COMMISSION DECISION

of 20 January 2006

laying down detailed rules for the implementation of Council Decision 2004/904/EC as regards procedures for making financial corrections in the context of actions co-financed by the European Refugee Fund

(notified under document number C(2006) 51/2)

(Only the Czech, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Swedish, Latvian, Lithuanian, Polish, Portuguese, Slovakian, Slovenian and Spanish texts are authentic)

(2006/400/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Decision 2004/904/EC of 2 December 2004 establishing a European Refugee Fund for the period 2005 to 2010 [1], and in particular Article 25(3) and 26(5) thereof,

Having consulted the Committee established by Article 11(1) of Decision 2004/904/EC,

Whereas:

(1) To allow recovery, pursuant to Article 24(1) of Decision 2004/904/EC, of amounts unduly paid, Member States should inform the Commission of cases of irregularities detected and the progress of administrative or legal proceedings.

(2) Article 25(2) of Decision 2004/904/EC lays down that Member States must make the financial corrections required in connection with the individual or systemic irregularity by cancelling all or part of the Community contribution. To ensure that this provision is applied uniformly throughout the Community, it is necessary to lay down rules for determining the corrections to be made and to provide for the Commission to be informed.

(3) If a Member State fails to comply with its obligations under Article 25 of Decision 2004/904/EC the Commission may itself make the financial corrections under Article 26 of Decision 2004/904/EC. To ensure that this provision is applied by the Commission in a transparent manner, it is necessary to lay down rules for determining the corrections to be made by the Commission and to provide for the Member States' right to submit comments.

(4) These rules should be in accordance with Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [2] (hereafter 'Implementing Rules of the Financial Regulation').

(5) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom takes part in Council Decision 2004/904/EC and by consequence in this present decision.

(6) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland takes part in Council Decision 2004/904/EC and by consequence in this present decison.

(7) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in Council Decision 2004/904/EC and is not bound by it nor by this present decision.

HAS ADOPTED THIS DECISION:

Article 1

1. Investigations of systematic irregularities under Article 26(1) of Decision 2004/904/EC shall cover all projects liable to be affected.

2. When cancelling all or part of the Community contribution, Member States shall take into account the nature and gravity of the irregularities and the financial loss to the fund.

[1] OJ L 381, 28.12.2004, p. 52.

[2] OJ L 357, 31.12.2002, p. 1. Regulation as last amended by Regulation (EC, Euratom) No 1261/2005 (OJ L 201, 2.8.2005, p. 3).

3. Member States shall inform the Commission, in a list annexed to the report referred to in Article 28(2) of Decision 2004/904/EC, of any proceedings to cancel assistance initiated in the course of the preceding year.

Article 2

1. Where amounts need to be recovered following the cancellation of the Community contribution under Article 25(1) of Decision 2004/904/EC, the department or organisation responsible shall initiate the recovery procedure and inform the responsible authority. Information on recovery shall be passed on to the Commission and the accounts shall be kept in accordance with Article 3 of this Decision.

2. Member States shall inform the Commission in the report referred to in Article 28(2) of Decision 2004/904/EC how they have decided or propose to re-use the funds cancelled.

Article 3

1. Any functional body of the Member State or national public body designated by a Member State under Article 13, paragraph 1 of Decision 2004/904/EC (hereafter 'Responsible Authority') shall keep an account of amounts recoverable from payments of Community assistance that have already been made and shall ensure that the amounts are recovered without delay. After recovery, the Responsible Authority shall reduce its next declaration of expenditure to the Commission by an amount equal to the sums recovered, or, if this amount is insufficient, it shall reimburse the Community. The amounts to be recovered shall accrue interest from their due date at the rate laid down in accordance with Article 86 of the Implementing Rules of the Financial Regulation.

2. When submitting the report referred to in Article 28(2) of Decision 2004/904/EC, Member States shall send the Commission a list of irregularities detected, indicating the amounts recovered or awaiting recovery and if appropriate, any administrative or judicial proceedings launched with a view to recovering amounts unduly paid.

Article 4

1. The amount of financial corrections made by the Commission under Article 26(3b) of Decision 2004/904/EC for individual or systemic irregularities shall be assessed wherever possible and practicable on the basis of individual files and be equal to the amount of expenditure wrongly charged to the Fund, having regard to the principle of proportionality.

2. Where it is not possible or practicable to quantify precisely the amount of irregular expenditure or where it would be disproportionate to cancel all the expenditure concerned, the Commission shall base its financial corrections on:

(a) extrapolation, using a representative sample of transactions that are homogeneous in nature;

or

(b) a flat-rate, in which case it shall assess the seriousness of the infringement of the rules and the extent and financial implications of the irregularity established.

