defined terminology and by focussing on the key principles such as: financial corrections are required in connection with irregularities detected in operations, the financial correction shall consist of cancelling all or part of the public contribution to an operation, the nature/gravity/duration of the irregularity and the loss to the fund shall be taken into account and a proportionate correction will be applied, the cancellation of all or part of the public contribution may go as far as total exclusion from one or several aid schemes or support measures for one or more calendar years.

Commission powers as regards penalties (Article 66)

55. This new article empowers the Commission to adopt delegated and implementing acts on key elements such as the reduction or suspension of payments to the Member States, the suspension of the right to participate in an aid scheme, the exclusion and suspension of payment, etc. Thus, it is not yet possible for the Court to take a position on those provisions.

Integrated Administration and Control System (IACS) (Articles 68 to 78)

56. In each Member State, the IACS consists of a database of holdings and applications, systems for identifying agricultural parcels and registering animals, as well as a register of entitlements. The Land Parcel Identification System (LPIS) is a database in which all the agricultural parcels of the Member State are recorded, preferably using ortho-photos.

57. In its 2010 Annual Report (paragraph 3.58(a)) the Court invited the Commission to take appropriate action to ensure that the use of ortho-photos becomes mandatory.

58. The draft regulation (Article 71) provides for compulsory use of high resolution ortho-photos.

59. These new provisions are likely to increase the quality of the administrative management of aid applications.

Cross compliance (Title VI)

60. Under the current schemes²⁵ the environmental objectives are pursued by making aid payments conditional upon respect of cross compliance obligations. Such obligations relate to the protection of the environment, of public health, animal and plant health and of animal welfare (they are set out in Statutory Management Requirements²⁶) as well as to the maintenance of agricultural land in good agricultural and environmental condition (GAEC). GAEC standards deal with avoiding soil erosion, preserving soil organic matter, protecting soil structure and maintaining the surface of land under permanent pasture. Detailed GAEC obligations are defined by the Member States.

Beneficiaries concerned (Article 92)

61. Beneficiaries of direct aid must respect cross compliance obligations. In case they do not, the amount of the direct payments they would be entitled to will be reduced or even cancelled. However, even though small farmers have to respect the law, the draft regulation exempts small farmers from such reductions which in reality amounts to exempting them from the obligation

²⁵ Under all EAGF direct aid schemes and certain EAFRD aid schemes, beneficiaries of EU aid have a legal obligation to fulfil 'cross compliance' requirements.

²⁶ SMRs related to obligations imposed by various EU directives and regulations.

altogether. This provision may be considered as a positive simplification to treat differently small farmers as it is very likely that the penalty would amount to less than 100 euro which corresponds to the threshold under which Member States may decide not to apply a penalty (Article 97(3)). The Court considers, however, that excluding small farmers from reductions means that certain regions with large numbers of small farms will no longer be subject to cross compliance controls and reductions²⁷.

62. In its Cross compliance report, the Court recommended that the Member States lay down precise obligations taking account of the specific characteristics of the areas and farming practices concerned where appropriate. The Court considers that the small farmers scheme referred to in Title V of the draft direct payment regulation should be adequately designed to prevent the risk expressed in the previous paragraph.

Rules on cross compliance (Article 93 and Annex II)

63. In the explanatory memorandum to its legislative proposal, the Commission explains that simplification has been an important consideration throughout the process, for instance in the reduction and better streamlining of cross compliance obligations.

64. In its Cross compliance report the Court highlighted the complexity of the cross compliance framework and invited the Commission to simplify that framework, in particular by organising it around the principal elements of farming activity where improvements are sought (e.g. water, soil structure, pesticides,...), by specifying the results that are expected, and by prioritising requirements and standards.

²⁷ See also paragraph 74 of the Court's Cross compliance report.

65. The Court acknowledges that the framework has been reorganised by proposing 8 GAECs instead of 15 and 13 SMRs instead of 18 (annex II of the draft regulation). However, it notes that:

- the GAEC standards which have been removed are to a large extent the previously optional GAEC standards²⁸, and that
- two additional directives (water and pesticides) will be added once they are implemented by all the Member States.

66. Overall, the Court considers that the list of requirements is still too dispersed across too many legal texts, not focused enough on key requirements and that the lower number of standards does not really correspond to a reduction in the level of complexity of this policy.

Checks of cross compliance (Article 96) and application of penalties (Article 97)

67. The Court observed that, in a significant number of cases, the checks of cross compliance obligations were purely formal and could not be expected to produce the expected results²⁹ and recommended that the Member States be required to define a set of verifiable requirements and standards, to be applied at farm level³⁰. The Court considers that the risk still exists that checks focus on formal aspects rather than on standards having a real environmental impact.

68. Furthermore, the Court wishes to highlight that many relevant aspects of the control and application of penalties cannot be fully assessed at this stage since the rules on the implementation of such checks are still to be spelt out by the

²⁸ Furthermore, the GAEC standards 'minimum livestock stocking rates' (optional) and 'avoiding encroachment of unwanted vegetation on agricultural land' (compulsory) have been abandoned and replaced by a new eligibility criterion, i.e. to keep land in a state that it can be made suitable again for cultivation or grazing by use of traditional agricultural methods and machinery.

²⁹ Paragraph 15 of the Cross compliance report.

³⁰ Paragraph 86 of the Cross compliance report.

Commission, by means of implementing acts (Article 96(4)). Such rules will cover many key issues such as the size of the control sample (currently 1 %).

69. Finally, the Court observed that the introduction of cross compliance had weakened the rural development provisions as cross compliance conditions were no longer considered to be eligibility criteria³¹. Furthermore, in the draft regulation, the Commission introduces a new provision (Article 97(4)) whereby 'The [cross compliance] penalty does not affect the legality and regularity of the payments on which the penalty applies' even though such 'penalties' consist in 'reductions' of payments or even 'exclusion' from payment³². The combination of the provisions laid down in Articles 91, 97 and 99 results in a deeply confusing situation and leads to the following contradiction: a beneficiary infringing legal provisions would be deemed to be entitled to the full payment which would be formally adjudged to remain legal even though he/she has to reimburse the sum received in full or in part and pay penalties for the infringement.

70. The Court wishes to highlight that, in substance, cross compliance obligations are legal requirements that must be met by all farmers in order to justify the full amount of direct payments, that failure to meet these requirements affects the conditions of the payment of the aid, and that such a failure makes the payment of the aid illegal and/or irregular.

71. With reference to Article 97(4) in particular, the Court wishes to underline that its implementation has the consequence that Member States do not include infringements of cross compliance obligations in their control statistics which correspond to errors in underlying transactions.

³¹ Paragraph 49 of the Cross compliance report.

³² The draft regulation (Article 91) no longer uses the terms 'reductions' or 'exclusions' but uses the term 'penalty'. However Article 97 of the proposal provides that the 'penalty' provided for in Article 91 shall be applied by means of 'reduction' or 'exclusion'.

72. Accordingly, the Court suggests deleting the sentence of Article 97(4) quoted above.

An effective and targeted policy

73. In its Cross compliance report, the Court indicated that, for cross compliance to be effective the relevant rules should be translated into controllable requirements at farm level. This is not yet the case because the objectives and the scope of cross compliance are not well defined, making it unclear what cross compliance is designed to achieve. In particular, the global objectives set out by Council have not yet all been translated into adequate operational requirements and standards to be applied at farm level. The Court recommended that the Commission develops and details the objectives set out in the Council regulation and organises them in a logical hierarchy and the Member States define a complete set of verifiable requirements and standards, to be applied at farm level.

An effective sanction system

74. The current legislation provides that, as a general rule, reductions in payments resulting from infringements of cross compliance obligations shall be set at 3 % of the total amount paid. The draft regulation no longer provides for this general rule, so that, in future, such infringements may be altogether ignored. This would constitute a weakening of the system.

