

## AMENDMENT OF THE IMPLEMENTING RULES TO THE F4E FINANCIAL REGULATION

### – EXPLANATORY NOTE –

As recommended by the Administration and Management Committee (AMC) at its meeting on 6 - 7 June 2017, the Governing Board is invited to adopt the submitted draft Decision amending the F4E Implementing Rules to the Financial Regulation.

As requested by the European Commission, the amendment introduces detailed implementing provisions governing the use of four existing derogations from common EU financial rules which F4E obtained in its F4E Financial Regulation. Content and wording of these implementing provisions have informally been agreed with the European Commission (DG BUDG and DG ENER).

The adoption by the Governing Board would be subject to the required positive formal Commission opinion which F4E requested subsequent to the AMC recommendation. If the Governing Board adopts the amendment to the Joint Undertaking's Implementing Rules and the Commission provides a positive formal opinion, the four implementing provisions enter into force on 1 August 2017.

### I. CONTEXT

On 2 December 2015, the Governing Board adopted a new Financial Regulation (hereinafter FR) and Implementing Rules (hereinafter IR) subject to the Commission's positive opinion. As required by the Joint Undertaking's Constituent instrument,<sup>1</sup> the new Financial Regulation and Implementing Rules aligned the Joint Undertaking's financial rules to the EU Framework Financial Regulation,<sup>2</sup> except for the derogations from this common framework required due to the Joint Undertaking's operating needs<sup>3</sup>. The new Financial Regulation and Implementing Rules entered into force on 1 January 2016 (except for the titles on procurement, grants and prizes which entered into force on 1 June 2016).

The European Commission has issued a positive opinion on 3 February 2016 on the new Financial Regulation in which it *"recognises the specific operating needs of the Joint Undertaking stemming from the implementation of international agreements in the field of fusion concluded by the Euratom under Article 101 of the Euratom Treaty, especially the Agreement on the Establishment of the ITER International Fusion Energy Organisation for the Joint Implementation of the ITER Project, which justify certain derogations from the Framework Financial Regulation in particular as regards procurement"*.<sup>4</sup> The derogations agreed by the Commission in its Opinion are enshrined in the Joint Undertaking's Financial Regulation, as adopted by the Governing Board on 2 December 2015.

In the Commission's Opinion on the Joint Undertaking's Implementing Rules of 16 February 2016, *"F4E is invited to consider inserting provisions in its implementing rules to govern the*

<sup>1</sup> Article 5.1 of the Council Decision (Euratom) No 198/2007 of 27 March 2007 establishing the European Joint Undertaking for ITER and the Development of Fusion Energy (Joint Undertaking or F4E) stipulates that "The Joint Undertaking shall have a distinct financial regulation based on the principles of the Framework Financial Regulation."

<sup>2</sup> Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013 on the framework financial regulation for the bodies referred to in Article 208 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council.

<sup>3</sup> Article 5.1 of the Constituent instrument provides that "The financial regulation of the Joint Undertaking may depart from the Framework Financial Regulation where the specific operating needs of the Joint Undertaking so require and subject to prior consultation with the Commission."

<sup>4</sup> Commission Opinion of 3.2.2016 on the draft Financial Regulation of the European Joint Undertaking for ITER and the Development of Fusion Energy, p. 2.

use of these derogations, in particular as regards the provisions listed in Annex II of this note”.<sup>5</sup> Annex II comprises four of the derogations specifying for each which aspects would benefit from implementing provisions. The four derogations concerned are:

1. Legal commitments before a corresponding budgetary commitment in specific circumstances (Article 70(2) FR);
2. Direct contracts involving certain predefined public authorities without a procurement procedure (Article 85b FR);
3. Contracts for additional supplies whose duration exceeds regular three years (Article 85e FR);
4. Award of grants to designated organisations in the field of scientific and technological fusion research without calls for proposals (Article 90c FR).

The Joint Undertaking considered the Commission’s request and decided to develop the requested four implementing provisions. Content and wording of the implementing provisions have then informally been agreed with the European Commission (DG BUDG and DG ENER). At its meeting on 6 - 7 June 2017, the Administration and Management Committee examined the proposed implementing provisions and recommended their adoption by the Governing Board.

