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COMMISSION REGULATION (EC) No 1681/94

of 11 July 1994

concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field

(OJ L 178, 12.7.1994, p. 43)

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concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organization of an information system in this field

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and other existing financial instruments ([1]) as amended by Regulation (EEC) No 2082/93 ([2]), and in particular the forth subparagraph of Article 23 (1) thereof,

Having consulted the Advisory Committee on the Development and Conversion of Regions and the Committee set up pursuant to Article 124 of the Treaty,

Whereas Article 23 of Regulation (EEC) No 4253/88 lays down the principles regulating, within the Community, the campaign against irregularities and the recovery of sums lost as a result of abuse or negligence in the field of the Structural Funds;

Whereas Article 9 (3) of Regulation (EEC) No 792/93 of 30 March 1993 establishing a cohesion financial instrument ([3]), amended by Regulation (EC) No 566/94 ([4]), provides that Article 23 of Regulation (EEC) No 4253/88 shall be applied *mutatis mutandis;* whereas, consequently, this Regulation covers the cohesion financial instrument;

Whereas the rules set out in this Regulation should relate to all forms of financial intervention provided for in Regulation (EEC) No 4254/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund ([5]), as amended by Regulation (EEC) No 2083/93 ([6]), in Regulation (EEC) No 4255/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Social Fund ([7]), amended by Regulation (EEC) No 2084/93 ([8]), in Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Sector ([9]), as amended by Regulation (EEC) No 2085/93 ([10]) in Regulation (EEC) No 2080/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the financial instrument of fisheries guidance ([11]), as well as in Regulation (EEC) No 792/93;

Whereas this Regulation governs only some aspects of Member States' obligations pursuant to the first and second subparagraph of Article 23 (1) of Regulation (EEC) No 4253/88 and consequently should not impinge on any other obligations under that Article;

Whereas, in order for the Community to be better informed of the measures taken by Member States to combat irregularities, the national provisions to be communicated to the Commission should be specified;

([1]) OJ No L 374, 31. 12. 1988, p. 1.
([2]) OJ No L 193, 31. 7. 1993, p. 20.
([3]) OJ No L 79, 1. 4. 1993, p. 74.
([4]) OJ No L 72, 16. 3. 1994, p. 1.
([5]) OJ No L 374, 31. 12. 1988, p. 15.
([6]) OJ No L 193, 31. 7. 1993, p. 34.
([7]) OJ No L 374, 31. 12. 1988, p. 21.
([8]) OJ No L 193, 31. 7. 1993, p. 39.
([9]) OJ No L 374, 31. 12. 1988, p. 25.
([10]) OJ No L 193, 31. 7. 1993, p. 44.
([11]) OJ No L 193, 31. 7. 1993, p. 1.

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Whereas, with a view to ascertaining the nature of irregular practices and the financial effects of irregularities and to recovering sums wrongly paid, provision should be made for detected irregularities to be reported to the Commission every quarter; whereas in addition to such reports information must also be provided on the progress of judicial or administrative procedures;

Whereas the Commission should be systematically informed of judicial and administrative procedures against persons who have committed irregularities; whereas it would also be advisable to ensure the systematic transmission of information concerning the measures taken by the Member States to protect the Community's financial interests;

Whereas it is appropriate to determine the procedures to be applied by the Member States and the Commission in cases where the sums lost through an irregularity prove to be irrecoverable;

Whereas a minimum threshold should be set, above which cases of irregularity must automatically be reported to the Commission;

Whereas national rules relating to criminal proceedings or mutual assistance between Member States at judicial level in criminal matters should not be affected by the provisions of this Regulation;

Whereas it is advisable to provide for the possibility of the Community is making a contribution to legal costs and to costs arising directly out of judicial proceedings;

Whereas, in order to prevent irregularities, cooperation between the Member States and the Commission should be reinforced, whilst every effort should be made to ensure that such action is conducted with due regard to the rules of confidentiality;