75. Furthermore, in its Cross compliance report, the Court recommended revising the principles underlying the sanction system to make reductions in payments proportional to or dependent on the seriousness of the breach of cross compliance obligations by the farmer sanctioned. This recommendation was made in line with the Treaty provisions which provide that environmental damage should as a priority be rectified at source and the polluter should pay. The application of the principle suffers from weaknesses in the supervisory and control systems (lack of relevant controls, reductions of subsidies calculated as a proportion of aid rather than as a proportion of the impact on the

environment) as well as in the actual enforcement of the reductions of payments. The Court recommends reinforcing this principle by ensuring its application in the relevant parts of the regulations as well as in the delegated acts to be adopted by the Commission.

2. THE DIRECT PAYMENTS REGULATION

76. The draft regulation sets out a new *basic payment scheme* to be implemented across the EU. This scheme would replace the single payment scheme and the single area payment scheme as from 2014. Under the basic payment scheme, all farmers in a given region (or a given Member State) would receive payment entitlements on the basis of the eligible hectares at their disposal in the first year of application (2014). The total amount of direct aid available to a Member State would remain subject to a national financial ceiling. Direct aid comprises the elements detailed in paragraphs 77, 78 and 79 below.

77. The draft regulation provides for three payment components additional to the basic payment:

- an additional payment for farmers: 30 % of the national ceiling would be devoted to what the draft regulation calls the '*greening component*' of direct payments;
- an additional payment that Member states might opt to establish for farmers in *areas under natural constraints* (up to 5 % of the ceiling);
- an additional payment for *young farmers* who commence their agricultural activity (up to 2 % of the ceiling).

78. In addition, the draft regulation provides for a simplified scheme for small farmers (hereinafter referred to as the '*small farmers*' scheme').

79. Also, the draft regulation provides for a voluntary *coupled support scheme* and a *crop specific payment for cotton*.

80. Finally, the draft regulation provides for a limited reduction in the differential in the aid levels per hectare across Member States. In Member States where the level of direct aid is less than 90 % of the EU average the national ceilings on direct payments will be calculated with a view to reducing the gap by one third between 2014 and 2020.

81. The Court has reported on the current direct aid schemes mainly in its Special Report No 5/2011 'single payment scheme (SPS): issues to be addressed to improve its sound financial management' (hereinafter 'SPS report') and in its 2007 to 2010 Annual Reports.

Objectives of direct payments

82. The Court observes that, even though the recitals of the regulation³³ refer to 'the objectives of this regulation', the specific objectives for direct payments to farmers within the framework of the CAP, are not disclosed in the articles of the Regulation (or in its preamble), neither are their expected results, impacts and indicators³⁴. The Court considers that these should be disclosed. It would help in focussing or targeting the policy on delivering results.

³³ Recital 7 of the draft regulation establishing rules for direct payments to farmers under the CAP states that '*The objectives of this regulation can be achieved more efficiently at EU level [...].*'.

Recital 26 of the same regulation states that '*One of the objectives of the new CAP is the enhancement of environmental performance through a mandatory greening component of direct payments [...].*'.

³⁴ The legislative financial statement which is attached to the proposed draft regulation (but not part of it) includes the following objectives :

1. In order to promote resource efficiency with a view to smart, sustainable and inclusive growth for EU agriculture and rural development in line with the Europe 2020 Strategy, the objectives of the CAP are:
 - viable food production;
 - balanced territorial development;
 - sustainable management of natural resources and climate action.
2. Specific objectives for the CAP Policy: to provide environmental public goods, to compensate for production difficulties in areas with specific natural constraints, to pursue climate change mitigation and adaptation actions, to manage the EU budget (CAP) in accordance with high standards of financial management.

Scope and definitions (Title I)

83. The draft regulation makes receipt of direct payments by farmers dependent on their meeting two sets of interrelated qualifications (a) practising an agricultural activity and (b) being active farmers. Agricultural activity is defined in Article 4 (under Title I) while active farmers are defined in Article 9 (under Title II). Article 9 provisions complement the definition of agricultural activity as set out in Article 4 in the sense that in order to benefit from direct payments it is necessary to carry out an agricultural activity but all persons carrying out some form of agricultural activity are not, *ipso facto*, entitled to direct payments. These two sets of provisions must therefore be read together to understand their purpose.

Definition of agricultural activity (Article 4)

84. Under the current definition, an ‘agricultural activity’ entails growing agricultural products, breeding, milking or keeping animals for farming purposes or maintaining land parcels for which aid is claimed in ‘good agricultural and environmental condition’ (GAEC). As regards the requirement to maintain the land in GAEC the current EU legislation sets out the domains in which standards must be established but leaves the definition of the minimum requirements under these standards to the discretion of the Member States.

85. In its SPS report, the Court recommended³⁵ that eligible land and agricultural activities be more clearly defined with a view to excluding from the benefit of SPS aid non-agricultural parcels and activities that do not contribute

3. Specific objective - Direct aids: To contribute to farm incomes and limit farm income variability.

³⁵ Recommendation 2 of the SPS report.

to increasing agricultural productivity or to actively maintaining the environmental value of the land³⁶.

86. According to the draft regulation, 'agricultural activity' consists of:

- rearing or growing of agricultural products including harvesting, milking, breeding animals and keeping animals for farming purposes,
- maintaining the agricultural area in a state which makes it suitable for grazing or cultivation without any particular preparatory action going beyond traditional agricultural methods and machineries, or
- carrying out a minimum activity to be established by Member States on agricultural areas naturally kept in a state suitable for grazing or cultivation.

87. Therefore, the proposed new definition of 'agricultural activity' replaces the requirement to maintain the land in GAEC by the provisions contained in the second indent, while a minimum level of activity to be carried out on agricultural areas to be kept in a 'natural state' will be defined by the Member States. The Commission shall, via delegated acts, define the framework within which such minimum activity will be detailed by each Member State as well as the criteria to be met by farmers in order to be deemed to have respected the obligation of maintaining the agricultural area in a state suitable for grazing or cultivation³⁷.

88. The Court considers that the risk persists that, in the future, payments will continue to be made even when beneficiaries do not exercise any activity on their land and that therefore the weaknesses identified by the Court as to the definition of minimum annual activity are not remedied.

³⁶ See also paragraph 5.65(b) of the 2008 Annual Report and paragraph 3.73(c) of the 2009 Annual Report.

³⁷ The Court notes that Article 4(2)(c) does not refer to all provisions of the second indent of Article 4(1)(c) and in particular the second part of the sentence 'without any particular preparatory action going beyond traditional agricultural methods and machineries'. These provisions would also need to be defined.

89. Finally, the Court notes that there is no direct link between the level of BPS aid (see section on basic payment scheme) and the costs incurred by farmers to carry out the minimum activity, to maintain the agricultural area in a state suitable for grazing or cultivation, or to comply with cross compliance requirements. Neither does it reflect the value of the positive externalities that agricultural activities generate.

General provisions on direct payments (Title II)

Active farmers (Article 9)

90. In its SPS report the Court found³⁸ that the definition of the beneficiaries of the scheme was formulated, and subsequently applied, in a way that permitted persons or entities not or only marginally engaged in an agricultural activity to benefit from SPS payments and recommended that aid be directed to active farmers excluding beneficiaries who have no or only insignificant agricultural activities. Neither the Member States visited nor the Commission have precise information on the number of such beneficiaries and the amount of SPS aid they receive. Notwithstanding the fact that the majority of beneficiaries are actively engaged in farming, the problem mentioned above is widespread.

