



EUROPEAN COMMISSION
EUROPEAN ANTI-FRAUD OFFICE (OLAF)

Directorate D — Policy
OLAF.D.2 — Fraud Prevention, Reporting and Analysis

Handbook
on
"Reporting of irregularities in shared management"

DISCLAIMER: This is a working document prepared by the European Anti-Fraud Office (OLAF) assisted by a group of Member States' experts under the Advisory Committee for Coordination of Fraud Prevention (COCOLAF) — Reporting and Analysis Group. It is intended to streamline Member States' obligation to report irregularities to the Commission under European Union (EU) law. It clarifies the obligations under EU law but does not change them. The document is without prejudice to the interpretation of the Court of Justice in relation to these obligations.

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1. INTRODUCTION

This document results from a collaborative working procedure under the Advisory Committee for Coordination of Fraud Prevention (COCOLAF) - Reporting and Analysis Group involving Member States' experts and Commission services.¹

Its purpose is to provide guidance on common aspects of Member States' reporting of irregularities in connection with European Union (EU) budget expenditure as part of shared management for Programming Period 2014-2020.²

Under EU law, Member States must report cases of irregularities in revenue and expenditure to the Commission, including suspected and established fraud. The Commission receives the irregularity reports with regard to budget expenditure through the irregularity management system (IMS) managed by the European Anti-Fraud Office (OLAF).

While substantial improvements have been made in recent years, Member States' practical application of the reporting provisions continues to vary significantly.

Despite EU-level definitions of the terms used in the reporting system ('irregularity', 'suspected fraud', 'primary administrative or judicial finding'), experience shows that they are not used uniformly by Member States.³

In order to ensure consistent application of definitions relating to irregularity reporting, these guidelines clarify the requirements and conditions to be met by all Member States, while respecting the particularities of each legal system.

1 Endorsed by the Advisory Committee for Coordination of Fraud Prevention (COCOLAF), and its 'Reporting and Analysis Group' in its meetings of 27 April 2017 and 23 May 2017. Contributions came from experts from the following Member States: Bulgaria, Croatia, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Malta, Poland, Romania, Slovenia, Spain and Sweden. Workshops were held on 23 February, 4 October and 11 November 2016.

2 The guidance also applies to the previous programming period, where the rules applicable do not conflict. See Annex I.

3 Staff working document *Implementation of Article 325 TFEU by the Member States in 2014*, SWD(2015) 154 final, accompanying the Report from the Commission to the European Parliament and the Council,

In fact, some definitions refer to processes involving steps and actors that are probably never completely identical even in two Member States. Different notions of exactly which step in the handling of a case meets a given definition are inevitable. Application varies depending on the legislation and practice in each Member State, and there are even differences within Member States depending on the type of expenditure or fund and the type of irregularity.

This situation results in different patterns of reporting, which means that data is not fully comparable between Member States. The lack of harmonised data makes the information less reliable for reporting and risk analysis.

The aim of this document is to streamline understanding of the reporting provisions, and in particular of the relevant definitions, thereby reducing disparities and standardising the reporting process while respecting the particularities of each Member State's legal system.

The Handbook seeks to improve irregularity reporting through:

- (i) ensuring cases are reported and updated promptly;
- (ii) ensuring that data is consistent and comparable.

It should ultimately contribute to a proactive, structured and targeted approach to managing the risk of fraud.

Protection of the EU's financial interests — Fight against fraud 2014 — Annual Report, COM(2015) 386 final, see in particular pages 56-57.

2. BACKGROUND

To protect the European Union's (EU) financial interests, EU legislation requires reporting in areas where the EU provides financial support.⁴ The Member States must send regular reports of irregularities (including suspected and established fraud) which have been the subject of 'primary administrative or judicial findings'.⁵

In 2015, Delegated and Implementing Regulations with specific reporting provisions for the various funds under the Multiannual Financial Framework 2014-2020 were adopted, published and entered into force.⁶ These are:

- (a) Commission Delegated Regulation (EU) 2015/1970 of 8 July 2015 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council with specific provisions on the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund;
- (b) Commission Delegated Regulation (EU) 2015/1971 of 8 July 2015 supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with specific provisions on the reporting of irregularities concerning the European

4 The relevant provisions are:

- Article 122(2) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013);
- Article 50(1) of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the Common Agricultural Policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008 (OJ L 347, 20.12.2013);
- Article 30(2) of Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid to the Most Deprived (OJ L 72, 12.3.2014). Article 5(5) of Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime, and crisis management (OJ L 150, 20.5.2014);
- Article 21(1)(d) of Regulation (EU) No 1309/13 on the European Globalisation Adjustment Fund, according to which the definition should be that of Article 122(2) of the Common Provisions Regulation for the ESI Funds (OJ L 347, 20.12.2013, p. 855).

For the irregularity reporting provisions applicable to previous programming periods, see Annex I.

5 As laid down in Article 2(b) of Delegated Regulation (EU) 2015/1970; Article 2(b) of Delegated Regulation (EU) 2015/1971; Article 2(b) of Delegated Regulation (EU) 2015/1972; and Article 2(b) of Delegated Regulation (EU) 2015/1973.

