



EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)
POLICY, LEGISLATION & LEGAL AFFAIRS
Work Programs, Reports & Consultative Committee

WORKING DOCUMENT

Requirement to notify irregularities: practical arrangements.

19th CoCoLaF

11/04/2002



EUROPEAN COMMISSION

POLICY, LEGISLATION & LEGAL AFFAIRS
General Affairs, Relations with other Institutions

Working document

Subject: The fight against fraud and other illegal activities
Requirement for Member States to notify irregularities:
practical arrangements.

Introduction

For the protection of its financial interests, Community legislation lays down reporting requirements as regards Community fields of activity.¹ The Member States must send regular reports of irregularities which have been the subject of primary administrative or judicial findings of fact.

In order to facilitate exploitation of the information notified to the Commission, the Community legislation contains a detailed list of the information to be provided, in particular the provision which has been infringed, the amounts in question, the practices used to commit the irregularity, and the natural or legal persons involved.²

The mutual notification and information system thus established is the concrete expression of the mutual duties of sincere cooperation arising from Article 10 of the

¹ See in particular Article 3(1) of Council Regulation (EEC) No 595/91 of 4 March 1991 (OJ L 67, 14.3.1997), Commission Regulation (EC) No 1681/94 of 11 July 1994 (and No 1831/94 of 26 July 1994 (OJ L 191, 27.7.1994) for expenditure, and Article 6(5) of Council Regulation (EC, Euratom) No 1150/2000 for traditional own resources.

² Except for Council Regulation (EC, Euratom) No 1150/2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources (OJ L 130, 31.5.2000), where this information is optional only.

EC Treaty,³ on which the Commission's antifraud strategy, defined in July 2000,⁴ rests. This partnership between the Commission and the Member States is also the guiding principle behind the provisions of secondary legislation.⁵

As the Council has stressed on a number of occasions, it is essential that the information supplied be consistent and of high quality if the Commission is to make the best use of it in enhancing its overall vision, stepping up the fight against fraud and ensuring that cases are properly followed up,⁶ at both national and Community level.

In this connection, the Ecofin Council in Göteborg on 15 June 2001 called on the Member States to improve the density and homogeneity of information on the results of the antifraud campaign, including information on the recovery of Community resources, in order to meet the reporting requirements laid down in Community legislation.⁷ Furthermore, the Commission itself made a number of commitments, particularly in its replies to the observations of the Court of Auditors in its Special Report No 10/2001 concerning the financial control of the Structural Funds.⁸

The Commission departments feel that, if this objective is to be achieved, the practical arrangements for implementing the reporting requirement must be clarified on the basis of the Commission's experience.

1. The concept of irregularity

Community regulations in the various sectors require the Member States periodically to send the Commission "a list of irregularities" (see the provisions mentioned above) or, for traditional own resources, "a description of cases of fraud and irregularities detected".

³ As confirmed by the Court in the *Zwartfeld* and *Yugoslav maize* cases). Case C-2/88 [1990] ECR I-3365, 13.7.90; Case C-68/88 *Commission v Greece* [1989] ECR 2965.

⁴ COM (2000) 358 final of 28.06.2000 and Action Plan 2001 – 2003 (COM (2001)254 final of 15.05.2001).

⁵ In particular, Article 4 of Regulations No 595/91, 1681/94 and 1831/94: "Each Member State shall forthwith communicate to the other Member States concerned and to the Commission any irregularities that have been discovered or that are suspected which it is feared may have effects outside its territory very quickly or which show that a new fraudulent practice has been adopted."

⁶ Including the accounting and recovery aspects.

⁷ Council conclusions on Protection of the Communities financial interests and fight against Fraud - doc. 9270/01-FIN 169-Point 4.

⁸ Special report No 10/2001 concerning the financial control of the Structural funds (OJ C 314, 8.11.2001).

- 1.1 The definition of "irregularity" is to be found in Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities' financial interests,⁹ Article 1(2) of which states that "irregularity" shall mean 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 or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure".

This definition covers all behaviour, intentional or not (act or omission) by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities.¹⁰ Its objective consequence must have been the infringement of a provision of Community law.

The concept of irregularity as defined by the Community legislator is not confined to acts leading to the administrative penalties listed in Article 5 of Regulation No 2988/95 (which require the existence of intentional or negligent wrongdoing to be established) but also includes acts which justify the application of Community measures and controls, corresponding to the objective of the protection of the *Communities'* financial interests.