91. In the draft regulation the Commission proposes that no direct payment shall be granted to natural or legal persons, or groups of natural or legal persons, where one of the following applies: (a) the annual amount of direct payments is less than 5 % of the total receipts they obtained from non-agricultural activities in the most recent fiscal year; or (b) their agricultural areas are mainly areas naturally kept in a state suitable for grazing or cultivation and they do not carry out on those areas the minimum activity established by Member States. In addition, this restricting provision shall not apply to farmers who received less than 5 000 euro of direct payments for the previous year.

³⁸ Paragraph 85 and recommendation 1 of the SPS report.

92. These provisions aim at the exclusion of beneficiaries whose business purpose is unrelated to agricultural activity, such as airports, railways, real estate companies or managers of recreational grounds whose non-agricultural revenue is significantly higher than their entitlement to direct payments³⁹.

93. These new provisions are a first attempt to limit aid to active farmers.

94. The Court considers, however, that the first criterion (5 % of total receipts obtained from non agricultural activities) will not prevent persons who are not or only marginally engaged in an agricultural activity from benefiting from direct payments.

95. The criterion will be difficult to implement and control; furthermore national provisions on fiscal confidentiality should be coordinated so that they do not restrict verification of information declared by the farmer.

96. As regards the second criterion (applicants declaring mainly or exclusively areas naturally kept in a state suitable for grazing), the Court notes that the proposed rules leave the eligibility of applicants entirely in the hands of the Member States which have the discretion to set the level of the minimum activity required on such land. The Court reported⁴⁰ in the past on situations whereby the minimum maintenance required by the Member States was merely the commitment of the claimants not to carry out specific activities that would change the natural state of the land or where the minimum requirements consisted in a mowing or grazing obligation once every three to five years. The Court considers that the draft regulation does not prevent similar situations from occurring in the future.

97. The draft regulation proposes that the obligation to meet the above 'active farmer' criteria does not apply to beneficiaries receiving less than 5 000 euro

³⁹ See recital 13 of the preamble.

⁴⁰ Paragraph 37 and box 4 of the SPS report.

direct aid. Although this threshold aims at preventing part-time farmers from being excluded from the scheme, the Court considers that, even for amounts less than 5 000 euro, attention should be paid not to grant aid to beneficiaries declaring areas naturally kept in a state suitable for grazing or cultivation without being obliged to carry out the required minimum activity thereon. In addition, the Court notes that this exception to the rules would affect around 74 % of all beneficiaries. Furthermore, beneficiaries such as sport clubs or airports receiving less than 5 000 euro would continue to receive the aid.

98. The Commission's goal of better targeting CAP subsidies towards 'active farmers' with a view to increasing agricultural productivity and, thus, increasing the individual earnings of persons engaged in agriculture corresponds to Article 39 of the TFEU. However, the Court considers that the measures detailed in the preceding paragraphs may prove extremely difficult to put into practice without imposing an excessive administrative burden on managing authorities and farmers. As a way out of this difficulty, the Court suggests adopting a general and simple definition of what constitutes an 'active farmer' and to entrust the Commission with the task of 'managing' the resulting legislation with a view to reaching the high level objectives set out in the Treaty. There are several ways of defining an 'active farmer' which are already in use in a number of Member States. For example an active farmer could be a person (or an entity) who is recognised as such by a public body or who actually bears the economic risk of the agricultural activity carried out on land declared for the benefit of the basic payment scheme. Alternatively, 'natural or legal persons whose agricultural activities form only an insignificant part of their overall economic activities or whose principal business or company objects do not consist in exercising an agricultural activity'⁴¹ could be excluded from the benefit of the basic payment scheme.

⁴¹ This is the current text of Regulation (EC) No 73/2009 (Article 28(2)) which was introduced in the legislation following the health check of 2008. However, very few

99. Also, the Court wishes to underline that, whatever the degree of detail spelt out in the regulation, it is unrealistic to expect that it can envisage in advance all the modes of carrying out an agricultural activity and separate those which should be eligible from those which should not. Therefore, it is necessary to monitor the implementation of the relevant legislation over time as it applies to an increasing variety of situations. The manager of this legislation is the Commission as it shall 'oversee the application of Union law under the control of the Court of Justice' (Article 17 TEU). The Commission should fulfil this role through all the forms of interpretation of legal provisions it has at its disposal (delegated acts, implementing acts, etc).

Distribution of aid, progressive reduction and capping of direct payments
(Article 11)

100. In its SPS report, the Court pointed out⁴² that the current distribution of SPS aid is characterised by the fact that the major part goes to a small number of large beneficiaries while the large majority of beneficiaries each receive only a limited amount of aid. This is due to the fact that the determination of SPS payments to individual farmers remains based (a) on the number of hectares farmed and (b), in the historical model, on the amounts paid in the past (reference years from 2000 to 2002).

101. The Court recommended⁴³ that a more balanced distribution of SPS aid between farmers should be sought either by further modulation of payments, or by capping higher individual payments, or by taking into consideration the specific circumstances of farmers.

Member States made use of this option to better target beneficiaries of the CAP subsidies.

⁴² Paragraphs 93 and 94 of the SPS report.

⁴³ Recommendation 5 of the SPS report.

102. According to the draft regulation, the amount of direct payments to be granted to a farmer will be gradually reduced and ultimately capped⁴⁴: the new proposals provide for progressive reduction rates starting at 20 % for the tranche between 150 000 euro and 200 000 euro and going up to 70 % for the tranche between 250 000 euro and 300 000 euro. For the tranche in excess of 300 000 euro no further amount shall be paid. The amounts shall be calculated by subtracting the salaries effectively paid by the farmer in the previous year, including taxes and social contributions related to employment from the aid amounts. Member States shall ensure that no payment is made to farmers who artificially created the conditions to avoid the effects of this article.

103. It should be noted that those maximum levels would not apply to the 'greening' component of the direct payment accruing to farmers observing agricultural practices beneficial for the climate and the environment (representing 30 % of the ceiling).

104. These reductions are significantly higher than under the current system, whereby in 2013 (last year under the current legislation) amounts up to 300 000 euro will be reduced by 10 % and amounts above 300 000 euro by 14 % only⁴⁵.

105. The introduction of these provisions is an attempt towards a more balanced distribution of SPS aid. The Court notes, however, that the global financial impact of capping will be limited. Indeed, according to the Commission, the estimated impact of the capping rules for the period 2014-20 would amount to approximately 1 billion euro, i.e. 0,5 % of the planned direct payments.

106. The Court considers that it is necessary for the Commission to guide the implementation of this provision over time so as to ensure that it does not

⁴⁴ Farmers in the 'outermost regions' of the EU and on the Aegean islands are exempted from any modulation.

⁴⁵ Except for Bulgaria and Romania.

impose an excessive administrative burden on managing authorities and beneficiaries and that unwanted or discriminatory effects are addressed.

The basic payment scheme and related payments (Title III)

Basic payment scheme (Articles 18 to 28)

First allocation of payment entitlements (Article 21)

107. The proposed basic payment scheme will replace the SPS and the SAPS as from 2014. Therefore payment entitlements obtained under SPS shall expire on 31 December 2013.

108. Under the new basic payment scheme entitlements will be allocated to farmers who apply for it by 15 May 2014 and if he/she has either activated at least one payment entitlement under the SPS in 2011 or claimed support under the SAPS⁴⁶.

109. The obligation to have activated at least one payment entitlement in 2011 is to create some stability and to ensure that entitlements activated by tenants in 2011 are not taken over by non-active landowners who could then collect a maximum of entitlements in 2014 and subsequently let their land together with entitlements at a higher price to their tenant farmers. Non-active landowners would indirectly benefit from EU aid for the entire new programming period. The Court considers that this risk is not entirely excluded, for example if entitlements were transferred back to the landowner in 2011.