It is important to reiterate that the derogations as such already form part of the Joint Undertaking’s Financial Regulation. The purpose of the proposed amendment to the Implementing Rules is therefore limited to specify certain implementation details for these already existing derogations.

## II. PROPOSED IMPLEMENTING PROVISIONS

This section contains the following elements for each derogation:

- Background comprising:
  - the legal text of the existing derogations referred to above (“Derogation”);
  - the citation drawn from the Commission’s opinion identifying which element of the derogation is considered to benefit from an implementing rule (“Commission request”);
- the implementing provision proposed for adoption by the Governing Board.

### 1. Legal commitment before budgetary commitment

#### a) Background

Existing derogation: Article 70 (2) F4E FR

*“The obligation to make a budgetary commitment before entering into a legal commitment ... shall not be applicable to legal commitments concluded in fulfilment of its tasks ... in cases of extreme urgency brought about by events not attributable to the Joint Undertaking when prior booking of the individual commitment would cause disproportionate additional costs, provided that these are taken in accordance with the procedure adopted by the Joint Undertaking. The booking of the budgetary commitment shall be done without delay after entering into a legal commitment with third parties.”*

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<sup>5</sup> Opinion of DG BUDGET of 16.2.2016 on the draft Implementing Rules to F4E’s Financial Regulation, p. 1.

Commission request

DG Budget invites F4E to consider adopting implementing rules to govern the use of Article 70(2) F4E FR “in order to define criteria allowing to establish whether the additional costs resulting from the prior booking of the individual budgetary commitment are disproportionate or not.”

**b) Implementing provision 1 proposed for Governing Board adoption**

**“Additional costs which would be caused by a prior booking of an individual budgetary commitment shall be deemed to be disproportionate for the purposes of Article 70(2) FR if the Authorising Officer, before entering into a legal commitment with third parties, estimates that such additional costs would be at least 10% and a minimum of EUR 25 000 higher than if the individual budgetary commitment is carried out after entering into a legal commitment with third parties. This estimation shall be duly substantiated and recorded without delay after entering into a legal commitment.”**

**2. Contracts without a procurement procedure****a) Background**

Existing derogation: Article 85b F4E FR - Exclusion of certain contracts with the ITER Organization, Domestic Agencies and host states

*“Where a public procurement procedure is not possible or appropriate, the Joint Undertaking may, following the approval of the Governing Board or the body delegated by it, conclude a contract, without having recourse to a public procurement procedure, with the ITER Organisation, the ITER Domestic Agencies and the Member States (including its public authorities) hosting the ITER Organization, the Joint Undertaking or its antennas, for the supply of goods, the provision of services or the execution of a work or works.”*

Commission request

DG Budget invites F4E to consider adopting implementing rules to govern the use of Article 85b F4E FR “in order to define criteria for the Governing Board to decide whether or not a public procurement procedure is not possible or appropriate”.

**b) Implementing provision 2 proposed for Governing Board adoption**

**“The Joint Undertaking may conclude a contract with or via the authorities referred to in Article 85b of the Financial Regulation (ITER Organization, the ITER Domestic Agencies and the Member States (including its public authorities) hosting the ITER Organisation or the Joint Undertaking offices) where a public procurement procedure is not possible or not appropriate. This shall in particular be deemed to be the case in**

**the following situations:**

- a) the goods, services or works to be procured are not available to the Joint Undertaking on the market or only available under conditions which are considered to be incompatible with or disproportionate to the specific requirements within which the Joint Undertaking is operating;**
- b) the applicable national legislation determines that the supply of the goods, the provision of the services or the performance of the works to be procured is to be carried out by or via an authority referred to in Article 85b of the Financial Regulation (ITER Organization, the ITER Domestic Agencies and the Member States (including its public authorities) hosting the ITER Organisation or the Joint Undertaking offices).**
- c) a procurement from or via a public authority referred to in Article 85b of the Financial Regulation creates efficiencies for the Joint Undertaking.**