- 1.2 To be defined as an irregularity, the behaviour must result in the infringement of a provision of Community law.

This should be taken to mean that the national provisions needed to give Community legislation its full effect are also to be considered as protecting Community financial interests.

With the cofinancing of the Structural Funds and Cohesion Funds, for example, it is the national provisions on budget management or financial control which apply. These provisions must therefore be considered as part of the system for protecting

⁹ Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ L 312, 21.12.1995, p. 1.)

¹⁰ This does not include errors or negligence detrimental to the Communities' budget committed by public authorities operating at national level (cf. point 3 above), and it does not prejudice the communication of errors as laid down in sectoral Regulations.

the European Communities' financial interests within the meaning of Regulation No 2988/95.¹¹

The scope of the concept of irregularity must therefore be considered in terms of the legislative framework of the Community's financial interests, which may vary depending on the field concerned.¹² As regards the EAGGF Guarantee Section, the implementing Regulations¹³ state that Member States shall take the measures necessary to prevent and deal with irregularities and to recover amounts lost as a result of irregularities or negligence. As regards traditional own resources, Member states are obliged to send the Commission a description of cases of fraud and irregularities detected¹⁴ and take all requisite measures to ensure that the

¹¹ Part of the complementarity between national and Community laws to ensure the protection of financial interests is the need, when giving notification of fraud and irregularities, to specify the relative share of each source of financing (cf. the fourth indent of Article 3(1) of Regulations 1681/94 and 1831/94).

¹² The same goes for interpreting the concept of irregularity within the context of the requirement for Member States to report irregularities. In the field of the Structural Funds and the Cohesion Funds, the financial control provisions in the basic instruments (Article 23 of Regulation No 4253/88 for periods 1989 – 1993 and 1994 – 1999 and Article 38 of Regulation 1260/99 for the period 2000 – 2006, as regards Structural funds, and Article 12 of Regulation No 1164/94 for the Cohesion Fund) require the Member States to take the necessary measures:

- to verify on a regular basis that operations financed by the Community have been properly carried out,
- to prevent and take action against irregularities,
- to recover any amounts lost as a result of an irregularity or negligence.

This obligation is set out, for example, in Article 2 of Regulation No 1681/94 and Article 2 of Regulation No 1831/94, which state that the Member States must communicate the provisions laid down by law, regulation or administrative action for the application of the measures taken under Article 23 of Regulation 4253/88 and Article 38 of Regulation 1260/99 (2000 – 2006 programming period) and Article 12 of Regulation No 1164/94. This emphasises the Community character of these obligations to be fulfilled by the Member States.

This obligation was clarified in Commission Regulations No 2064/97 (OJ L 290, 23.10.1997) and 438/2001 (OJ L 63, 03.03.2001) which set out the detailed implementing rules for Council Regulations No 4253/88 and 1260/99.

They lay down the requirement to adopt legislative or regulatory measures at Member State level and oblige Member States to organise a management and control system to ensure a sound financial management and to establish whether or not there is a sufficient audit trail including at final beneficiary level. Failure by economic operators to respect these national provisions, adopted in application of Community law, must therefore be considered an irregularity within the meaning of Article 1(2) of Regulation No 2988/95, as it could have “the effect of prejudicing the general budget of the Communities or budgets managed by them”. Any such failure must therefore be communicated by the Member State under Regulation No 1681/94, particularly if the irregularity consists of the infringement of national implementing legislation.

¹³ Council Regulation (EEC) No 729/70 of 21 April 1970 (OJ L 94, 28.4.1970) repealed by Council Regulation (EC) No 1258/99 of 17 May 1999 on the financing of the common agricultural policy (OJ L 160, 26.6.1999), which applies to agricultural expenditure from 1 January 2000; for expenditure incurred under the EAGGF, Guarantee Section, the Commission applies the procedure known as “clearance of the accounts”, introduced for the first time in 1970 and substantially amended for the first time for the 1996 financial year (Commission Regulation (EC) No 1663/95 laying down detailed rules for the application of Council Regulation (EEC) No 729/70 regarding the procedure for the clearance of the accounts of the EAGGF Guarantee Section (OJ L 158, 8.7.1995)).