6 OJ L 293, 10.11.2015, p. 1-5.

Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development and repealing Commission Regulation (EC) No 1848/2006;

- (c) Commission Delegated Regulation (EU) 2015/1972 of 8 July 2015 supplementing Regulation (EU) No 223/2014 of the European Parliament and of the Council with specific provisions on the reporting of irregularities concerning the Fund for European Aid to the Most Deprived;
- (d) Commission Delegated Regulation (EU) 2015/1973 of 8 July 2015 supplementing Regulation (EU) No 514/2014 of the European Parliament and of the Council with specific provisions on the reporting of irregularities concerning the Asylum, Migration and Integration Fund and the instrument for financial support for police cooperation, preventing and combating crime, and crisis management;
- (e) Commission Implementing Regulation (EU) 2015/1974 of 8 July 2015 setting out the frequency and the format of the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, under Regulation (EU) No 1303/2013 of the European Parliament and of the Council;
- (f) Commission Implementing Regulation (EU) 2015/1975 of 8 July 2015 setting out the frequency and the format of the reporting of irregularities concerning the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development, under Regulation (EU) No 1306/2013 of the European Parliament and of the Council;
- (g) Commission Implementing Regulation (EU) 2015/1976 of 8 July 2015 setting out the frequency and the format of the reporting of irregularities concerning the Fund for European Aid to the Most Deprived, under Regulation (EU) No 223/2014 of the European Parliament and of the Council;
- (h) Commission Implementing Regulation (EU) 2015/1977 of 8 July 2015 setting out the frequency and the format of the reporting of irregularities concerning the Asylum, Migration and Integration Fund and the instrument for financial support for police cooperation, preventing and combating crime, and crisis management, under Regulation (EU) No 514/2014 of the European Parliament and of the Council.

In order to process the information reported by Member States to the Commission, EU legislation contains a detailed list of data to be provided. This includes the provision which has been infringed, the amounts in question, the practices used to commit the irregularity, the parties involved, and whether the detected irregularity constitutes ‘fraud’ (suspected or established).⁷

⁷ Article 3(2) of Delegated Regulation (EU) 2015/1970; Article 3(2) of Delegated Regulation (EU) 2015/1971; Article 3(2) of Delegated Regulation (EU) 2015/1972; Article 3(2) of Delegated Regulation (EU) 2015/1973.

In shared implementation of the EU budget, Member States are required to report detected irregularities to the Commission, including ‘suspected fraud’ and ‘established fraud’. OLAF, on behalf of the Commission, receives the reports via the Irregularity Management System (IMS).

Therefore, the established reporting and information system is the practical application of the principle of sincere cooperation set out in Article 4(3) of the Treaty on European Union (TEU).⁸

Article 325(1) of the Treaty on the Functioning of the European Union (TFEU) lays down that ‘the Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken which shall act as a deterrent and be such as to afford effective protection in the Member States’.⁹

EU legislation should enable the Commission to carry out its responsibility to protect the Union’s financial interests and fight fraud, which is closely linked to its responsibility to implement the budget,¹⁰ and its role as guardian of the Treaties under Article 17(1) TEU). To this end, the EU has clearly stated the objectives of reporting fraud and other irregularities.¹¹ Council Regulation (EC, Euratom) No 2988/95 provides for general rules for the purposes of protecting the EU’s financial interests relating to homogeneous checks, and to administrative measures and penalties necessary to ensure the correct application of EU law.¹²

Regulation (EU, Euratom) No 883/2013 conferred on the European Anti-Fraud Office (OLAF)¹³ operational powers to conduct administrative investigations, and to contribute to

8 Article 4(3) of the Treaty on European Union, Consolidated Version, [hereinafter TEU post-Lisbon] (OJ C 83, 30.3.2010) as confirmed by the Court in the Zwartveld (Case C-2/88 Imm. Zwartveld and Others [1990] ECR I-3365) and Yugoslav maize (Case C-68/88 Commission v Greece [1989] ECR 2965) cases.

9 Article 325(1) of the Treaty on the Functioning of the European Union (TFEU).

10 Article 317 TFEU.

11 See Delegated Regulations (EU) 2015/1970, 2015/1971, 2015/1972, 2015/1973 Article 5(1): ‘The Commission may use any information provided by Member States in accordance with this Regulation to perform risk analysis, using information technology support, and may, on the basis of the information obtained, produce reports and develop systems serving to identify risks more effectively’.

12 Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ L 312, 23.12.1995, Article 1).

13 OJ L 248, 18.9.2013, p. 1.

the design and development of methods of fighting fraud. OLAF processes and analyses the information provided on irregularities for fraud prevention purposes.¹⁴ In accordance with Article 3.4 of Regulation No 883/2013¹⁵, Member States shall designate an anti-fraud coordination service (AFCOS) to facilitate effective cooperation and exchange of information with OLAF. Most of them have coordination responsibilities including irregularity reporting.

2.1. Aim of the reporting obligations

Detailed reporting of the information on irregularities required in various sectoral regulations has a dual purpose. It is a preventive measure to support proactive risk analysis, and it also allows administrative and judicial monitoring of action taken by Member States.

In addition, it provides information to the European Parliament, Member States and the Commission (including OLAF)¹⁶ for the fight against fraud and reporting of irregularities, including suspected and established fraud and acts as a tool for sound financial management.

Reporting should be seen as a concrete expression of the Commission's right under several regulations in force, to receive information and to carry out checks. This applies in combination with its duty to analyse the information and return it to the Member States. The information is intended to help them carry out risk analysis, produce reports and develop systems serving to identify risks more effectively.¹⁷

¹⁴ Article 5 of Delegated Regulations (EU) 2015/1970; Delegated Regulation (EU) 2015/1971; Delegated Regulation (EU) 2015/1972; Delegated Regulation (EU) 2015/1973, for full reference see footnote 6.

¹⁵ Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, p. 1.

¹⁶ See e.g. the Report from the Commission to the European Parliament and to the Council *Protection of the European Union's financial interests — Fight against fraud 2015*, COM(2016) 472 final, 14.7.2016.