Whereas it should be further laid down that the provisions of this Regulation shall also apply where a payment which should have been made in the context of the Structural Funds or a financial instrument having a structural objective has not been made swing to an irregularity;

Whereas the measures laid down in this Regulation are in accordance with the opinion delivered by the Management Committee on Agricultural Structures and Rural Development and the Standing Committee on Fisheries,

HAS ADOPTED THIS REGULATION:

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Article 1

1. Without prejudice to the obligations arising directly out of Article 23 of Regulation (EEC) No 4253/88 and Article 38 of Regulation (EC) No 1260/1999, this Regulation shall relate to all forms of financial intervention provided for in Regulations (EEC) No 4254/88, (EEC) No 4255/88, (EEC) No 4256/88, (EC) No 2080/93 and in Regulations (EC) No 1783/1999, (EC) No 1784/1999 and (EC) No 1263/1999. This Regulation shall also apply to the measures financed under the first indent of Article 35(2) of Regulation (EC) No 1257/1999 (Guidance Section).

2. Irregularities relating to the Interreg programmes provided for in Article 20(1)(a) of Regulation (EC) No 1260/1999, and other programmes of a transnational character, shall be reported by the Member State in which the expenditure was incurred. The Member State shall at the same time inform the managing authority and the paying authority for the programme and the person or body designated to establish declarations on winding-up under Article 15 of Regulation (EC) No 438/2001.

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Article 1a

For the purposes of this Regulation the following definitions shall apply:

1. 'irregularity' means any infringement of a provision of Community law resulting from an act or omission by an economic operator which has, or would have, the effect of prejudicing the general budget of the Communities by charging an unjustified item of expenditure to the Community budget;

2. 'economic operator' means any natural or legal person or other entity taking part in the administration of assistance from the Funds, with the exception of Member States exercising their prerogatives as a public authority;

3. 'primary administrative or judicial finding' means a first written assessment by a competent authority, either administrative or judicial, concluding on the basis of specific facts that an irregularity has been committed, without prejudice to the possibility that this conclusion may subsequently have to be revised or withdrawn as a result of developments in the course of the administrative or judicial procedure;

4. 'suspected fraud' means an irregularity giving rise to the initiation of administrative and/or judicial proceedings at national level in order to establish the presence of intentional behaviour, in particular fraud, such as is referred to in Article 1(1), point (a), of the Convention on the protection of the European Communities' financial interests;

5. 'bankruptcy' means insolvency proceedings within the meaning of Article 2, point (a), of Council Regulation (EC) No 1346/2000 ([1]).

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Article 3

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1. During the two months following the end of each quarter, Member States shall report to the Commission any irregularities which have been the subject of a primary administrative and/or judicial finding. To this end Member States shall in all cases give details of:

(a) the Structural Fund(s) or financial instrument concerned, the objective, identification of the form of assistance and the operation concerned and the ARINCO or CCI (common identification code) numbers;

(b) the provision which has been infringed;

(c) the date and source of the first information leading to suspicion that an irregularity had been committed;

(d) the practices employed in committing the irregularity;

(e) where appropriate, whether the practice gives rise to a suspicion of fraud;

(f) the manner in which the irregularity was discovered;

(g) where appropriate, the Member States and third countries involved;

(h) the period during which, or the moment at which, the irregularity was committed;

(i) the national authorities or bodies which drew up the official report on the irregularity and the authorities responsible for administrative and/or judicial follow-up;

(j) the date on which the primary administrative or judicial finding on the irregularity was established;

([1]) OJ L 160, 30.6.2000, p. 1.

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(k) the identity of the natural and/or legal persons involved or of any other participating entities, except where this information is irrelevant for the purposes of combating irregularities, given the nature of the irregularity in question;

(l) the total budget approved for the operation and the distribution of its co-financing between Community, national, private and other contributions;

(m) the amount affected by the irregularity and its distribution between Community, national, private and other contributions; where no payment of the public contribution has been made to the persons and/or other entities identified under point (k), the amounts which would have been wrongly paid had the irregularity not been identified;

(n) the suspension of payments, where applicable, and the possibilities of recovery;

(o) the nature of the irregular expenditure.