***The justification shall be duly substantiated and recorded.***

### **3. Contracts for additional supplies with a duration of more than three years**

#### **a) Background**

Existing derogation: Article 85e F4E FR - Use of a negotiated procedure without prior publication for additional deliveries

*“By way of derogation to Article 134(1)(f)(i) of Delegated Regulation (EU) No 1268/2012 (use of a negotiated procedure without prior publication for additional deliveries), instead of the last sentence of the aforementioned provision, the following shall apply to the Joint Undertaking: “the duration of such contracts shall not, as a general rule, exceed three years”.*”

#### Commission request

*DG Budget invites F4E to consider adopting implementing rules to govern the use of Article 85e F4E FR “in order to determine the conditions justifying departing from the general rule setting at three year the maximal duration of these contracts.”*

#### **b) Implementing provision 3 proposed for Governing Board adoption**

***“Whenever the Joint Undertaking has recourse to a negotiated procedure without prior publication of a contract notice in accordance with Article 134(1)(f)(i) of Delegated Regulation (EU) No 1268/2012 (use of a negotiated procedure without prior publication for additional deliveries), subject to Article 85e of the Financial Regulation (foreseeing that the duration of such contracts shall not, as a general rule, exceed three years), it shall only award a contract with a duration exceeding three years in case it is justified by the specific nature of the subject matter of the contract, notably the time required for the production, testing, acceptance and installation of the supplies, their maintenance or warranty obligations linked to them.”***

#### 4. Award of grants to designated organisations in the field of scientific and technological fusion research without calls for proposals

##### a) Background

Existing derogation: Article 90c F4E FR - Grants to designated organisations in the field of scientific and technological fusion research

*“In addition to the cases set out in Article 190(1) of Delegated Regulation (EU) No 1268/2012 (exceptions to calls for proposals), grants may also be awarded without a call for proposals to organisations in the field of scientific and technological research designated by the Members of the Joint Undertaking and included in the list drawn up by the Governing Board on a proposal from the Director in accordance with Article 15a of the Statutes (designated organisations in the field of scientific and technological fusion research).”*

##### Commission request

*DG Budget invites F4E to consider adopting implementing rules to govern the use of Article 90c F4E FR “in order to set out the rules governing the establishment by the governing board of the list of organisations to which grants may be awarded without a call for proposals as well as the subsequent use of this list.”*

##### b) Implementing provision 4 proposed for Governing Board adoption

**“1. For the purposes of Article 15a of the Statutes (designated organisations in the field of scientific and technological fusion research), each Member of the Joint Undertaking shall have the right to designate one or more organisations suitable to carry out research and development activities in furtherance of the tasks of the Joint Undertaking. The Members shall communicate any subsequent modification of their designation to the Director.**

**The Director shall verify that the designated organisations fulfil the following eligibility, exclusion and selection criteria:**

- a) they are established in a territory of a Member of Fusion for Energy;**
- b) they are not in an exclusion situation referred to in Article 131 (4) of Regulation 966/2012 (applicability of exclusion grounds to grant applicants and beneficiaries);**
- c) they have adequate financial and economic capacity;**
- d) they have a proven experience in the field of scientific and technological fusion research.**

**The Director shall propose to the Governing Board those designated organisations which fulfil the above criteria for inclusion in the list of competent organisations which may carry out research and development activities in furtherance of the tasks of the Joint Undertaking, either individually or in**

**networks. Upon adoption by the Governing Board, the list and any modifications to it shall be published on the website of the Joint Undertaking.**

- 2. For the purposes of awarding grants without a call for proposals in accordance with Article 90c of the Financial Regulation (grants to designated organisations in the field of scientific and technological fusion research), the Joint Undertaking shall address an invitation to submit a proposal to all the organisations on the list. The received proposals shall be evaluated on the basis of the pre-announced award criteria. This evaluation and the award shall comply with Article 133 of Regulation 966/2012 (evaluation procedure) and Articles 204 (evaluation and award) and 205 (information for applicants) of Commission Delegated Regulation 1268/2012 in conjunction with Article 90 (1) of the Financial Regulation (applicability of aforementioned regulations)."**

### III. NEXT STEPS

If the Governing Board adopts the submitted draft Decision amending the Joint Undertaking's Implementing Rules by adding the four implementing provisions proposed above, the next steps are:

- i. If a positive Commission opinion is received, the Governing Board Decision enters into force the following day, taking effect from 1 August 2017.
- ii. If the Commission in its opinion were to require changes, the amendment would not enter into force. The Director would assess such request and re-submit a revised amendment to the AMC and subsequently to the Governing Board.