3. Where the Commission bases its position on facts established by auditors from outside its own departments it shall draw its own conclusions on the financial implications after examining the measures taken by the Member State concerned under Article 25(2) of Decision 2004/904/EC.

4. The period of time within which the Member State concerned may respond to a request under Article 26(3) of Decision 2004/904/EC shall be two months. In duly justified cases, a longer period may be agreed by the Commission.

5. Where the Commission proposes financial corrections determined by extrapolation or at a flat rate, the Member State shall be given the opportunity to demonstrate, on the basis of an examination of the files concerned, that the actual extent of irregularity was less than the Commission's assessment. In agreement with the Commission, the Member State may limit the scope of this examination to an appropriate proportion or sample of the files concerned. Except in duly justified cases, the time allowed for this examination shall not exceed a further period of two months after the two-month period referred to in paragraph 4. The Commission shall take account of any evidence supplied by the Member State within the time-limits.

6. Where the Commission suspends payments under Article 26(1) of Decision 2004/904/EC or where after expiry of the period referred to in paragraph 4, the reasons for the suspension remain or the Member State concerned has not notified the Commission of the measures taken to correct the irregularities, Article 26(3) will apply.

7. Guidelines on the principles, criteria and indicative scales to be applied by Commission departments in determining the flat-rate corrections are set out in the Annex to this Decision.

Article 5

1. Any repayment to the Commission under Article 26(3) of Decision 2004/904/EC shall be made by the deadline set in the recovery order drawn up in accordance with Article 81 of the Implementing Rules of the Financial Regulation.

2. Any delay in effecting repayment shall give rise to interest on account of late payment, starting on the due date referred to in paragraph 1 and ending on the date of actual repayment. The applicable rate of interest shall be that referred to in Article 3(1) of this Decision.

3. A financial correction under Article 26(2) of Decision 2004/904/EC shall not prejudice the Member State's obligation to pursue recoveries under Article 25(2) of Decision 2004/904/EC and Article 2(1) of this Decision and to recover State aid under Article 14 of Regulation (EC) No 659/1999.

Article 6

Member States may apply national rules on financial corrections that are more rigorous than those prescribed here.

Article 7

The present decision is addressed to the Kingdom of Belgium, the Czech Republic, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 20 January 2006.

For the Commission
Franco FRATTINI
Vice-President

ANNEX

GUIDELINES ON THE PRINCIPLES, CRITERIA AND INDICATIVE SCALES TO BE APPLIED BY COMMISSION DEPARTMENTS IN DETERMINING FINANCIAL CORRECTIONS UNDER ARTICLES 25 AND 26 OF COUNCIL DECISION 2004/904/EC

1. PRINCIPLES

The purpose of financial corrections is to restore a situation where 100 % of the expenditure declared for co-financing from the Fund is in line with the applicable national and Community rules and regulations. This allows the establishment of a number of key principles for the Commission departments to apply in determining financial corrections:

(a) Irregularity is defined in Article 1(2) of Regulation (EC) No 2988/95 [1]. Irregularities can be one-off or systemic;

(b) A systemic irregularity is a recurrent error due to serious failings in management and control systems designed to ensure correct accounting and compliance with the rules and regulations in force.

— If the applicable rules and regulations are respected, and all reasonable measures are taken to prevent, detect and correct fraud and irregularity, no financial corrections will be required.

— If the applicable rules and regulations are respected, but the management and control systems need to be improved, pertinent recommendations should be made to the Member State, but no financial corrections need be envisaged.

— Where only errors relating to sums of less than 4 000 euro are found, the Member State should be urged to correct the errors without opening financial correction proceedings under Article 25(2) of Council Decision 2004/904/EC.

— If there are serious failings in the management or control systems which could lead to systemic irregularities, in particular failures to respect the applicable rules and regulations, financial corrections should always be made.

(c) The amount of the financial correction will be assessed wherever possible on the basis of individual files and be equal to the amount of expenditure wrongly charged to the Fund in the cases concerned. Specifically quantified corrections for each individual project concerned are not always possible or practicable, however, or it may be disproportionate to cancel the entire expenditure in question. In such cases, the Commission has to determine corrections on the basis of extrapolation or at flat-rates.

(d) Where there is evidence that individual quantifiable irregularities of the same type have occurred in a great number of other operations, or throughout a measure or programme, but it is not cost-effective to determine the irregular expenditure for each project individually, the financial correction may be based on extrapolation.