¹⁴ In the case of traditional own resources, cases of fraud and irregularities are reported by the Member States by means of fraud sheets sent through the OWNRES system, which has been in force since 1996.

amounts corresponding to the entitlements established are recovered and paid into the Community budget.¹⁵

2. The fact generating the obligation to notify

The Community legislation referred to above requires the Member States to communicate, during the two months following the end of each quarter, cases of irregularities which have been the subject of primary administrative or judicial findings of fact. As regards traditional own resources, Article 6(5)¹⁶ states that the communication must be made as soon as the fraud or the irregularity is detected, without any reference to the underlying administrative act, i.e. the obligation to notify exists even if the competent authorities have not yet entered the amount of the debt in the account.

The “primary finding of fact” is not necessarily the formal document closing an administrative or judicial procedure, for which the existence of an irregularity has actually been established, since the Member States must communicate at a later date any information relating to the irregularity which were not available when the facts were first reported (see, for example, Article 3(2) of Regulation No 595/91). The Member State must also inform the Commission subsequently of the proceedings commenced after the initial report, administrative or judicial decisions taken during the proceedings and decisions terminating them (see Article 5(1) and (2) of Regulation No 595/91).

It follows from this that the reporting requirement for the Member State already exists well before all the facts establishing the irregularity have been gathered; it applies from the moment of detection.

This approach is an integral part of the aim of the notification system set up by Community legislation to facilitate rapid intervention by the Commission and by other Member States which might be concerned.¹⁷

¹⁵ Articles 6(5) and 17(1) of Regulation 1150/2000.

¹⁶ See previous footnote.

¹⁷ See the articles (e.g. Article 4 of Regulations 595/91, 1681/94 and 1831/94) which impose an explicit obligation to notify the other Member States of "irregularities that have been discovered or that are suspected". The obligation to notify is not affected by the six-month period referred to in Article 7 of Commission Regulation (EC) No 2064/97 of 15 October 1997 establishing detailed arrangements for

To give the communication system full effect, the primary finding of fact must be taken to be the first demonstration by the administration or the courts that an irregularity exists, even if this is merely an internal document, as long as it is based on actual facts. This does not prevent the administrative or judicial authorities from subsequently withdrawing or correcting this first finding on the basis of developments in the administrative or judicial procedure¹⁸.

3. THE CONCEPT OF ECONOMIC OPERATOR

The irregularities which the Member States must communicate, as defined by Article 1(2) and Article 7 of Regulation No 2988/95 above, are any infringement “of a provision of Community law resulting from an act or omission by an economic operator”.

For the purposes of the practical application of the Regulation, the concept of economic operator was defined in a declaration entered in the Council minutes, stating that the Member States, in the exercise of the prerogatives of public power, could not be considered to be “economic operators” for the purposes of this Regulation¹⁹.

In order to ensure that the aim of the Community legislation in question is adhered to, it is important to clarify the actions of the Member States when they exercise their prerogatives of public power, that is those activities of the Member States connected with the exercise of official authority²⁰ that are conducted in conditions that diverge from the civil law governing relationships between individuals. These specific activities apart, a Member State may be considered to be an economic operator for the purposes of Regulation No 2988/95, particularly when carrying out management acts, such as the organisation of a training course under an ESF-funded programme, for example, or measures to improve road infrastructure under an ERDF-funded programme. In such cases irregularities in the management of Community funds must be communicated under Community legislation, since the

the implementation of Council Regulation (EEC) No 4253/88 as regards the financial control by Member States of operations co-financed by the Structural Funds (1994-1999 programming period).

¹⁸ As laid down by Articles 3 (2), 5 and 10 of the abovementioned Regulations

¹⁹ Council conclusions of 14 June 1995. Declaration recorded in the minutes (Doc. Council FIN 233 No 8138/95, item 9, Articles 1 and 7).

²⁰ Within the meaning in particular of Article 45 of the EC Treaty.

Member State is acting in this case as the implementing and managing authority and not in the exercise of its prerogatives of public power.

4. THE NOTIFICATION THRESHOLD

4.1 For amounts of less than € 4000, the Community legislation applicable in the field of expenditure (Article 12 of Regulations No 595/91, No 1681/94 and No 1831/94) provides for notification in cases of irregularity only at the express request of the Commission; in the field of traditional own resources, however, the notification requirement begins only at the threshold of €10 000.

As regards this restriction on the notification requirement, however, it should be stressed that Community legislation requires that not only must irregularities that have caused actual damage above these thresholds be notified, but also irregularities likely to have an impact above these minimum thresholds. The legislation mentions “the amounts which would have been wrongly paid had the irregularity not been discovered” (second indent of Article 3(1) of Regulations No 595/91, 1681/94 and 1831/94).