¹⁷ Delegated Regulation (EU) 2015/1970; Delegated Regulation (EU) 2015/1971; Delegated Regulation (EU) 2015/1972; Delegated Regulation (EU) 2015/1973.

Against this background, each Member State must immediately report cases to the Commission that have repercussions beyond its territory, indicating any other Member State concerned.¹⁸

Moreover, analysing the results of Member States actions helps the Commission make EU legislation more fraud-proof.¹⁹

When OLAF is required to make a decision about opening an investigation, Member State reporting of irregularities keeps the Office informed of ongoing investigations in a Member

Reporting obligations help to inform the European Parliament, Member States and the public about the fight against fraud and to ensure sound financial management.

Each Member State must immediately report cases to the Commission that have repercussions beyond its territory, indicating any other Member State concerned.

The information is used to produce reports and to detect risks more effectively.

State which might involve the same economic operator or project. Article 8 of Regulation (EU) No 883/2013 provides for the exchange of information between OLAF and the competent authorities, including judicial authorities,²⁰ within the framework of the internal or external investigations of the Office.²¹

18 Article 2(3) of Implementing Regulation 2015/1974; Article 2(3) of Implementing Regulation 2015/1975; Article 2(3) of Implementing Regulation 2015/1976; Article 2(3) of Implementing Regulation 2015/1977.

19 Communication from the Commission to the Council, the European Parliament and the European Court of Auditors *Prevention of fraud by building on operational results: a dynamic approach to fraud-proofing*, {SEC(2007) 1676}/ COM(2007) 806 final [Not published in the Official Journal].

20 Article 8 of Regulation (EU, Euratom) No 883/2013.

21 See also Regulation No 883/2013, recitals 6 and 10; Regulation No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, Article 4 (OJ L 292, 15.11.1996); Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the

3. THE CONCEPT OF ‘IRREGULARITY’

EU regulations in various sectors require the Member States to report irregularities to the Commission.²² The concept of ‘irregularity’ must always be considered in terms of the entire legislative framework of the Union’s financial interests, which may vary depending on the field concerned.^{23,24}

Legal basis

Article 3(1) of Commission Delegated Regulation (EU) Nos 2015/1970, 2015/1971, 2015/1972 and 2015/1973:

Article 3 — Initial reporting

1. *Member States shall report irregularities to the Commission which:*
 - (a) *affect an amount that exceeds EUR 10 000 in contribution from the funds;*
 - (b) *have been the subject of a primary administrative or judicial finding.*

European Communities financial interests, Article 9 (OJ L312, 23.12.1995), on the necessary coordination and close cooperation between national authorities and Commission departments in the organisation and the conduct of the checks and assistance to be given to the Commission as part of on-the-spot checks and inspections.

²² Regulation (EU) No 1303/2013; 1306/2013; 223/2014; 514/2014, see footnote 5. Pursuant to Article 21(d) of Regulation (EU) No 1309/2013 (OJ L 347, 20.12.2013, p. 855) on the European Globalisation Adjustment Fund (2014-2020), Article 122(2) of the (EU) No 1303/2013 applies to reporting of irregularities. However, Regulation No 1309/2013 does not empower the Commission to adopt a Delegated and an Implementing Regulation on irregularity reporting. So, this reporting should be included in the annual report to the Commission on the Fund.

²³ Regulation (EU) No 1303/2013; 1306/2013; 223/2014; and 514/2014 (for full references see footnote 5). They require Member States to adopt legislative or regulatory measures, to organise a management and control system to ensure 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 comply with these national provisions applying EU law is therefore 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 reported by the Member State under Regulation (EU) No 2015/1970, 2015/1971, 2015/1972, 2015/1973, or 2015/1974, particularly if the irregularity is an infringement of national implementing legislation.

²⁴ For ‘Cross Compliance’ in the agriculture field, according to Article 97(4) of Regulation (EU) No 1306/2013 “the imposition of an administrative penalty shall not affect the legality and regularity of the payment to which it applies”. In line with the above, non-compliance in cross-compliance is not an irregularity or fraudulent activity in view of the fact that the penalties do not affect the legality and regularity of the payment.

The definition of ‘irregularity’ can be found in Article 1(2) of Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities’ financial interests.²⁵

Legal basis

Article 1(2) of Regulation (EC, Euratom) No 2988/95 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.’

NB: References to ‘Community law’ should be read as references to EU law.

Specific sectoral regulations have further refined this general definition.

For the **European Agricultural Guarantee Fund**, the definition of ‘irregularity’ in Article 2(g) of Regulation (EU) No 1306/2013 refers to that of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95.

For the **Asylum, Migration and Integration Fund** and the instrument for financial support for police cooperation, preventing and combating crime and crisis management (AMIF/ISF), recital (3) of the Commission Regulation (EU) 2015/1973 refers to the definition used in Article 1(2) of Council Regulation (EC, Euratom) No 2988/95.

For the **European Structural and Investment Funds (ESIF)** a slightly different definition is given in Article 2(36) of Regulation (EU) No 1303/2013:

“irregularity” means any breach of Union law or of national law relating to its application, resulting from an act or omission by an economic operator involved in the implementation of the Fund, which has, or would have, the effect of prejudicing an unjustified item of expenditure to the budget of the Union’

The same definition is given in Article 2(16) of Regulation (EU) No 223/2014 on the **Fund for European Aid to the Most Deprived (FEAD)**.

²⁵ Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 — for full reference see footnote 12.