— Extrapolation can be used only where a homogeneous population or subset of projects sharing similar characteristics can be identified and shown to have been affected by the deficiency. In this case, the results of a thorough examination of a representative sample of the individual files concerned selected at random are extrapolated to all the files making up the population identified, in accordance with generally accepted auditing standards.

(e) In the case of individual breaches or systemic irregularities whose financial impact is not precisely quantifiable because it is subject to too many variables or is diffuse in its effects, such as those resulting from a failure to undertake checks effectively in order to prevent or detect the irregularity or to comply with a condition of the assistance or a Community rule, but where it would be disproportionate to refuse all the assistance concerned, flat rates should be applied.

— Flat rate corrections are determined in accordance with the seriousness of the deficiency in the management and control system or the individual breach and the financial implications of the irregularity. A list of what the Commission considers to be key and ancillary elements of systems for the purpose of assessing the seriousness of deficiencies is given in section 2.2 and an indicative scale of flat rates for corrections in section 2.3. Flat-rate corrections are applied to all expenditure under the measure or measures concerned unless the deficiencies were limited to certain areas of expenditure (individual projects or types of project), in which case they are applied to those areas of expenditure only. The same expenditure will not normally be subject to more than one correction.

[1] OJ L 312, 23.12.1995, p. 1.

(f) In areas where there is a margin for discretion in evaluating the gravity of the infringement, as in cases of disregard of environmental conditions, corrections shall be subject to the following conditions: a significant failure to respect the rules and a clearly identifiable link with the action receiving Community funding.

(g) Irrespective of the kind of corrections proposed by the Commission, the Member State is always given the opportunity to demonstrate that the real loss or risk to the Fund and the extent or gravity of the irregularity was less than that assessed by the Commission services. The procedure and time-limits are set out in Article 13(4) to (6) of this Decision.

(h) Unlike the case with corrections made by the Member State under Article 25 (2) of Decision 2004/904/EC, financial corrections decided by the Commission under Article 26(3) always involve a net reduction to the Community funding committed to the programme concerned.

(i) Where the Member State's audit system — Court of Auditors, internal or external audits — has detected the irregularities and the Member State takes appropriate corrective action under Article 25(2) of Decision 2004/904/EC within a reasonable period of time, no financial corrections can be imposed by the Commission under Article 26(2) of Decision 2004/904/EC and the Member State is free to re-use the funds. In other cases the Commission may make corrections on the basis of the findings of national audit bodies, as where an EU audit body establishes the irregularity. When the Commission bases its position on the facts established and fully documented by other EU audit bodies, it will form its own conclusions regarding their financial consequences, after examining any replies from the Member State.

2. CRITERIA AND SCALES FOR FLAT-RATE CORRECTIONS

2.1. **Criteria**

As noted in paragraph 1(c) above, flat-rate corrections may be envisaged when the information resulting from the enquiry does not permit the financial impact of an individual case or several cases of irregularities to be evaluated precisely by statistical means, or by reference to other verifiable data, but does lead to the conclusion that the Member State has failed to carry out adequate verification of the eligibility of claims paid.

Flat-rate corrections should be considered when the Commission finds a failure to adequately effect any control which is explicitly required by a regulation, or implicitly required in order to respect an explicit rule (the limiting of aid to a certain type of project, for example), and whose absence could lead to systemic irregularity. They should also be considered where the Commission finds serious deficiencies in management and control systems resulting in large-scale breaches of applicable rules and regulations, or where it detects individual breaches. Flat-rate corrections can also be appropriate when the Member States' own control departments discover such irregularities but the Member State fails to take appropriate corrective action within a reasonable period of time.

In determining whether a flat-rate financial correction should result and, if so, at what rate, the general consideration shall be the assessment of the degree of risk of loss to which Community funds were exposed as a consequence of the control deficiency. Thus the correction should be in compliance with the principle of proportionality. The specific elements to be taken into account should include the following:

1. whether the irregularity is related to an individual case, multiple cases or all cases;

2. whether the deficiency relates to the effectiveness of the management and control system generally, or to the effectiveness of a particular element of the system, i.e. the operation of particular functions necessary to ensure the legality, regularity and eligibility of expenditure declared for co-financing from the Fund under the applicable national and Community rules (see section 2.2 below);

3. the importance of the deficiency within the totality of the administrative, physical and other controls foreseen;

4. the vulnerability to fraud of the measures, having regard particularly to the economic incentive.