110. The use of a reference year (2011) to apply for entitlements in 2014, will also create barriers, for example, for new entrants who apply after 2011. It is

⁴⁶ By way of derogation, farmers who exclusively produced fruits, vegetables and/or exclusively cultivated vineyards will receive payment entitlements under the new scheme. These farmers had normally not received payment entitlements under the SPS. Similarly, farmers who had only agricultural land that was not in good agricultural condition on 30 June 2003 and could thus not benefit from SAPS payments will be able to receive payment entitlements under the new scheme.

however difficult to anticipate all possible undesirable consequences in the regulation. The Court considers that sufficient safeguards should be provided by a proactive management of the scheme by the Commission.

Carrying forward until 2018 the effects of the historical model (Articles 18 to 22)

111. The proposed basic payment scheme will generalise the use of the regional model. It will thus redistribute support away from the sectors and farms that benefited from high historical direct payments towards farms using large areas. The Court recognises the efforts made by the Commission to simplify the provisions of the common agricultural policy (CAP) by abandoning the different implementing models under the current single payment scheme.

112. The proposal is based on the principle that all entitlements of a region shall have a uniform value (regional model); however it provides for a transition from SPS to BPS whereby Member States are allowed to carry forward until 2018 the effects of the historical model⁴⁷.

113. The Court notes that, under these transition provisions, up to 60 % of the future support can be paid on the basis of historical reference amounts until claim year 2019 and thus the historical model is prolonged to a significant extent.

Distribution of the aid (Articles 18 to 22)

114. In its SPS report, the Court observed that ‘while the SPS appears to meet its objective of contributing significantly to farmers’ income, the distribution of

⁴⁷ Member States which apply the SPS, may limit the calculation of the unit value of the new payment entitlements to an amount corresponding to no less than 40 % of the national or regional ceiling. Member States making use of this possibility shall use the part of the ceiling which remains to increase the value of payment entitlements in cases where the total value of payment entitlements held by farmers under the basic payment scheme is lower than the total value of payment entitlements, including special entitlements, held on 31 December 2013 under the SPS. These provisions are intended to avoid disruptive financial consequences for farmers. See recital 21 of the preamble.

subsidies to individual farmers remains essentially based on the surface of land farmed and thus a high proportion of SPS aid still goes to large farms, as was the case under the previous system. There is a contradiction in the design of the SPS which is on the one hand intended as a support to individual income and the fact that its distribution takes little account of the specific circumstances of the recipient.’ The Court notes that no specific objective for the BPS is defined in the regulation, that the future distribution support will follow the distribution of agricultural land and that some farmers who operate in specific circumstances (less favoured areas, young farmers – see further paragraphs 128, 129 and 130 to 132) will receive an additional amount of aid ‘per hectare’. Hence, the Court considers that the scheme will only indirectly address the circumstances of some farmers but globally it will not resolve the contradiction in the design of the payments and it is still not targeted to needs or current standards of living.

Windfall profits (Article 22(4))

115. In the draft regulation the rules allowing Member States to return parts of the values of the payment entitlements to the national reserve are optional only. The Court considers that it is thus possible that farmers, who substantially reduce their farming activities after 2013, may consolidate their historical entitlements on very small areas and thus realise a windfall profit⁴⁸. The Court notes however that, as in 2003, the application of the so called windfall profit clause to return the amount to the national reserve is left to the discretion of the Member States. The Court has already highlighted instances where such windfall profits were not claimed back from beneficiaries⁴⁹.

⁴⁸ I.e. windfall profits that would accrue to farmers in cases where the holding had less agricultural area at the material time for lodging the 2014 application than it had declared in 2013.

⁴⁹ Paragraphs 69 to 73 of the SPS Report.

Availability of eligible hectares (Articles 25 and 26)

116. When the SPS was introduced, the legislation did not allow the payment of aid when parcels were used for non-agricultural activities. Following the health check, such land is now considered as eligible as long as the agricultural activity can be exercised without being significantly hampered by the intensity, nature, duration and timing of the non-agricultural activity (the parcel should be 'predominantly used for agricultural activities'). However, the precise definition of such situations is left to the Member States. In its SPS report the Court found cases where the national authorities had allocated payment entitlements which were activated for parcels of land used primarily for recreational activities. The Court considers that this provision in the draft regulation (Article 25(2)) could be clarified by inviting the Commission to define criteria for allowable non-agricultural activities (and their duration). Alternatively, non-agricultural activities could be excluded.

117. With respect to the availability of the land, the Court found in its SPS report⁵⁰ that the provision that land be at the farmer's disposal on a fixed date resulted in the situation whereby the declared land may be at the disposal of any other person for any period of time outside of this fixed date during the same calendar year, without this affecting the qualification of the claimant as a farmer.

118. The draft regulation maintains the condition that parcels shall be at the farmer's disposal on a date fixed by Member States, with the result that the same unsatisfactory situations will be repeated.

Transfer of payment entitlements (Article 27)

119. Under the current SPS scheme, entitlements to payment are separated from the land: payment entitlements may be traded independently of the

⁵⁰ Paragraph 24 of the SPS Report.

transfer of the land on which they were generated and they can be activated on whatever type of eligible land, whatever the agricultural activity carried out on this land. In its SPS report⁵¹, the Court noted that this had resulted in the creation of secondary markets for payment entitlements. The Court found that this had resulted in adverse effects: the possibility to lease low value marginal land on which beneficiaries do not have to respect particularly exacting GAEC obligations helped pave the way for speculative acquisitions and the accumulation of payment entitlements by investors who activated these entitlements on parcels of land not requiring any 'real' agricultural activity.

120. In the draft regulation it is foreseen that payment entitlements may be transferred only to a farmer and only within the same region or between regions of a Member State where the value of payment entitlements per hectare are the same. This provision is an attempt to remedy the adverse effects identified.

'Greening' component: Payment for agricultural practices beneficial for the climate and the environment (Articles 29 to 33)

121. Farmers entitled to a payment under the basic payment scheme shall observe on their eligible hectares the following agricultural practices:

- have three different crops on their arable land provided they have more than 3 hectares of arable land (specific exceptions are foreseen);
- maintain existing permanent grassland on their holding (reference year 2014); and
- reserve at least 7 % of their holding as an 'ecological area'. Such areas are defined as land left fallow, terraces, landscape features, buffer strips and afforested areas.

⁵¹ Paragraphs 63 and 66 of the SPS report.

122. Member States shall grant an additional flat rate payment to farmers observing those of the three practises referred to in paragraph 121 that are relevant for them. This 'greening' component of direct payments represents 30 % of the respective national ceiling and pursues the objective of enhancing the environmental performance of direct payments.

123. In the SPS report, the Court recommended that the calculation of SPS should be modified to better reflect the cost of environment and other externalities. The additional flat rate payment per hectare under the 'greening' component is calculated by dividing 30 % of the annual national ceiling by the number of eligible hectares declared. Thus it is unclear to what extent the flat rate per hectare compensates the costs farmers have to bear in adopting the compulsory practices or in producing the public goods.

124. The new rules foresee the obligation on the farmer to maintain as permanent grassland the areas of their holding declared as such in the application made for the claim year 2014. Farmers may thus consider it more profitable to convert permanent grassland into arable land prior to 2014, which would be contrary to the environmental objectives of the new scheme.

125. The Court is of the view that consideration should be given to reviewing upwards the threshold of 3 hectares for the obligation to cultivate three different crops, as in certain Member States the threshold may turn out to be less than the minimum number of hectares a farmer shall have at his disposal to be eligible for payments⁵².