Barcelona,

[idm@F4Eref] Ver. 1.0

**DECISION OF THE GOVERNING BOARD OF THE EUROPEAN JOINT  
UNDERTAKING FOR ITER AND THE DEVELOPMENT OF FUSION ENERGY  
AMENDING THE IMPLEMENTING RULES OF THE FINANCIAL REGULATION**

THE GOVERNING BOARD OF THE EUROPEAN JOINT UNDERTAKING FOR ITER AND THE DEVELOPMENT OF FUSION ENERGY,

Having regard to the Council Decision (EURATOM) No 198/2007 of 27 March 2007 establishing the European Joint Undertaking for ITER and the Development of Fusion Energy (hereinafter "the Joint Undertaking") and conferring advantages upon it,<sup>6</sup> as amended on 13 December 2013,<sup>7</sup> (hereinafter "the Constituent instrument") and in particular Article 5 thereof,

Having regard to the Statutes annexed to the Constituent instrument (hereinafter "the Statutes") and in particular Article 6(3)(h), Article 13, and Annex III thereof,

Having regard to the Commission Delegated Regulation (EU) No 1271/2013 of 30 September 2013, on the framework financial regulation for the bodies referred to in Article 208 of Regulation (EU, EURATOM) 966/2012 of the European Parliament and of the Council<sup>8</sup> (hereinafter "the Framework Financial Regulation"),

Having regard to Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, EURATOM) No 1605/2002<sup>9</sup> (hereinafter "the General Financial Regulation"),

Having regard to Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union<sup>10</sup> (hereinafter "the Rules of Application"),

Having regard to the Governing Board Decision of 2 December 2015 adopting the Financial Regulation and Implementing Rules of the European Joint Undertaking for ITER and the Development of Fusion Energy (hereinafter "the Financial Regulation" and "Implementing Rules"),<sup>11</sup>

Having regard to the recommendation of the Administration and Management Committee of 7 June 2017,<sup>12</sup>

Having regard to the consultation with the Commission and the Commission's positive opinion of [insert date],<sup>13</sup>

<sup>6</sup> OJ L 90, 30.3.2007, p. 58.

<sup>7</sup> COUNCIL DECISION of 13 December 2013 amending Decision 2007/198/Euratom establishing the European Joint Undertaking for ITER and the Development of Fusion Energy and conferring advantages upon it (2013/791/Euratom), OJ L 349, 21.12.2013, p. 100.

<sup>8</sup> OJ L 328, 7.12.2013, p.42.

<sup>9</sup> OJ L 298, 26.10.2012, p.1.

<sup>10</sup> OJ L 362, 31.12.2012, p.1.

<sup>11</sup> F4E(15)-GB34.

<sup>12</sup> F4E(17)-AMC05.

<sup>13</sup> [insert reference]

WHEREAS:

- (1) The Joint Undertaking shall have a distinct financial regulation based on the principles of the Framework Financial Regulation, which may depart from the latter where the specific operating needs of the Joint Undertaking so require and subject to prior consultation with the Commission.
- (2) The Financial Regulation of the Joint Undertaking provides for several derogations allowing a partial departure from provisions laid down in the Framework Financial Regulation and the General Financial Regulation so as to reflect the specific operating needs of the Joint Undertaking stemming, in particular, from the contribution of high technological and experimental components and services under the terms of international agreements.
- (3) More detailed provisions shall be inserted in the Joint Undertaking's Implementing Rules to govern particular aspects of the use of certain derogations.