By way of derogation from the first subparagraph, the following cases need not be reported:

— cases where the irregularity consists solely of the failure to partially or totally execute an operation co-financed by the Community budget owing to the bankruptcy of the final beneficiary and/or the final recipient. However, irregularities preceding a bankruptcy and cases of suspected fraud must be reported,

— cases brought to the attention of the administrative authority by the final beneficiary or the final recipient voluntarily or before detection by the relevant authority, whether before or after the granting of the public contribution,

— cases where the administrative authority finds a mistake regarding the eligibility of the financed project and corrects the mistake prior to payment of the public contribution.

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2. Where some of the information referred to in paragraph 1, and in particular that concerning the practices employed in committing the irregularity and the manner in which it was discovered, is not available, Member States shall as far as possible supply the missing information when forwarding subsequent quarterly reports of irregularities to the Commission.

3. If national provisions provide for the confidentiality of investigations, communication of the information shall be subject to the authorization of the competent court of tribunal.

Article 4

Each Member State shall forthwith report to the Commission and, where necessary, to the other Member States concerned, any irregularities discovered or supposed to have occurred, where it is feared that

— they may very quickly have repercussions outside its territory,

and/or

— they show that a new mal-practice has been employed.

Article 5

1. During the two months following the end of each quarter, Member States shall inform the Commission, with reference back to any previous report made under Article 3, of the procedures instituted following all irregularities previously notified and of important changes resulting therefrom, including:

— the amounts which have been, or are expected to be, recovered,

— the interim measures taken by Member States to safeguard recovery of sums wrongly paid,

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— the judicial and administrative procedures instituted with a view to recovering sums wrongly paid and to imposing sanctions,

— the reasons for any abandonment of recovery procedures; the Commission shall, as far as possible, be notified before a decision is taken,

— any abandonment of criminal prosecutions.

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Member States shall report to the Commission administrative or judicial decisions, or the main points thereof, concerning the termination of such procedures and shall state in particular whether or not the findings are such that fraud is suspected.

2. Where a Member State considers that an amount cannot be recovered or is not expected to be recovered, it shall inform the Commission, in a special report, of the amount not recovered and the reasons why the amount should, in its view, be borne by the Community or by the Member State.

This information must be sufficiently detailed to allow the Commission to decide as soon as possible, after consulting the authorities of the Member States concerned, on the apportionment of:

— the financial consequences referred to in the third indent of Article 23(1) of Regulation (EEC) No 4253/88,

— the amounts concerned as regards forms of assistance falling under Regulation (EC) No 1260/1999.

This information shall include at least the following:

(a) a copy of the award decision;

(b) the date of the last payment made to the final beneficiary or the final recipient;

(c) a copy of the recovery order;

(d) where applicable, a copy of the document attesting the final beneficiary's or final recipient's insolvency;

(e) an outline description of the measures taken by the Member State, with indication of their dates, to recover the relevant amount.

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3. In the eventuality referred to in paragraph 2, the Commission may expressly request the Member State to continue the recovery procedure.

Article 6

Should there be no irregularities to report in the reference period, Member States shall inform the Commission of this fact within the same time limit as is set out in Article 3 (1).

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Article 6a

The information required under Articles 3, 4 and 5(1) shall be sent, whenever it is possible to do so, by electronic means, using the module provided by the Commission for the purpose via a secure connection.

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Article 7

Where the competent authorities of a Member State decide, at the express request of the Commission, to initiate or continue legal proceedings with a view to recovering amounts wrongly paid, the Commission may undertake to reimburse to the Member State all or part of the legal costs and costs arising directly from the legal proceedings, on presentation of documentary evidence, even if the proceedings are unsuccessful.

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Article 8

1. The Commission shall maintain appropriate contacts with the Member States concerned for the purpose of supplementing the information supplied on the irregularities referred to in Article 3, on the procedures referred to in Article 5, and, in particular, on the possibility of recovery.