126. Scientific evidence exists which justify the effectiveness and necessity of measures such as crop diversification and ecological focus areas (for biodiversity, the quality of water, for soil etc.). However, the regulation does not specify the concrete objectives, which should be achieved by the farming community in that domain, nor does it explain the impact which is expected

⁵² Article 10 and Annex IV of the draft regulation.

from implementing such measures. The absence of such justification raises the questions as to the claimed aim that the policy is results oriented.

127. Finally, some of the key aspects for crop diversification and ecological focus areas will be defined in delegated acts adopted by the Commission. Thus, at this stage it is too early to fully assess the proposed measures.

Payment for areas with natural constraints (Articles 34 and 35)

128. The draft regulation foresees that Member States may grant payments of up to 5 % of annual national ceiling for farmers in areas facing specific natural constraints (areas delimited in the same manner as for rural development purposes). This aid is intended to help maintaining agricultural activity and farmers in areas facing specific natural constraints and complement existing support under rural development.

129. The Court is of the opinion that this measure is consistent with the objective of preserving a balanced territorial development. However, the Court notes that similar measures exist under rural development with the aim of compensating farmers for additional costs resulting from the constraints on agricultural production in the areas concerned. The Court raises concerns on the overall level of support provided to beneficiaries of two sources of aid and is of the view that consideration should be given to the complexity and possible inconsistency of maintaining two different schemes purporting to pursue the same objective.

Young farmers (Articles 23, 36 and 37)

130. In its SPS report⁵³ the Court raised concerns that in some Member States new entrants have to acquire payment entitlements which may entail substantial investments and place significant barriers to entry.

⁵³ SPS report Paragraphs 33 to 35 of the SPS report.

131. The draft regulation addresses, at least partly, the concerns expressed by the Court:

- Member States have to use their national reserve to allocate payment entitlements, as a matter of priority, to young farmers who commence their agricultural activity (Article 23). Applicants must be under 40 years of age and not have set up a holding during five years preceding the first submission of an application;
- in addition, young farmers who are entitled to support under the basic payment scheme can benefit from an additional annual payment corresponding to 25 % of the average value of the entitlements activated. This payment is granted during a maximum period of five years and is limited to 25 payment entitlements or to the average size of holdings in the Member State concerned if this average size exceeds 25 hectares. The support is complementary to business start-up aid for young farmers under rural development⁵⁴.

132. The proposed measures may indeed encourage young farmers to start up innovative and dynamic farming businesses. The draft regulation guarantees that entitlements are available in the national reserves for 2014, it is for consideration whether this guarantee should be extended for every year thereafter so that young farmers can apply for it.

⁵⁴ Article 20 of the proposal for a Regulation of the European Parliament and of the Council on support for rural development by the European Agricultural Fund for Rural Development (EAFRD).

Coupled support (Title IV)

Voluntary coupled support (Articles 38 to 41)

133. Under the current provisions coupled support is voluntary for the Member States and is allowed to be paid after 2012 only for the suckler cow, sheepmeat and goatmeat, rice and cotton sectors.

134. In the draft regulation, coupled support will remain voluntary for the Member States but the list of sectors eligible for such support has been extended⁵⁵.

135. In principle, coupled support may only be granted to sectors or to regions of a Member State where specific types of farming or specific agricultural sectors encounter certain difficulties and are particularly important for economic and/or social and/or environmental reasons. Coupled support may only be granted to the extent necessary to create an incentive to maintain current levels of production in the regions concerned.

136. Member States may decide to dedicate up to 5 % of their national ceiling to voluntary coupled support. Under certain conditions, this percentage may be raised by Member States to 10 % and, subject to other restrictions, to over 10 % of the national ceiling.

137. Member States' decisions to grant coupled support shall be notified to the Commission including information on the regions targeted, the selected types of crops and the level of support to be granted. If a Member State intends to

⁵⁵ It now comprises the following products: cereals, oilseeds, protein crops, grain legumes, flax, hemp, rice, nuts, starch potato, milk and milk products, seeds, sheepmeat and goatmeat, beef and veal, olive oil, silk worms, dried fodder, hops, sugar beet, cane and chicory, fruit and vegetables and short rotation coppice.

use more than 10 % of the national ceiling, the Commission shall only approve the decision provided that the need⁵⁶ is demonstrated.

138. The Commission shall be empowered to adopt delegated acts concerning the conditions for granting the support and the rules on consistency with other measures of the EU and on the adding up of various types of support.

139. The Court agrees with the necessity to have a detailed analysis of the particular situation in the regions targeted; however, it stresses the importance of ensuring that clear objectives and adequate monitoring are associated with the choice to resort to coupled support.

140. Furthermore, the Court suggests that all decisions to resort to coupled support should be approved by the Commission.

141. The Court also considers that standard definitions of what constitutes 'certain difficulties' and 'particularly important for economic and/or social and/or environmental reasons' should be defined in an homogeneous manner across Member States and compliance with such standards should be checked.

142. Similarly baseline indicators of 'current levels of production' as well as indicators to monitor changes in the said levels of production should be developed and agreed upon.

⁵⁶ One of the following needs in the region or sector concerned should be demonstrated:

- the necessity to sustain a certain level of specific production due to the lack of alternatives and to reduce the risk of production abandonment and the resulting social and/or environmental problems;
- the necessity to provide stable supply to the local processing industry, thus avoiding the negative social and economic consequence of any ensuing restructuring;
- the necessity to compensate disadvantages affecting farmers in a particular sector which are the consequence of continuing disturbances on the related market;
- the necessity to intervene where the existence of any other support available is deemed insufficient to meet the previously specified needs.

Small farmers scheme (Title V)

143. The draft regulation provides that small farmers holding payment entitlements may opt for participating in a simplified scheme referred to as ‘the small farmers scheme’. The payments under the small farmers scheme replace all (coupled or decoupled) direct aid and farmers participating in the scheme are exempted from the agricultural practices obligatory for the ‘greening’ component of the direct payment (see paragraphs 121 to 124).

144. The amount of aid per small farmer shall not be lower than 500 euro⁵⁷ and not be higher than 1 000 euro⁵⁸.

145. Member States shall ensure that no payment is made to farmers who divide their holding with the sole purpose of benefiting from the small farmers scheme. This shall also apply to farmers whose holding results from that division.

146. As regards cross compliance requirements, small farmers must comply with them but their payments would not be reduced in case of non compliance⁵⁹ (see specific observations thereon in paragraph 61).

147. The Court considers that this scheme represents a welcome simplification from the administrative point of view.

⁵⁷ 200 euro in Cyprus and Malta.

⁵⁸ The amount of aid per small farmer is proposed to be either

- a standard amount per beneficiary (irrespective of his exact number of hectares) equal to no more than 15 % of the national average payment per beneficiary, or
- an amount corresponding to the national average payment per hectare multiplied by a figure corresponding to the number of hectares with a maximum of three.

⁵⁹ Article 92 of the Horizontal CAP regulation.

3. EAFRD: THE RURAL DEVELOPMENT REGULATION

148. The draft regulation on rural development lays down the general rules governing the European Agricultural Fund for Rural Development (hereinafter 'the EAFRD'), including the objectives of rural development policy.

149. The Court reported on several occasions on rural development expenditure, particularly in its Special Report No 7/2011 'Is agri-environment support well designed and managed?' (hereinafter Agri-environment report), in its Special Report No 5/2010 'Implementation of the Leader approach for rural development' (hereinafter Leader report) and in Special Report No 7/2006 concerning rural development investments: Do they effectively address the problems of rural areas? (hereinafter Investment report) as well as in its 2007 to 2010 Annual Reports.

150. Other important provisions applicable to EAFRD (such as those setting out the strategic approach, the programming, monitoring and evaluation, the financial support, the management and control) are laid down in a different draft regulation⁶⁰ that the Court commented upon in its Opinion No 7/2011.