HAS ADOPTED THIS DECISION:

### **Article 1**

The Implementing Rules are amended as follows:

- (1) The following Article 62a is added:

**“Exceptional registration of legal before budgetary commitments**  
*(Article 70(2) of the Financial Regulation)*

Additional costs which would be caused by a prior booking of an individual budgetary commitment shall be deemed to be disproportionate for the purposes of Article 70(2) FR if the Authorising Officer, before entering into a legal commitment with third parties, estimates that such additional costs would be at least 10% and a minimum of EUR 25 000 higher than if the individual budgetary commitment is carried out after entering into a legal commitment with third parties. This estimation shall be duly substantiated and recorded without delay after entering into a legal commitment. ”

- (2) The following Article 78a is added under Title V - Procurement:

**“Contracts involving certain predefined public authorities without a public procurement procedure**  
*(Article 85b of the Financial Regulation)*

The Joint Undertaking may conclude a contract with or via the authorities referred to in Article 85b of the Financial Regulation where a public procurement procedure is not possible or not appropriate. This shall in particular be deemed to be the case in the following situations:



- a) the goods, services or works to be procured are not available to the Joint Undertaking on the market or only available under conditions which are considered to be incompatible with or disproportionate to the specific requirements within which the Joint Undertaking is operating;
- b) the applicable national legislation determines that the supply of the goods, the provision of the services or the performance of the works to be procured is to be carried out by or via an authority referred to in Article 85b of the Financial Regulation.
- c) a procurement from or via a public authority referred to in Article 85b of the Financial Regulation creates efficiencies for the Joint Undertaking.

The justification shall be duly substantiated and recorded.”

- (3) The following Article 78b is added:

**“Use of a negotiated procedure without prior publication  
for additional deliveries**

(Article 85e of the Financial Regulation)

Whenever the Joint Undertaking has recourse to a negotiated procedure without prior publication of a contract notice in accordance with Article 134(1)(f)(i) of Delegated Regulation (EU) No 1268/2012, subject to Article 85e of the Financial Regulation, it shall only award a contract with a duration exceeding three years in case it is justified by the specific nature of the subject matter of the contract, notably the time required for the production, testing, acceptance and installation of the supplies, their maintenance or warranty obligations linked to them.”

- (4) The following Article 80a under Title VIII – Grants is added:

**“Grants to designated organisations  
in the field of scientific and technological fusion research**  
(Article 15a of the Statutes, Article 90c of the Financial Regulation)

- “1. For the purposes of Article 15a of the Statutes, each Member of the Joint Undertaking shall have the right to designate one or more organisations suitable to carry out research and development activities in furtherance of the tasks of the Joint Undertaking. The Members shall communicate any subsequent modification of their designation to the Director.

The Director shall verify that the designated organisations fulfil the following eligibility, exclusion and selection criteria:

- a) they are established in a territory of a Member of Fusion for Energy;
- b) they are not in an exclusion situation referred to in Article 131 (4) of Regulation 966/2012;

- c) they have adequate financial and economic capacity;
- d) they have a proven experience in the field of scientific and technological fusion research.

The Director shall propose to the Governing Board those designated organisations which fulfil the above criteria for inclusion in the list of competent organisations which may carry out research and development activities in furtherance of the tasks of the Joint Undertaking, either individually or in networks. Upon adoption by the Governing Board, the list and any modifications to it shall be published on the website of the Joint Undertaking.

2. For the purposes of awarding grants without a call for proposals in accordance with Article 90c of the Financial Regulation, the Joint Undertaking shall address an invitation to submit a proposal to all the organisations on the list. The received proposals shall be evaluated on the basis of the pre-announced award criteria. This evaluation and the award shall comply with Article 133 of Regulation 966/2012 and Articles 204 and 205 of Commission Delegated Regulation 1268/2012 in conjunction with Article 90 (1) of the Financial Regulation.”

## **Article 2**

This Decision amending the Joint Undertaking’s Implementing Rules to the Financial Regulation as set out in Article 1 above shall enter into force the day after a positive Commission opinion is issued, taking effect from 1 August 2017.

Done at Cadarache, on 4 July 2017

For the Governing Board  
Joaquín Sánchez  
Chair of the Governing Board



For the Secretariat

**Romina Benelmans**  
Secretary of the Governing Board