3.1. Act or omission, intentional or unintentional

The definition above is valid across all sectors concerned and covers all behaviour, intentional or unintentional, by an economic operator²⁶ which has, or would have, the effect of prejudicing the general budget of the Union. Specifically:

- Irregularities may stem from action or lack of action (i.e. ‘an act or an omission’) and may be categorised according to whether they
 - a) are intentional or not;
 - b) are one-off or systemic;²⁷
 - c) might have an impact in other Member States or non-EU countries.
- Irregularities may be detected by any competent national or EU (Commission services, OLAF, European Court of Auditor, other) authority.

The EU concept of irregularity is not confined to acts leading to the administrative penalties listed in Article 5 of Regulation No 2988/95 (which requires the existence of intentional or negligent wrongdoing to be established)²⁸ but also includes acts which justify the application of other EU measures and controls, with the aim of protecting the Union’s financial interests.

26 For the definition of economic operator, see Article 2(37) of Regulation (EU) No 1303/2013 (full reference in footnote 6).

27 Under Article 2(38) of Regulation (EU) No 1303/2013 (see footnote 6) ‘systemic irregularity’ means any irregularity, which may be of a recurring nature, with a high probability of occurrence in similar types of operations, which results from a serious deficiency in the effective functioning of a management and control system, including a failure to establish appropriate procedures in accordance with that Regulation and the Fund-specific rules.

28 For reference see footnote 12.

3.2. Infringement of an EU provision or national law

In order to be considered an irregularity, the behaviour must result in an infringement/breach of EU or national law.²⁹

‘Any breach of Union law or of national law relating to its application’ encompasses the whole normative framework and binding procedures relevant to EU funding; these include, on the one hand, provisions specific to EU funds, and on the other, provisions on the management of public funds in general at national or institutional level.

In summary

No complete and exhaustive list can be given of what is and what is not an irregularity — decisions can only be taken with reference to particular cases, and are therefore subject to institutional judgment. In concrete instances two questions should be asked:

- a) Have rules been broken? and**
- b) If so, might this have a negative impact on the EU budget?**

It has to be emphasised that ‘Union law or national law’ is to be obeyed not only in relation to the EU funds supplied by the EC, but also to co-financing (whether delivered jointly or in parallel) from the national budget (irrespective of whether it is at national, regional or municipal level), or from the resources of grant beneficiaries or final recipients (irrespective of whether they are public or private institutions). This includes national provisions which directly or indirectly concern the eligibility, regularity, management or control of operations and the corresponding expenditure, giving EU legislation its full effect.

Where the definition of an irregularity set out in Regulations (EC, Euratom) No 2988/95³⁰ and Regulation (EU) No 1303/2013³¹ is relevant, the applicable Union or national rules on public contracts must be considered to form part of the law to which that definition refers.

29 Annex IV.3 to these guidelines provides for concrete examples on errors and irregularities caused by administrative acts.

30 Article 1(2) of Council Regulation (EC, Euratom) No 2988/95 (for full reference see footnote 12).

31 Article 2(36) of Regulation (EU) No 1303/2013 (for full reference see footnote 5).

This means that a breach of a rule on public contracts which affects the EU budget is an irregularity within the meaning of that Regulation. See for example Article 72 of Regulation (EU) No 1303/2013 concerning the ESI Funds, where the general principles of management and control systems are stipulated, and Article 9 of Delegated Regulation (EU) No 480/2014,³² where the first control level specifically covers compliance with the applicable national and Union law, which includes law on public contracts.³³

Note that:

- An irregularity may occur at any moment in the project cycle, from programming through to audit, *ex post* monitoring or evaluation. Checks at any stage may indicate that the conditions to be met by a beneficiary after project completion (e.g. operation of infrastructure) are not being met.

- An irregularity does not need to have resulted in ineligible expenditure being declared by the Member State to the Commission as eligible. Even if it is detected before related expenditure is declared to the Commission as eligible, it is an irregularity, since it ‘would have’ prejudiced the EU budget if it had not been detected.³⁴

‘Union law or national law relating to its application’ includes national provisions which directly or indirectly concern the eligibility, regularity, management or control of operations and the corresponding expenditure, giving EU legislation its full effect.

32 Commission Delegated Regulation (EU) No 480/2014 of 3 March 2014 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund (OJ L 138, 13.5.2014).

33 See also Article 57 of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 (OJ L 298, 26.10.2012) on the definition of conflict of interests.

34 For exceptions, see section 8.

- The Commission (including OLAF) has issued guidance on these matters that may also be consulted³⁵ — for instance on:

- a) fraud risk assessment and anti-fraud measures for the 2014-2020 programming period;
- b) fraud indicators developed for the 2007-2013 Structural Funds;
- c) anonymised irregularity cases related to structural actions;
- d) practical guides on conflict of interest and forged documents.

4. THE CONCEPT OF ‘ECONOMIC OPERATOR’

The irregularities which Member States must report in accordance with the sectoral regulations are any infringements ‘of a provision of Community law, resulting from an act or omission by an economic operator’ as set out by Articles 1(2) and 7 of Regulation (EU) No 2988/95.³⁶

For the purposes of practical application of Regulation No 2988/95, the concept of economic operator was originally defined in a declaration entered in the Council minutes stating that the Member States, in the exercise of their prerogatives as public authority, could not be considered to be ‘economic operators’ for the purposes of the Regulation.³⁷

In 2006 a definition was inserted in the relevant Regulations on the reporting of irregularities.³⁸ This definition has been reproduced and adapted for the different expenditure fields:

³⁵ See <https://afis.olaf.europa.eu/afis/afislibrary/>, http://ec.europa.eu/regional_policy/en/information/publications/guidelines.

³⁶ Council Regulation (EC, Euratom) No 2988/95, Article 1(2) and Article 7 (for full reference see footnote 12).