This interpretation is confirmed by the definition of the concept of irregularity given in Article 1(2) of Regulation No 2988/95 which also refers to “any infringement ... which ... would have the effect of prejudicing the general budget of the Communities”.

4.2 The artificial splitting of a set of operations so as to avoid the reporting requirement would be contrary to the objectives pursued by Community legislation, which are to inform the Commission of the areas of greatest risk, in particular cases that are premeditated, organised and have a certain continuity in time and geographical distribution. Thus an "irregularity" within the meaning of Community legislation - on the basis of material evidence - may consist of irregular or even fraudulent operations, which are interdependent, whose generating fact is prolonged in time and whose financial impact is greater than €4000 (or €10 000 for traditional own resources), while each operation considered in isolation remains below the threshold.

5. EXCEPTIONS FROM THE NOTIFICATION REQUIREMENT²¹

Regulations No 595/91, 1681/94 and 1831/94²² provide for exceptions from the notification requirement in cases "where the error or negligence is detected before payment and does not result in any administrative or judicial penalty" (second indent of Article 3(1)).

In practice, the Commission's and Member States' administrations may face situations which do not comply with the applicable legislation but for which the definition of irregularity set out above is inappropriate. In the light of experience, the Commission may consider the following exceptions in such cases:²³

- irregularities notified to the administrative authority by the beneficiary of his own free will or before discovery by the competent authority, either before or after payment of the amounts requested;
- situations where the administrative authority finds that it was mistaken as regards the eligibility of the project financed and corrects its mistake before payment is made;²⁴
- cases of *force majeure* within the limits set out by the Court of Justice's case law.²⁵

6. CONFIDENTIALITY OF INVESTIGATIONS

The obligation imposed in principle by Community legislation may nonetheless be limited by the requirements of national legislation "if national provisions provide for confidentiality of investigations", making communication to the Commission subject "to the authorisation of the competent court" (see, for example, Article 3(3) of Regulations No 595/91, 1681/94 and 1831/94).

²¹ Excluding traditional own resources, to which the following point does not relate.

²² See footnote on page 1.

²³ Already raised in the context of the implementation of the former Regulation No 283/72, now replaced by Regulation 595/91, in a working document produced by DG VI (Doc. VI/278 Rev. 3).

²⁴ Such exemption does not apply when the error is discovered after payment because the administration must then undertake a recovery and consequently notify the case.

²⁵ Commission Communication C(88) 1696 (OJ C 259, 6.10.1988, p. 10). This is an exception to the general rule of scrupulous adherence to the legislative provisions, which is interpreted and applied strictly.

However, from the point of view of the more general requirement of loyal cooperation, citing the confidentiality of investigations as grounds for refusing to communicate information must remain the exception. It should not lead to a total refusal to communicate irregularities, which would deprive the notification requirement of all meaning and value.

Nor must the overlap with certain national legal provisions lead to a systematic refusal to communicate cases of irregularity (suspected or confirmed). This would be contrary to the principle of uniform application of Community law since, in some Member States, the rules on confidentiality of investigations do not prevent information being exchanged between public authorities (judicial or administrative), provided that they need know that information in the exercise of their duties.

Moreover, the confidentiality of investigations should be used in accordance with its purpose, which is primarily to ensure that the presumption of innocence is maintained, the facts are gathered and the truth established.

Consequently, confidentiality of investigations cannot be used to defend a refusal by the national authorities to communicate their findings if, at a later stage in the proceedings, they intend to pass them to a judicial authority, since confidentiality of investigations may only be used when the matter has actually been referred to a judicial authority for investigation and this authority has not given its approval for the communication of information to the Commission on a case of irregularity (this is also the case for any information that may have been gathered by the administrative authority responsible after legal proceedings have been opened).

The power conferred on the judicial authority in some Member States to decide whether or not to notify in the light of the confidentiality of investigations must also be exercised in a balanced manner, since the authority must take into account the fact that under Community legislation there is also an obligation to inform the Commission of developments in legal proceedings.

Therefore, confidentiality of investigations is not absolute; where it exists, it overlaps with compliance with the confidentiality of certain data and enables the judicial authority conducting a case to transmit information to the Commission on the conduct of the proceedings (stages) and on certain factual elements, such as the

amounts in question or the measure or programme concerned or any other relevant element not covered by the confidentiality of the proceedings.²⁶

*

*

*

²⁶ As regards traditional own resources, Article 2(3) of Regulation No 1150/2000 states that if a case is referred to a court, the date of referral may count as the date of establishment; by analogy, it is the final date on which communication to the Commission can occur.