2.2. **Classification of elements of management and control systems for the purpose of applying flat-rates of financial corrections for system deficiencies or individual breaches**

Management and control systems for the Fund consist of various elements or functions of greater or lesser importance for ensuring the legality, regularity and eligibility of expenditure declared for co-financing. For the purpose of assessing flat-rate corrections for deficiencies in such systems or individual cases of irregularity, it is useful to classify the functions of management and control systems into key and ancillary elements.

Key elements are those designed and essential to ensure the legality and regularity and indeed the substance of projects supported by the Fund, ancillary elements those that contribute to the quality of a management and control system and help ensure that the system keeps performing well in relation to its key functions.

The list below contains the majority of elements of good management and control systems and good audit practice. The seriousness of deficiencies and individual breaches varies considerably, and cases will therefore be assessed by the Commission, having regard, in particular, to section 2.4 below.

2.2.1. *Key elements for ensuring eligibility for co-financing*

1. Provision and application of procedures for grant applications, appraisal of applications, selection of projects for funding and selection of contractors/suppliers, appropriate publication of calls for grant applications according to the procedures for the programme concerned:

   (a) compliance, where applicable, with rules on publicity, equality of opportunity and public procurement, and with Treaty rules and principles of equality of treatment and non-discrimination where EC public procurement directives are not applicable;

   (b) appraisal of grant applications in accordance with programme criteria and procedures, including compliance with rules on environmental impact assessment, equality of opportunity legislation and policies;

   (c) selection of projects for funding:

      — projects selected correspond to objectives and published criteria of programme,

      — reasons for acceptance or rejection of applications are clearly set out,

      — observance of State aid rules,

      — observance of eligibility rules,

      — inclusion of terms and conditions of funding in approval decision.

2. Adequate verification of delivery of co-financed products and services and of eligibility of expenditure charged to programme by the responsible authority designated under Article 13 of Decision 2004/904/EC and the intermediary organisations between the grant recipient and the responsible authority:

   (a) verification of the reality of 'deliverables' (services, works, supplies, etc.) against plans, invoices, acceptance documents, experts' reports, etc., and, where appropriate, on the spot;

   (b) verification of observance of conditions of grant approval;

   (c) verification of the eligibility of expenditure for which a claim is made;

   (d) adequate follow-up of all outstanding questions before acceptance of claim;

   (e) maintenance of an adequate and reliable accounting system;

(f) maintenance of the audit trail at all levels from grant recipient up through the system;

(g) taking reasonable measures to obtain assurance that the declarations of expenditure the responsible authority certifies to the Commission are correct insofar as:

— expenditure was effected within the eligible period in projects selected for co-financing in accordance with normal procedures and all applicable terms and conditions,

— the co-financed projects have actually been carried out.

3. Sufficient quantity and quality of sample checks on projects and adequate follow-up:

(a) carrying out sample checks on at least 10 % of total eligible expenditure in accordance with Article 4 of this Decision, supported by a report on the work done by the auditor;

(b) the sample is representative and the risk analysis adequate;

(c) adequate separation of functions vis-à-vis line management to ensure independence;

(d) follow-up to checks, ensuring:

— appropriate assessment of results and financial corrections where appropriate,

— action at a general level to correct systemic irregularities.

2.2.2. *Ancillary elements*

(a) satisfactory administrative controls in the form of standard checklists or equivalent means and proper documentation of results, to ensure for instance:

— that claims have not been paid before and transactions (contracts, receipts, invoices, payments) are separately identifiable,

— reconciliation within the accounting system of declarations and expenditure recorded;

(b) proper supervision of claims processing and authorisation procedures;

(c) satisfactory procedures to ensure proper dissemination of information about Community rules;

(d) ensuring timely payment of Community funding to beneficiaries.

2.3. **Indicative scales of flat-rate corrections**

100 % correction

The rate of correction may be fixed at 100 % when the deficiencies in the Member State's management and control system are, or an individual breach is, so serious as to constitute a complete failure to comply with Community rules, so rendering all the payments irregular.

25 % correction

When a Member State's application of its management and control system is gravely deficient, and there is evidence of widespread irregularity, and negligence in countering irregular or fraudulent practices, a correction of 25 % is justified, as it can then reasonably be assumed that the freedom to submit irregular claims with impunity will occasion exceptionally high losses to the Fund. A correction at this rate is also appropriate for irregularities in an individual case which are serious but do not invalidate the whole project.

10 % correction

When one or more key elements of the system do not function or function so poorly or so infrequently that they are completely ineffective in determining the eligibility of the claim or preventing irregularity, a correction of 10 % is justified, as it can reasonably be concluded that there was a high risk of widespread loss to the Fund. This rate of correction is also appropriate for individual irregularities of moderate seriousness in relation to key elements of the system.