³⁷ Council conclusions of 14 June 1995. Declaration recorded in the minutes (Council Doc. FIN 233 No 8138/95, item 9, Articles 1 and 7).

³⁸ Article 2(17) of Regulation (EU) No 223/2014, see footnote 5; Article 2(37) of Regulation (EU) No 1303/2013, see footnote 5; recital 3 of Commission Delegated Regulation (EU) 2015/1971, see footnote 6; recital 3 of Commission Delegated Regulation (EU) 2015/1973, see footnote 6.

For **ESI Funds**, the definition is in Article 2(37) of Regulation (EU) No 1303/2013, for the **FEAD** in Article 2(17) of Regulation (EU) No 223/2014, for the **European Agricultural Guarantee Fund** in recital (3) of Commission Delegated Regulation (EU) 2015/1971, and for the **AMIF/ISF** in recital (3) of Commission Delegated Regulation (EU) 2015/1973.

To ensure that the aim of the EU legislation in question is achieved, it is important to clarify the notion of a Member State exercising its prerogatives as a public authority. A parallel can be drawn with Article 51 TFEU, which limits freedom of establishment with regard to activities connected with the ‘exercise of official authority’.

The European Court of Justice has consistently held in case-law that the scope of Article 51 TFEU must be construed in a narrow manner, limiting it to activities with a direct and specific connection with official authority. Narrow interpretation would support a functional rather than an institutional approach, so that not all activities of a body constituted under public law in a Member State are automatically considered part of its prerogatives as a public authority. Where

the public body acts in a form regulated by civil or commercial law, i.e. in particular through contracts, this is an indicator that it is not exercising public authority. Ultimately, however, a

Definition for the ESI Funds

Article 2(37) of Regulation (EU) No 1303/2013:

“‘economic operator’ means any natural or legal person or other entity taking part in the implementation of assistance from the ESI Funds, with the exception of a Member State exercising its prerogatives as a public authority’.

Definition for the European Agricultural Guarantee Fund

Recital (3) of Commission Delegated Regulation (EU) 2015/1971:

‘economic operator’ is to be understood as ‘any natural or legal person or other entity taking part in the implementation of assistance from the fund or having to pay an assigned revenue within the meaning of Article 43(1) point (b) of Regulation (EU) No 1306/2013, with the exception of a Member State exercising its prerogatives as a public authority’.

Definition for the Fund for European Aid for the Most Deprived (FEAD)

Article 2(17) of Regulation (EU) No 223/2014:

‘economic operator’ means any natural or legal person or other entity taking part in the implementation of assistance from the Fund.

Definition for the AMIF/ISD Funds:

Recital (3) of Commission Delegated Regulation (EU) 2015/1973:

‘economic operator’ is to be understood as ‘any natural or legal person or other entity taking part in the implementation of assistance from the fund or having to pay an assigned revenue within the meaning of Article 43(1) point (b) of Regulation (EU) No 1306/2013, with the exception of a Member State exercising its prerogatives as a public authority’.

functional and substantive test will have to be applied, so that even acts committed in a form regulated by public law may lack a direct and specific connection with public authority and the public body, when taking such an act, may still qualify as an economic operator.

Therefore, a Member State may be considered to be an economic operator for the purposes of Regulation No 2988/95 or sector-specific Regulations, particularly when conducting operations such as measures to improve road infrastructure under an ERDF-funded programme or holding a training course under an ESF-funded programme.³⁹

In such cases, irregularities in the management of EU funds must be reported under EU legislation, since in this case the Member State is acting as the implementing body and not exercising its prerogatives as a public authority.⁴⁰

Another notion of 'economic operator' with a different purpose and scope – related to public procurement by EU institutions and bodies – is defined in Article 101(1)(g) of the Financial Regulation.⁴¹ That definition does not affect Member States' reporting obligations but needs to be taken into account when it comes to the use of information reported through the IMS in the context of the Early Detection and Exclusion System (see section 16 and Annex III).

5. THE CONCEPT OF 'SUSPECTED FRAUD'

Since 2006, Member States reporting irregularity cases to the Commission have been required to identify whether these cases involve 'suspected fraud';⁴² a definition of 'suspected fraud' was inserted in the reporting provisions.

³⁹ For example, the managing authority could be considered an economic operator if the service receives technical assistance.

⁴⁰ See also the long-standing case-law of the European Court of Justice (ECJ) on the notion of 'economic operator' (Case C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECR I-01 979 and subsequent case-law, *mutatis mutandis*).

⁴¹ Article 101(1)(g) of the Financial Regulation (for full reference of the Financial Regulation see footnote 33): 'economic operator' means any natural or legal person, including a public entity, or a group of such persons, which offers to supply products, execute works or provide services or immovable property.

⁴² Article 1(2)(4) of 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 (OJ L 328, 15.12.2005).

The same definition has now been inserted in all Delegated Regulations⁴³ on the reporting of irregularities.

The main factor in identifying ‘fraud’ is ‘deliberate intent’ to commit an irregularity. Therefore, an irregularity should always be treated as ‘suspected fraud’ if it is submitted to a prosecution service.⁴⁴

Legal basis

Article 3(2)(g) of the Commission Delegated Regulations (EU) No 2015/1970, 2015/1971, 2015/1972 and 2015/1973 requires Member States to state the following information:

(g) where appropriate, whether the practice gives rise to suspected fraud;

Article 2(a)

“Suspected fraud” means an irregularity that gives rise to the initiation of administrative or judicial proceedings at national level in order to establish the presence of intentional behaviour, in particular fraud, as referred to in Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests’.

