

COMMISSION REGULATION (EC) No 2035/2005

of 12 December 2005

amending Regulation (EC) No 1681/94 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation 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 (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds ⁽¹⁾, and in particular Article 53(2) thereof,

After consulting the committee established under Article 147 of the Treaty, the Committee on Agricultural Structures and Rural Development and the Standing Management Committee on Fisheries Structures,

Whereas:

- (1) Article 54 of Regulation (EC) No 1260/1999 repealed Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the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 the other existing financial instruments ⁽²⁾.
- (2) Article 54 of Regulation (EC) No 1260/1999 provides that references to the repealed Regulation (EEC) No 4253/88 should be construed as references to Regulation (EC) No 1260/1999. Accordingly, Commission Regulation (EC) No 1681/94 ⁽³⁾ applies to the measures adopted under Regulation (EC) No 1260/1999.
- (3) Regulation (EC) No 1681/94 should be updated in order to enhance the effectiveness of the system for reporting irregularities.
- (4) For reasons of legal certainty, it is necessary to clearly specify that the provisions of Regulation (EC) No 1681/94 must also apply to all forms of financial assistance under Regulation (EC) No 1260/1999 as

they are described in Regulation (EC) No 1783/1999 of the European Parliament and of the Council of 12 July 1999 on the European Regional Development Fund ⁽⁴⁾, in Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund ⁽⁵⁾, in Council Regulation (EC) No 1263/1999 of 21 June 1999 on the financial instrument for fisheries guidance ⁽⁶⁾, and in Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations ⁽⁷⁾.

- (5) It is necessary to clarify to what extent a Member State participating in cross-border transnational and interregional cooperation under Article 20(1)(a) of Regulation (EC) No 1260/1999, known as the 'Interreg' programmes, or in any other programmes having a transnational character, are required to notify irregularities.
- (6) It is necessary to specify that the definition of 'irregularity' used for the purposes of Regulation (EC) No 1681/94 is taken from Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests ⁽⁸⁾.
- (7) It is necessary to define the term 'suspected fraud', taking account of the definition of fraud contained in the Convention of 26 July 1995 on the protection of the European Communities' financial interests ⁽⁹⁾.
- (8) It is necessary to establish that the definition of 'First administrative or judicial finding of fact' is taken from Article 35 of Council Regulation (EC) No 1290/2005 relating to the financing of the common agricultural policy ⁽¹⁰⁾.
- (9) It is also necessary to define the terms 'bankruptcy' and 'economic operator'.

⁽⁴⁾ OJ L 213, 13.8.1999, p. 1.

⁽⁵⁾ OJ L 213, 13.8.1999, p. 5.

⁽⁶⁾ OJ L 161, 26.6.1999, p. 54.

⁽⁷⁾ OJ L 160, 26.6.1999, p. 80. Regulation as last amended by Regulation (EC) No 2223/2004 (OJ L 379, 24.12.2004, p. 1).

⁽⁸⁾ OJ L 312, 23.12.1995, p. 1.

⁽⁹⁾ OJ C 316, 27.11.1995, p. 49.

⁽¹⁰⁾ OJ L 209, 11.8.2005, p. 1.

⁽¹⁾ OJ L 161, 26.6.1999, p. 1. Regulation as last amended by Regulation (EC) No 173/2005 (OJ L 29, 2.2.2005, p. 3).

⁽²⁾ OJ L 374, 31.12.1988, p. 1.

⁽³⁾ OJ L 178, 12.7.1994, p. 43.

- (10) In order to enhance the added value of the reporting system, the obligation to report cases of suspected fraud for the purposes of risk analysis should be more closely determined, and for this purpose the quality of the information supplied should be ensured.
- (11) It should be clearly stated that Regulation (EC) No 1681/94 will remain applicable to cases of irregularities of less than EUR 10 000 already reported.
- (12) It is necessary to clarify the question as to the charging of unrecovered amounts in connection with the forms of assistance governed by Regulation (EC) No 1260/1999 and to specify the information needed for dealing with such cases.
- (13) In order to reduce the burden imposed by reporting on the Member States and to improve efficiency, it is necessary to increase the minimum threshold above which irregularities have to be reported by Member States and to determine those cases in which no reporting obligation arises.
- (14) Regulation (EC) No 1681/94 should apply without prejudice to Article 8 of Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds ⁽¹⁾.
- (15) Account must be taken of the obligations arising out of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ⁽²⁾ and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽³⁾.
- (16) Conversion rates should be established for Member States outside the euro zone.
- (17) Regulation (EC) No 1681/94 should be amended accordingly.
- (18) The measures provided for in this Regulation are in accordance with the opinion of the Advisory Committee on the Development and Conversion of Regions,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1681/94 is amended as follows:

1. Article 1 is replaced by the following:

'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.;

2. the following Article 1a is inserted:

'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;

⁽¹⁾ OJ L 63, 3.3.2001, p. 21. Regulation as amended by Regulation (EC) No 2355/2002 (OJ L 351, 28.12.2002, p. 42).

⁽²⁾ OJ L 8, 12.1.2001, p. 1.

⁽³⁾ OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

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 (*).

(*) OJ L 160, 30.6.2000, p. 1.

3. Article 2 is deleted;

4. Article 3(1) is replaced by the following:

'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;

(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.’;

5. Article 5 is amended as follows:

(a) The second subparagraph of Article 5(1) is replaced by the following:

‘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.’;

(b) paragraph 2 is replaced by the following:

‘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.’;

6. the following Article 6a is inserted:

‘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.’;

7. the following Article 8a is inserted:

‘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.’;

8. the second sentence in Article 9 is replaced by the following:

‘The committees referred to in Articles 48, 49, 50 and 51 of Regulation (EC) No 1260/1999 shall also be informed.’;

9. Article 10(3) is replaced by the following:

‘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.’;

10. Article 12 is replaced by the following:

'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.'

Article 2

Article 5 of Regulation (EC) No 1681/94, as it applied prior to the entry into force of this Regulation, shall continue to be applied for those cases involving an amount of less than EUR 10 000 which are notified before 28 February 2006.

Article 3

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

It shall apply from 1 January 2006.

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

Done at Brussels, 12 December 2005.

For the Commission

Siim KALLAS

Vice-President