Objectives and strategy (Title I)

Objective and priorities of rural development support (Articles 4 and 5)

151. The Court considers that a disparate and very wide ranging set of objectives are laid down for rural development (see **Box 1**). It is not clear from the regulation if and how these objectives are interlinked and what these objectives intend to achieve at EU level. The Court considers that the rural development policy would benefit from a less complex and more precise set of

⁶⁰ Proposal for a Regulation of the European Parliament and of the Council laying down common provisions for European Regional Development Fund (ERDF), European Social Fund (ESF), Cohesion Fund (CF), European Agricultural Fund for Rural Development (EAFRD) and European Maritime and Fisheries Fund (EMFF) (COM(2011) 615 Final).

objectives including clear targets (expected results and impacts as well as indicators). This would help to focus the policy on delivering results on key EU priorities.

BOX 1 – The objectives for the rural development are laid down at different levels:

- The Regulation on the common provisions for the Common Strategic Framework Funds (ERDF, EARDF, ESF, CF, EMFF) provides that these funds shall support **11 thematic objectives (Article 9)**.
- The Rural development regulation (Article 4) provides that within the overall framework of the CAP, support for rural development shall contribute to achieving the **competitiveness** of agriculture, the **sustainable management** of natural resources and **climate** action, a balanced **territorial approach**.
- The legislative financial statement which is attached to the draft Rural development regulation defines four specific objectives for the CAP: to provide environmental public goods, to compensate for production difficulties in areas with specific natural constraints, to pursue climate change mitigation and adaptation actions, to manage the EU budget (CAP) in accordance with high standards of financial management). It also defines four specific objectives for rural development, to foster green growth through innovation, to support rural employment and maintain the social fabric of rural areas, to improve the rural economy and promote diversification, to allow for structural diversity in farming systems.
- The Rural development regulation (Article 5) provides that the achievement of the objectives of rural development, which contribute to the Europe 2020 strategy for smart, sustainable and inclusive growth, shall be pursued through **six priorities**⁶¹ (devised in 18 sub-priorities) for rural development which translate the relevant thematic objectives of the CSF.

⁶¹ (1) Fostering knowledge transfer and innovation in agriculture, forestry, and rural areas,

- Article 5 of the Rural development regulation further specifies that all of the priorities shall contribute to the **cross-cutting objectives** of innovation, environment and climate change mitigation and adaptation.
- Each of the 24 rural development measures shall contribute to the achievement of one or more Union priorities for rural development (Article 14 of the Rural development regulation).
- The member states will prepare programmes which will define priorities setting out **specific objectives**.

152. In the current programming period a minimum spending per axis has been determined in the regulation⁶². This is no longer foreseen in the draft regulation. The Court considers that the abolition of compulsory axes (including a minimum spending per axis) and the new situation whereby every measure can contribute to more priorities⁶³ will increase on the one hand flexibility for the Member States but also, on the other hand, the difficulties in fixing specific objectives and targets and monitoring their achievements.

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- (2) enhancing competitiveness of all types of agriculture and enhancing farm viability,
 - (3) promoting food chain organisation and risk management in agriculture,
 - (4) restoring, preserving and enhancing ecosystems dependent on agriculture and forestry,
 - (5) promoting resource efficiency and supporting the shift towards a low carbon and climate resilient economy in agriculture, food and forestry sectors,
 - (6) promoting social inclusion poverty reduction and economic development in rural areas.

All of the priorities shall contribute to the cross-cutting objectives of innovation, environment and climate change mitigation and adaptation.

⁶² Article 17 of Council Regulation (EC) No 1698/2005 (OJ L 277, 21.10.2005, p. 1).

⁶³ According to the draft regulation (Article 14) each rural development measure shall be programmed to contribute specifically to the achievement of one or more Union priorities for rural development.

Programming (Title II)Content of rural development programmes and targeting support to rural areas
(Articles 9(1), 11 and 18)

153. In its Investment report, the Court recommended⁶⁴ that the Commission should ensure that Member States' programmes prioritise the allocation of funds to the most needy areas and beneficiaries.

154. According to the draft regulation, each rural development programme (RDP) shall include, inter alia, a description of the strategy which includes the target set for each of the focus areas of the Union priorities for rural development included in the programme and a selection of measures, including an assessment of the expected contribution of the measures chosen to achieve the targets. Additionally, the RDP shall demonstrate⁶⁵ that specific needs linked with specific conditions at regional or sub-regional level are taken into account and concretely addressed through adequately designed combinations of measures or thematic sub-programmes.

155. While this is a valid approach, the Court stresses the importance of specific concrete objectives for the proposed measures and of ensuring that support will be targeted to rural areas where investments are most needed.

Simplification (Article 9(1))

156. In its annual reports the Court pointed out that additional efforts are required to further simplify the rules and conditions (paragraphs 5.66 in the 2008 Annual Report and 3.74 in the 2009 Annual Report).

⁶⁴ Paragraph 66.

⁶⁵ Reference Article 9(1)(c)(iii).

157. According to Article 9(1)(c) of the draft regulation, the rural development programme shall demonstrate that: [...] '(v) appropriate action is envisaged to simplify the implementation of the programme'.

158. Some eligibility conditions for given individual measures are set out in the proposed Rural development regulation. However, through national rural development programmes, the Member States shall set out more specific conditions and rules applying to the selected measures. Consequently at this stage the Court is not in a position to conclude whether the simplification objective has been achieved.

Information and verifiability and controllability of measures (Article 9)

159. According to Article 9(1)(n)(i) each rural development programme shall include *for information* a summary description of the management and control structure. According to Article 69 of the draft regulation, Member States shall ensure that all rural development measures they intend to implement are verifiable and controllable. To this end, for each rural development programme they shall provide an *ex ante* assessment of the verifiability and controllability of the measures to be included in the rural development programme. The Member States shall also undertake an assessment of the verifiability and controllability of measures during the implementation of the rural development programme. *Ex ante* assessment and assessment during the implementation period shall take into account the results of controls in the previous and current programming period. Where the assessment reveals that the requirements of verifiability and controllability are not met, the measures concerned shall be adjusted accordingly.

160. The Court considers that it would be appropriate that the Commission itself assesses the verifiability and controllability of the management and control structure and makes it a condition of approval of the RDP.

Rural development support (Title III)

Individual Measures (Chapter I)

161. The Court notes that, overall, the range and scope of measures has increased. Although the number of measures has been reduced (from over 40 to less than 20) this is largely optical. Some 2007-13 measures have been merged or are now presented as sub-measures of a larger measure. In addition, new types of measures have been created.

Risk of irregular double financing

162. The draft regulation provides for the funding of many (new) measures from sources other than the EAFRD, either other EU funds or national funds. Cases in point include knowledge transfer and information actions, farm and business development (especially business start-up aid for non-agricultural activities in rural areas), basic services and village renewal in rural areas, cooperation and risk management. The Court considers that this diversity of funding sources entails a high risk of irregular double financing which needs to be addressed via effective tools, such as clear and unambiguous selection criteria.

Farm and business development (Article 20)

163. According to the draft regulation, support under this measure shall also cover annual payments for farmers who, at the time of submitting their application for support, participate in the small farmers scheme (see paragraphs 143-147) for at least one year and who commit to permanently transfer their entire holding and the corresponding payment entitlements to another farmer. Support shall be paid from the date of the transfer until 31 December 2020. The annual payments under this measure shall be equal to 120 % of the annual payments that the beneficiary received under the small farmers scheme. In other words, when farmer A participated in the small farmers scheme for one year and he decides to sell his farm (including his

entitlements) to farmer B, farmer A will continue to receive (until 2020) 120 % of the annual payment he received whereas farmer B will receive direct payments by activating the acquired entitlements.