5.1. Indicative list of types of irregularity to be described as ‘suspected fraud’

On the basis of Member States’ reports, an indicative list has been drawn up of the typology used by Member States in cases that should be considered as ‘suspected fraud’.

⁴³ Article 2(a) of Delegated Regulation (EU) 2015/1970; Article 2(a) of Delegated Regulation (EU) 2015/1971; Article 2(a) of Delegated Regulation (EU) 2015/1972; Article 2(a) of Delegated Regulation (EU) 2015/1973.

⁴⁴ In addition, the Convention of 26 July 1995 and its First Protocol, which entered into force on 17 October 2002, give a common description of behaviour involving fraud (Article 1 of the Convention) and corruption (Articles 2 and 3 of the Protocol), including complicity, instigation and an attempt. Moreover, Article 1, third indent, of Council Directive 91/308/EEC of 10 June 1991 defines behaviour that constitutes money laundering, linked to the product of fraud and corruption. The criminal law of the Member States guarantees that the serious offences thus defined are ‘liable to penal, effective and proportional and dissuasive sanctions’. Consequently, common instruments exist to determine behaviour and, from the point of view of the close and regular cooperation provided for in the Treaty, to inform the relevant Union authority for the fight against fraud and the protection of the Union’s financial interests.

In the following scenarios, the deliberate nature of the irregularity is obvious, since it is clear that the legal/natural person/entity that committed the irregularity was aware that its acts or omissions would have an impact on public funds (the EU and national contribution to the relevant area of expenditure):

- The legal/natural person/entity that knowingly committed the presumed irregularity makes declarations or uses documents that do not reflect reality; the following are typical cases:
 - false / falsified accounts;
 - false / falsified documents;
 - a description of the facts, products, operations, goods, an origin or a destination that is known to be false;
 - false / falsified supporting documents;
 - the presentation of applications that are known to be false.
- The legal/natural person/entity that knowingly committed the presumed irregularity strives to conceal or mask the actual facts in full knowledge of those facts. The following are typical cases:
 - misappropriation of funds or goods;
 - goods imported or exported without declaration;
 - the presumed perpetrator of the irregularity invents a purely fictitious situation;
 - fictitious execution of an action, project, use or processing;
 - misrepresentation or falsification of the nature, quality or quantity of an action/project/product;
 - refusal of control by economic operator;
 - fictitious economic operator.

In other scenarios, intent should be checked case by case, as the economic operator might have acted in good faith or negligently. These categories might include:

- a combination of incompatible aid;
- failure to present accounts or supporting documents;
- failure to complete a transaction.

An irregularity that gives rise to administrative or judicial proceedings being brought at national level to establish whether behaviour was intentional should be treated as ‘suspected fraud’

6. THE CLASSIFICATION OF AN IRREGULARITY

6.1. Irregularity

The term ‘irregularity’ includes — but is not limited to — ‘suspected fraud’ and ‘established fraud’.

The obligation to distinguish these two types stems from Article 3(2)(g) — or Article 3(2)(f) — and Article 4(2)(c) of Commission Delegated Regulations (EU) No 2015/1970, 2015/1971, 2015/1972 and 2015/1973, which require that:

- in the initial report, Member States indicate ‘*where appropriate, whether the practice gives rise to suspected fraud*’ (Article 3(2)(g) or (f)); and
- with regard to irregularities for which penalties have been imposed, Member States indicate ‘*whether fraud was established*’ (Article 4(2)(c)).

Correct and timely classification is of the utmost importance, because it is the basis for distinguishing between ‘irregularities reported as fraudulent’ and ‘irregularities not reported as fraudulent’ as set out in the annual report on the Protection of the European Union’s financial interests – Fight against fraud (PIF).⁴⁵ For this reason it is essential that, when classifying irregularities, Member States adopt a uniform approach to what they classify as ‘suspected fraud’ and when. The following paragraphs aim at providing suitable guidance to achieve this.

How to do this in IMS

The irregularity management system (IMS) enables any irregularity reported to be properly classified by selecting one of these three choices in the relevant field:

- ‘IRQ2 – ‘Irregularity’;
- ‘IRQ3 – ‘Suspected fraud’;
- ‘IRQ5 — Established fraud’.

⁴⁵ Report pursuant of Article 325(5) of TFEU.

6.2. Suspected fraud

The definition of ‘suspected fraud’ does not describe behaviour which would arouse suspicion of fraud. It is merely a procedural definition: all irregularities for which national authorities have taken specific procedural steps are categorised as ‘suspected fraud’.

Provided that all Member States have ratified the PIF Convention and amended their legal systems⁴⁶ to insert the definition of fraud, the classification ‘suspected fraud’ should be used when reporting the irregularity to the Commission any time a procedure is initiated under those provisions.

With the exception of some specific national situations, the general rule would be that a criminal procedure is initiated at the moment that a case is sent to and/or initiated by the prosecution service to ascertain whether fraud has been committed.

National rules may vary in this respect, depending on their legal systems. In some Member States, a criminal procedure may be compulsory; in others it may be discretionary.

The final decision on whether an irregularity actually constitutes fraud is the responsibility of the relevant authorities of the Member State involved. This implies that a case initially reported by Member States as potentially fraudulent may later be dismissed by the judicial authorities.

To harmonise Member States’ classification of suspected fraud cases, common moments in the procedure need to be identified which national authorities can all use in the same way for classification when reporting to the Commission.⁴⁷ Based on the results of a 2014 questionnaire the following stages have been identified:

⁴⁶ See Section 6.3 on the PIF Convention. Member States need to align their criminal codes and/or their criminal procedural codes or provisions with it.