2. Independently of the contacts mentioned in paragraph 1 the Commission shall inform Member States where the nature of the irregularity is such as to suggest that identical or similar practices could occur in other Member States.

3. The Commission shall organize information meetings at Community level for representatives of the Member States in order to examine with them the information obtained pursuant to Articles 3, 4 and 5, and pursuant to paragraph 1 of this Article, in particular with regard to the lessons to be learned therefrom in connection with irregularities, preventive measures and legal proceedings.

4. At the request of a Member State or of the Commission, the Member States and the Commission shall consult each other for the purpose of closing any loopholes prejudicial to Community interests which become apparent in the course of the enforcement of provisions in force.

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Article 8a

The Commission may use any information of a general or operational nature communicated by Member States under this Regulation to perform risk analyses, using information technology support, and may, on the basis of the information obtained, produce reports and develop early-warning systems serving to identify risks more effectively.

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Article 9

The Commission shall regularly inform the Member States, in the framework of the Consultative Committee for Coordination in the field of fraud prevention, of the order of magnitude of the funds involved in the irregularities which have been discovered and of the various categories of irregularity, broken down by type and counted up. ►M1 The committees referred to in Articles 48, 49, 50 and 51 of Regulation (EC) No 1260/1999 shall also be informed. ◄

Article 10

1. Member States and the Commission shall take all necessary precautions to ensure that the information which they exchange remains confidential.

2. The information referred to in this Regulation may not, in particular, be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it, unless the Member State supplying it has expressly so agreed.

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3. The Commission and the Member States shall ensure, when processing personal data pursuant to this Regulation, that the Community and national provisions on the protection of personal data, in particular those laid down by Directive 95/46/EC and, where applicable, by Regulation (EC) No 45/2001, are complied with.

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4. Information communicated, or acquired in any form whatever pursuant to this Regulation shall be covered by professional confidentiality and be protected in the same way as similar information is protected by the national legislation of the Member State that received it and by the corresponding provisions applicable to the Community institutions.

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In addition, that information may not be used for any purposes other than those provided for in this Regulation unless the authorities that have provided it have given their express consent, and provided that the provisions in force in the Member State in which the recipient authority is to be found do not prohibit such communication or use.

5. Paragraphs 1 to 4 shall not impede the use, in any legal actions or proceedings subsequently instituted for non-compliance with Community rules in the area of Structural Funds and financial instruments with strucutral objectives, of information obtained pursuant to this Regulation. The competent authority of the Member State which supplied this information shall be informed forthwith of such use.

6. Where a Member State notifies the Commission that a natural or legal person whose name has been communicated to the Commission pursuant to this Regulation proves on further inquiry not to be involved in any irregularity, the Commission shall forthwith inform all those to whom it disclosed that name pursuant to this Regulation of that fact. Such person shall thereupon cease to be treated, by virtue of the earlier notification, as a person involved in the irregularity in question.

Article 11

In cases of cofinancing borne jointly by a Structural Fund or financial instrument with structural objectives and by a Member State, the amounts recovered shall be shared by that Member State and the Community in proportion to the expenditure already incurred by them.

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Article 12

1. Where the irregularities relate to amounts of less than EUR 10 000 chargeable to the Community budget, Member States shall not send the Commission the information provided for in Articles 3 and 5 unless the latter expressly requests it.

2. Member States which have not adopted the euro as their currency by the date when the irregularity is established shall convert expenditure incurred in national currency into euro. The amount shall be converted into euro by using the Commission's monthly accounting rate for the month in which the expenditure was or would have been entered into the accounts of the paying authority responsible for the operational programme in question. The Commission publishes this rate electronically once a month.

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Article 13

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

The period between the day of entry into force and the end of the current quarter shall be deemed to be a quarter for the purposes of Articles 3 and 5.

This Regulation shall be binding in its entirety and directly applicable in all Member States.