164. The Court considers that it will be necessary to clarify the objectives of this measure and to establish clear criteria and effective controls in order to avoid abusive operations by farmers seeking to obtain the aid by, for example, formally transferring the holdings to a family member.

Measures to support forestry investments and management (Articles 22 to 26 and 35)

165. The draft regulation provides in its recital 25 that ‘During the 2007-13 programming period a variety of measures covered different types of support for forestry investments and management. In the interests of simplification but also of allowing beneficiaries to design and realise integrated projects with increased added value, a single measure should cover all types of support for forestry investments and management.’.

166. The Court notes that although all relevant sub-measures are mentioned in one single article⁶⁶, each of them remains governed by specific requirements and provisions. Therefore the Court has doubts as to whether the proposal effectively leads to the intended simplification.

Measures agri-environment-climate (Article 29) and organic farming (Article 30)

167. In its Agri-environment report, the Court recommended⁶⁷ that for the next programming period, the Commission should consider whether agri-environment measures should differentiate between simple, generalised agri-environmental actions with a relatively low rate of aid, on the one hand, and

⁶⁶ Article 22.

⁶⁷ Recommendation 4.

more demanding actions targeted to EU-level priority areas and attracting a higher rate of aid, on the other hand. In that context, support for organic farming would constitute a third measure.

168. The Court considers that part of this recommendation has been addressed via the introduction of the 'greening' component under Pillar I and through the provisions for the rural development measure 'organic farming'.

Income stabilisation tool (Article 40)

169. While direct payments under pillar I are likely to contribute to farm incomes, the rural development (pillar II) regulation also includes an income stabilisation tool which provides compensation to farmers who experience a severe drop in their income. The Court considers it necessary to clearly delineate the objectives between pillar I and pillar II and to ensure that the decision to finance a measure by a pillar is based on the measure's contribution to achieving the objectives of the pillar.

Common provisions for several measures (Chapter II)

Environmental impact of investments (Article 46)

170. According to the draft regulation, in order to be eligible for EAFRD support, investment operations shall be preceded by an assessment of the expected environmental impact in accordance with legislation specific to such an investment where the investment is likely to have negative effects on the environment.

171. The Court considers that the purpose of the legislative provision is unclear because an investment remains ultimately eligible even if the assessment indicates that there would be negative effects on the environment.

Project selection (Article 49)

172. According to the draft regulation, the Managing Authority of the rural development programme shall define selection criteria for operations under all measures following consultation with the Monitoring Committee. Selection criteria shall aim to ensure equal treatment of applicants, better use of financial resources and targeting of measures in accordance with the Union priorities for rural development. In defining selection criteria the principle of proportionality shall be taken into account in relation to small grants. The application of selection criteria shall not be compulsory in the case of certain measures such as agri-environment-climate⁶⁸ except where available funds are not sufficient to cover all eligible applicants.

173. The Court observes that, for agri-environment measures, the selection criteria will not be compulsory unless available funds are not sufficient to cover all eligible applicants; therefore the Court considers that the risk exists that the lack of targeting expenditure to specific needs will persist.

174. In addition, the situation of concentration of expenditure on a limited number of sub-measures⁶⁹ risks to be reinforced by the logic of applying a single EAFRD contribution rate (see paragraph 175).

Financial provisions (Title V)

Unique fund contribution rate (Article 65)

175. The draft regulation provides that, in order to facilitate the management of EAFRD funds⁷⁰, rural development programmes shall establish a single

⁶⁸ Measures referred to are agri-environment-climate (Article 29), organic farming (Article 30), Natura 2000 and water framework directive payments (Article 31), payments to areas facing natural or other specific constraints (Article 32), animal welfare (Article 34) and forest-environmental and climate services and forest conservation (Article 35).

⁶⁹ Situation described in recommendation 3 of the Agri-environment report.

EAFRD contribution rate applicable to all measures in a given rural development programme. This single rate for all measures may be fixed by the Member States but it should lie between a minimum and a maximum rate set by the regulation. This fixed rate will also apply to all sub-measures. The minimum EAFRD contribution rate shall be 20 % while the maximum shall be 50 % of the eligible public expenditure (85 % in the less developed regions, the outermost regions and the smaller Aegean islands)⁷¹.

176. In its Agri-environment report the Court recommended⁷² that for the next programming period, the Commission should consider whether the EU contribution rate for agri-environment sub-measures should be differentiated so that those sub-measures with a higher potential to achieve lasting positive environmental effects receive a higher rate of EU contribution. The Court considers that, from an administrative point of view, setting a unique contribution rate might seem a simplification, but it is not effective in achieving the objectives set for all rural development measures or sub-measures. Thus, it is not in line with the Court's recommendations.

Maintaining the level of effort in certain areas (recital 28 and Article 65)

177. According to the preamble of the draft regulation (recital 28), Member States should maintain the level of effort made during the 2007-13 programming period and spend a minimum of 25 % of the total contribution from the EAFRD to each rural development programme for climate change mitigation and adaptation and land management, through the measures agri-environment- climate, organic farming and payments to areas facing natural or other specific constraints.

⁷⁰ Recital 54 of the draft Rural development regulation.

⁷¹ By way of derogation the maximum EAFRD contribution rate shall be 80 % for the measures referred to in Article 15 (knowledge transfer and information actions), Article 28 (setting up of producer groups), Article 36 (co-operation) and Leader.

⁷² Recommendation 3.

178. The Court notes that, although the preservation of the resources devoted to former axis 2 appears to be one objective of the draft regulation, the recommended allocation of resources is only included in the preamble. The Court considers that if the legislator wishes that the allocation of resources mentioned in recital 28 is indeed to be achieved, it should be included in the mandatory provisions and not only in the preamble.

Basis of standard costs or additional costs and income foregone (Article 69(2))

179. According to the draft regulation (Article 69(2)), 'Where aid is granted on the basis of standard costs or additional costs and income foregone, Member States shall ensure that the relevant calculations are adequate and accurate and established in advance on the basis of a fair, equitable and verifiable calculation. To this end, a body that is independent from the authorities responsible for the calculations and that possesses the appropriate expertise shall provide a certificate confirming the adequacy and accuracy of the calculations. That certificate shall be included in the rural development programme.'

180. In its Agri-environment report the Court identified problems in the establishment of aid amounts and recommended that the Commission should ensure, before approving programmes, that all relevant elements are included in the calculations and that the main assumptions and parameters are appropriate⁷³.

181. The introduction of an independent verification of the adequacy and accuracy of the calculations responds to the Court's criticisms.

⁷³ Paragraph 97 and recommendation 2.

***Management, control and publicity, and monitoring and evaluation
(Title VI and Title VII)***

182. The Court commented on the management and control arrangements, and on the monitoring and evaluation in its Opinion No 7/2011 and in the framework of the Horizontal regulation (see paragraphs 47 to 59).

4. THE SINGLE CMO REGULATION

183. The draft Single CMO regulation lays down rules for the common organisation of agricultural markets.

184. The organisation of agricultural markets has been at the core of the CAP since its foundation. However, the EU has reformed most of its market management instruments under successive CAP reforms and the amount of support provided through market intervention measures has gradually been reduced.

185. The draft regulation broadly maintains the existing framework for market interventions (or organisations).

186. However, the draft regulation introduces some adjustments :

- (i) the aid scheme for the most deprived persons is to be placed under a separate instrument⁷⁴;
- (ii) supply controls (quotas) on milk, sugar and the planting of vines will be eliminated;

⁷⁴ Recital 24 of the draft Single CMO regulation: 'The existing scheme for food distribution to the most deprived in the Union adopted under the common agricultural policy should be the subject of a separate regulation adopted to reflect its social cohesion objectives. Provision should nevertheless be made in this regulation to allow for disposal of products held in public intervention by making them available for use in the scheme.'