⁴⁷ Annex IV.2 to these guidelines provides concrete examples.

Suspected fraud

Administrative decision: the administrative authority decides, based on a type of irregularity discovered and modus operandi, that the case constitutes a suspected fraud

Transmission of information by the administrative authority: the authority forwards the case to the prosecution service concerning a possible infringement of EU or national provisions to the detriment of the EU's financial interests

Opening of a criminal investigation: a prosecutor opens a file concerning a possible infringement of EU or national provisions to the detriment of the EU's financial interests

Requests of indictment: a prosecutor requests the indictment of a person in relation to a possible infringement of provisions to the EU's financial interests

How to reflect this in IMS

As a practical approach and in order to eliminate problems of data interpretation without imposing procedural changes on Member States, IMS enables Member States to specify the stage at which the case is classified as 'suspected fraud'.

6.3. Established fraud

The definition of fraud against the EU financial interests was first introduced by Article 1(1)(a) of the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests,⁴⁸

Legal basis

The PIF Convention defines fraud against the EU's financial interests as:

a) *In respect to expenditure, any intentional act or omission relating to:*

- *the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the EU or budgets managed by, or on behalf of, the EU,*
- *non-disclosure of information in violation of a specific obligation, with the same effect,*
- *the misapplication of such funds for purposes other than those for which they were originally granted;*

b) *...*

also known as the PIF Convention.

All Member States have ratified the above provisions and implemented them in national legislation. There have been different approaches, for instance making specific references to fraud against EU funds⁴⁹ or having general definitions of behaviour without any specific reference to the 'victim' (the 'EU's financial interests').⁵⁰

⁴⁸ At the time of adopting of the Convention (1995), it referred throughout to the Communities. This Handbook reflects the current institutional set-up by referring to the EU, and changing other relevant references to present-day institutions and concepts.

⁴⁹ Belgium, Bulgaria, Czech Republic, Denmark, Greece, Spain, Croatia, Italy, Cyprus, Hungary, Malta, Portugal, Romania, Slovenia, Slovakia and Sweden.

⁵⁰ Germany, Estonia, France, Lithuania, Luxembourg, Netherlands, Ireland, Austria, Poland, Finland and the United Kingdom.

Regardless of the approach adopted by each Member State, the ratification of the 1995 Convention has equipped every country with a basis for prosecuting and possibly

How to reflect this in IMS

If the irregularity has been correctly reported so far, there is already a case of 'suspected fraud'. Open it and make a 'request' to update it by amending the relevant tab pages and fields, such as:

Classification of the irregularity: change from IRQ3 to IRQ5

The sanctions (penalties) are filled in.

IMS allows the uploading of the relevant documents as attachment (e.g. sentence).

imposing penalties for specific conduct.

If this happens, i.e. a guilty verdict is pronounced and is not appealed against, the case can be considered 'established fraud'.

7. THE FACT GENERATING THE OBLIGATION TO REPORT

7.1. Definition of a primary administrative or judicial finding (PACA)

EU legislation requires Member States to report cases of irregularity and suspected fraud which have been the subject of a primary administrative or judicial finding (*premier acte de constat administratif ou judiciaire* — PACA).

Legal basis:

Article 3(1) of Commission Delegated Regulations (EU) No 2015/1970, 2015/1971, 2015/1972 and 2015/1973 require Member States to provide the following information:

Article 3

Initial reporting

- 1. Member States shall report irregularities to the Commission which*
 - (a) affect an amount that exceeds EUR 10 000 in contribution from the funds;*
 - (b) have been the subject of a 'primary administrative or judicial finding'.*

Article 2(b) of Commission Delegated Regulations (EU) No 2015/1970, 2015/1971, 2015/1972 and 2015/1973 defines the 'primary administrative or judicial finding' as follows:

Article 2(b)

'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.

Reference to an administrative or judicial procedure or proceedings should be seen as indicating that an irregularity has been established,⁵¹ since the Member States must later

⁵¹ Article 3(2)(e) of Delegated Regulation (EU) 2015/1970; Article 3(2)(e) of Delegated Regulation (EU) 2015/1971; Article 3(2)(d) of Delegated Regulation (EU) 2015/1972; Article 3(2)(e) of Delegated Regulation (EU) 2015/1973, see Annex II.

provide any information about the irregularity that was not available when the facts were first reported.⁵²

For the reporting system to have full effect, the primary finding must be taken to be the first record by the administration or the courts that an irregularity exists, even if this is merely an internal document, provided 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 procedure.**⁵³

This approach is an integral part of the reporting system set up in EU legislation to enable rapid intervention by the Commission and by any other Member State concerned.⁵⁴

With reference to the definition of primary administrative or judicial finding, the **first written assessment** can refer to several kinds of documents, such as an audit report by an Audit Authority or an irregularity report by a competent authority leading to the commencement of the recovery procedures, or document recording transmission of the case to the prosecution service.

The main elements or requirements of a ‘primary finding’ have to be seen in conjunction with the definition of ‘irregularity’.

Therefore, the main elements or characteristics of the primary finding are as follows:

- **a document in writing (written assessment):** a report, memorandum, resolution, recovery order, letter or any other document which details the facts and elements of the irregularity, transmission document to the public prosecutor,⁵⁵ and sentence, judgment, indictment, where applicable;

⁵² See Article 4 of these Delegated Regulations.

⁵³ As laid down in Article 4(1) of the Delegated Regulations. See also Section 9.

⁵⁴ As laid down by Article 2(3) of the Commission Implementing Regulations (EU) No 2015/1974, 2015/1975, 2015/1976 and 2015/1977.