5 % correction

When all the key elements of the system function, but not with the consistency, frequency, or depth required by the regulations, then a correction of 5 % is justified, as it can reasonably be concluded that they do not provide a sufficient level of assurance of the regularity of claims, and that the risk to the Fund was significant. A 5 % correction can also be appropriate for less serious irregularities in individual projects in relation to key elements.

The fact that the way in which a system operates is perfectible is not in itself sufficient grounds for a financial correction. There must be a serious deficiency of compliance with explicit Community rules or standards of good practice and the deficiency must expose the Fund to a real risk of loss or irregularity.

2 % correction

When performance is adequate in relation to the key elements of the system, but there is a complete failure to operate one or more ancillary elements, a correction of 2 % is justified in view of the lower risk of loss to the Fund, and the lesser seriousness of the infringement.

A 2 % correction will be increased to 5 % if the same deficiency is established in relation to expenditure after the date of the first correction imposed and the Member State has failed to take adequate corrective measures for the part of the system at fault after the first correction.

A correction of 2 % is also justified where the Commission has informed the Member State, without imposing any correction, of the need to make improvements to ancillary elements of the system that are in place but do not operate satisfactorily, but the Member State has not taken the necessary action.

Corrections are only imposed for deficiencies in ancillary elements of management and control systems where no deficiencies have been identified in key elements. If there are deficiencies in relation to ancillary elements as well as in key elements, corrections are only made at the rate applicable to the key elements.

2.4. **Borderline cases**

Where the correction resulting from a strict application of these guidelines would be clearly disproportionate, a lower rate of correction may be proposed.

For example, where the deficiencies arose from difficulties in the interpretation of Community rules or requirements (except in cases where it should reasonably be expected that the Member State raise such difficulties with the Commission), and the national authorities took effective steps to remedy the deficiencies as soon as they were brought to light, this mitigating factor may be taken into account and a lower rate or no correction may be proposed. Similarly, due regard should be paid to claims of legal security when the deficiencies were not reported following earlier audits by the Commission's services.

In general, the fact that deficient management or control systems were improved immediately after the deficiencies were reported to the Member State is not considered as a mitigating factor when assessing the financial impact of the systemic irregularities before the improvement was made.

2.5. **Basis of assessment**

Whenever the situation in other Member States is known, the Commission should perform (there should be) a comparison between them to ensure equal treatment in the assessment of the rates of correction.

The rate of correction should be applied to that part of the expenditure placed at risk. When the deficiency results from a failure by the Member State to adopt an appropriate control system, then the correction should be applied to the entire expenditure for which that control system was required. When there is reason to suppose that the deficiency is limited to that of a particular authority's or region's application of the control system adopted by the Member State, the correction should be limited to the expenditure controlled by that authority or region. When the deficiency relates for example to verification of the criteria for eligibility for a higher rate of aid, then the correction should be based on the difference between the higher and lower rate of aid.

The correction should normally concern the expenditure of the measure over the period being examined, for example one financial year. However, when the irregularity results from systemic deficiencies, which are evidently long-standing and affecting several years' expenditure, then the correction should concern all the expenditure declared by the Member State while the system deficiency obtained until the month in which it was remedied.

When several deficiencies are found in the same system, the flat rates of correction are not cumulated, the most serious deficiency being taken as an indication of the risks presented by the control system as a whole [1]. They are applied to the expenditure remaining after deduction of the amounts refused for individual files. In the case of the Member State's non-application of penalties prescribed by Community law, the financial correction should be the amount of the penalties not applied, together with 2 % of the remaining claims, as the non-application of penalties increases the risk that irregular claims will be submitted.

3. APPLICATION AND EFFECT OF NET FINANCIAL CORRECTIONS

Where the Member State made the financial correction proposed in the procedure under Article 26(2) of Decision 2004/904/EC, the Commission need not impose a net reduction in the funding, but may allow the Member State to reallocate the sums released. However, financial corrections imposed by the Commission under Article 26(2) of Decision 2004/904/EC after completion of the procedure laid down by Article 26(3) and (4) of the same Decision will in all cases involve a net reduction in the indicative allocation of assistance from the Fund.

A net correction is automatically made if the Commission considers that the Member State has not taken satisfactory account of conclusions on irregularities detected by Community or national bodies and/or if the irregularity is related to a serious deficiency in the management or control system of the Member State or of the management or payment authorities.

Any sum due to the Commission as a result of net corrections is to be paid together with interest under Article 26(4) of Decision 2004/904/EC and in accordance with Article 3(1) of this Decision.

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[1] See also section 2.3 (2 % correction).