- (iii) the possible use of crisis intervention mechanisms in the event of market disturbances (disturbances due to a loss of consumer confidence, the outbreak of an animal disease or unusual price volatility) is generalised across commodities;
- (iv) with a view to strengthening the bargaining power of milk producers in the food chain, the possibility for producer organisations to negotiate contract terms, including prices is introduced and the use of written contracts is encouraged;
- (v) the formation of producers' organisations is facilitated in sectors other than fruits and vegetables⁷⁵.

187. The Court wishes to highlight that the current Single CMO regulation is subject to two consecutive legislative proposals for which the adoption procedures are still in progress, one launched in 2010⁷⁶ and the second one concerning the draft regulation subject to this Court's opinion. In other words this draft regulation (Article 163) proposes to repeal another regulation which is still at a draft stage. This risks introducing an additional burden and confusion in the legislative procedure.

188. The Court has reported, in its Special Reports, on public storage operations, the milk market, the school milk and fruit schemes, the sugar market and the aid scheme for deprived persons⁷⁷.

⁷⁵ In addition, support for the setting up of producer groups in the fruit and vegetable sector is moved to rural development.

⁷⁶ COM(2010) 799 final - 'Proposal for a regulation of the European Parliament and of the Council establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO regulation)'. This draft regulation proposes to repeal Regulation (EC) No 1234/2007 currently in force.

⁷⁷ Special Report No 11/2008 'The management of the EU support for the public storage operations of cereals' (hereinafter 'Public storage report'), Special Report No 14/2009 'Have the management instruments applied to the market in milk and

Market intervention (Part II - Title I)

Public intervention and aid for private storage (Chapter I)

Discontinuing certain measures to aid disposal (recital 47)

189. The Court found that several measures to aid disposal, such as use of milk powder in animal feed or processing of skimmed milk into casein and caseinates, had a limited effect on market equilibrium⁷⁸.

190. The Court's audit findings thus support the changes proposed by the draft regulation which states 'The aid for Union-produced skimmed milk and skimmed-milk powder intended for use as a feedingstuff and for processing into casein and caseinates has not proved effective in supporting the market and should therefore be discontinued, along with the rules concerning the use of casein and caseinates in the manufacture of cheese'⁷⁹.

Public intervention and reserve for crisis in the agricultural sector (Articles 13 and 159)

191. According to the draft regulation, 'In order to stabilise the markets and to ensure a fair standard of living for the agricultural community, a differentiated system of price support for the different sectors has been developed and direct support schemes have been introduced [...]. Those measures take the form of public intervention or, as the case may be, the payment of aid for private

milk products achieved their main objectives?' (hereinafter 'Milk report'), Special Report No 10/2011 'Are the school milk and school fruit schemes effective?' Special Report No 6/2010 'Has the reform of the sugar market achieved its main objectives?' (hereinafter 'Sugar report'), Special Report No 6/2009 'European Union food aid for deprived persons: an assessment of the objectives, the means and the methods employed' (hereinafter 'Deprived persons report').

⁷⁸ Paragraphs 20 and 21 of the Milk report.

⁷⁹ Preamble – recital 47.

storage. There continues to be a need to maintain price support measures whilst streamlining and simplifying them'⁸⁰.

192. In its Milk report the Court noted that 'the Council has decided to retain public intervention as a "safety net". Nevertheless, this safety net is so thin that there is a risk it will be of only limited use in a major crisis'⁸¹.

193. In this regard, although the draft regulation does not change the maximum amounts allowed for public intervention concerning butter and skimmed milk powder, it foresees the possibility to transfer funds from the reserve to meet a crisis in the agricultural sector for any expenditure under public intervention and aid for private storage, increasing the sums available for a 'safety net'.

General principles on disposal from public intervention (Article 15) - Distribution to the most deprived persons in the EU

194. In its Deprived persons report, the Court observed, among others, that the link of the dedicated scheme with agricultural expenditure had become tenuous and invited the Commission to consider whether it was appropriate to continue financing such a measure under the common agricultural policy. In addition, in its 13 April 2011 decision, the Court of Justice ruled ⁸² that the majority of food supplies under the scheme should come from public storage⁸³.

⁸⁰ Preamble – recital 12.

⁸¹ Paragraph 66.

⁸² Judgment of the General Court of 13 April 2011 - Germany v Commission (Case T-576/08) : Agriculture - Common organisation of the markets - Distribution of food from intervention stocks for the benefit of the most deprived persons - Regulation (EC) No 983/2008 - Plan allocating to the Member States resources to be charged to the 2009 budget year for the distribution programme - Mobilisations on the market - Actions for annulment.

⁸³ To ensure continuity of supply, in the mid-1990s the aid scheme was modified to make it possible to supplement intervention stocks with market purchases.

195. The proposal to place the funding of the aid scheme for the most deprived persons under a different heading of the Multiannual Financial Framework is thus logical. The Court notes, however, that provisions are made in this draft regulation (Article 15) to allow for the disposal of products held in public intervention by making them available for use in the scheme. It reiterates its observation concerning bartering arrangements⁸⁴ and considers that such arrangements should be discontinued.

196. As regards the other observations made by the Court, it is not yet in a position to assess to which extent the weaknesses identified will be addressed by the upcoming specific regulation on the scheme for food distribution to the most deprived in the Union.

Aid schemes (Chapter II)

Schemes to improve access to food (Articles 21 to 26)

197. The Court observed a number of weaknesses as regards the effectiveness of the school milk and the school fruit schemes.

198. The Court notes that key elements of the implementation of the schemes will be set out in delegated acts to be adopted by the Commission, in particular rules on eligible products, target groups and conditions for granting the aid. Another legislative proposal⁸⁵ provides that ‘the Commission shall also, by means of implementing acts, fix the aid amounts for eligible milk products other than milk, taking into account the milk components of the product concerned’.

⁸⁴ Paragraph 85 of the Deprived persons report.

⁸⁵ Article 2 of COM(2011) 629 final – Proposal for a Council Regulation determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products.

199. Therefore, the Court is not in a position to give an opinion on whether the provisions relating to those schemes address the weaknesses highlighted in its School milk report.

Rules concerning marketing and producer organisations (Part II - Title II)

Contractual relations and negotiations in the milk and milk products sector
(recital 91 and Articles 104 and 105)

200. In its Milk report the Court recommended that the Commission and the Member States ensure that the concentration of processing and distribution companies do not reduce milk producers to mere price-takers and does not restrict the final consumer's possibility of enjoying an equitable share of price reductions⁸⁶.

201. In line with this concern, the draft regulation indicates that 'In order to ensure the rational development of production and thus a fair standard of living for dairy farmers, their bargaining power vis-à-vis processors should be strengthened which should result in a fairer distribution of value-added along the supply chain. Therefore, [...] a provision should [...] allow producer organisations constituted by dairy farmers or their associations to negotiate contract terms, including price, for some or all of its members' production with a dairy'⁸⁷.

202. The proposed measure should lead to a significant expansion in the role of producer groups and an enforcement of their position in the supply chain. The Court suggests that it would be appropriate for the Commission to monitor the effectiveness of the proposed measures and to rapidly remedy potential failures.

⁸⁶ Recommendation 2.

⁸⁷ Preamble - recital 91.

203. With regard to the necessity for written contracts, the Court notes that the draft regulation sets out different approaches for the milk and sugar sectors, so that it is up to the Member States to decide whether every delivery of raw milk by a farmer to a processor of raw milk must be covered by a written contract between the parties (Article 104) while written agreements are made compulsory for buying sugar beet and sugar cane (Article 101).

This Opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 8 March 2012.

For the Court of Auditors

Vítor Manuel da SILVA CALDEIRA
President