⁵⁵ It should be noted that a number of Member States introduced in their internal reporting procedures the concept of an ‘irregularity signal’ which, in principle, is not to be considered a ‘first written assessment’, see Annex II.

- **an assessment by a competent authority;**
- **a conclusion that an irregularity has been committed.**

Examples	management verifications report;
	management verifications check-lists;
	audit reports (audit authority, regional audit bodies, Supreme Audit Institution);
	control reports by paying agencies;
	report by the European Commission;
	report by the European Anti-fraud Office;
	report by the European Court of Auditors;
	resolution to initiate the recovery procedure;
	recovery order;
	report by an investigative body;
	other reports or memoranda issued by public bodies (internal audit, management reports, etc.);
	transmission document to the Public Prosecutor;
	request of indictment (where applicable).

In some cases, the first written assessment can come from checks or audits not related to EU funds.

Examples	<p>The Audit body responsible for auditing the grants financed by the national budget is auditing the beneficiary of a grant awarded in the area of research, to recruit researchers. The auditor detects a double financing when cross-checking data, and also discovers that the grants were co-financed by the EU, which was not mentioned in the call that was published. The audit report constitutes the 'PACA'.</p>
	<p>The internal control body of the Member State, responsible for performing the statutory audits of public bodies, is carrying out the annual audit of an independent body which implements EU co-financed projects. During the audit, some irregularities are detected in one of the contracts co-financed by EU funds. The control report constitutes the 'PACA'.</p>

The status of the written document that is taken as the first written assessment should be the first document that has passed the drafting stage, which might, however, be subject to changes later. It does not have to be a document that typically marks the end of an

administrative or judicial procedure (final report, final judgment). However, this first written assessment could be the final document if the time limit for completing the procedure coincides with the reporting deadline (e.g. a national contradictory procedure with the audited beneficiary concerned, to finalise the report, is short).

For cases of irregularity classified by an administrative authority as suspected fraud, the primary finding should be no later than when a report is drawn up to be forwarded to the competent authorities (public prosecutor/judicial authority) for further action.⁵⁶

Examples

In the case of audit or management verification reports, where the time limit for the contradictory procedure is short (less than five months), it could be convenient to wait for the final report, so that, when reporting the irregularities, all the elements have been taken into account, at that stage, to confirm or correct the facts included in the initial report.

For cases under judicial proceedings, as there can be a long period of time between the initiation of the proceeding and the verdict, this could be taken into consideration when deciding on the moment to report the irregularities detected.

7.2. **Link between PACA and recovery of funds**

It is important to highlight that the main aim of the reporting of irregularities is not to trigger the procedure for recovery of funds but to report the case to the Commission for analysis and information purposes.

However, in most cases PACA can be linked to initiating the recovery procedure, because once an irregularity has been detected the next step for the competent authority (managing authority, responsible authority, paying agency, certifying authority, or audit authority) is to recover the funds that were paid in an irregular manner.

It is important to point out that the date of the primary finding (PACA) should be no later than the initiation of the recovery procedure.⁵⁷ While the specific procedures for

⁵⁶ Annex IV.1 to these guidelines provides concrete examples.

collecting the debt can vary from one Member State to another, the recovery procedure begins on the date on which the competent authority (in most cases) takes administrative action to recover the money. This may lead to the beneficiary being notified for the first time in writing by a Member State authority that an amount of subsidy should be reimbursed and to the irregularity being reported to the Commission.

7.3. Relationship between the date of PACA, and the calculation of the exact amount affected and registration of the debt

Because of the way financial corrections are imposed, if one is imposed in the course of project implementation, the exact amount affected by the irregularity can be calculated only after the activities affected by the irregularity are finished.⁵⁸ The managing authorities cannot calculate the exact amount of the irregularity until the affected activity has finished, because before that the actual amount spent by the beneficiary on the activity is unknown. The purpose of applying financial corrections is to restore a situation where 100 % of the expenditure declared for financing from the ESI Funds is in line with the applicable national and EU rules and regulations.

When the activity affected by the irregularity is finished and the beneficiary claims a certain amount for this activity, the managing authority should then calculate the actual amount of the irregularity. In the course of project implementation, when a beneficiary claims amounts which were spent on the affected activity, the managing authority should deduct the percentage of the financial correction from the interim and final payments but the exact irregular amount is known only after the final payment.

For irregularities that are classified as ‘suspected fraud’, sometimes the affected amount cannot be calculated at the time when the irregularity is established and the approximate amount cannot be considered as debt. As soon as the exact amount affected becomes clear, the Member State should report it with a follow-up. Even in cases of pre-trial procedures which can take a long time (a year or more), Member States should report all the information when they send the case to the Prosecutor’s Office. In some cases at the end of the pre-trial

⁵⁷ See Article 54 of Regulation (EU) No 1306/2013 (for full reference see footnote 5).

⁵⁸ See Article 4 of the Delegated Regulations (for full reference see footnote 6).

procedure the exact affected amount becomes clear, together with whether it should be considered as debt. The reason for that approach is that irregularity reporting is not an accounting tool, but a source of information for preventive action and statistical analysis.

8. EXCEPTIONS TO REPORTING OBLIGATIONS

In the field of expenditure, the reporting provisions contain some exceptions.⁵⁹ The following categories of cases do not need to be reported.

8.1. Notification threshold

Article 3(1)(a) of the Delegated Regulations requires Member States to report to the Commission only irregularities (including ‘suspected fraud’ and ‘fraud’) that affect an amount exceeding EUR 10 000 in contribution to the funds.⁶⁰

To split a set of operations artificially so as to avoid the reporting requirement would be contrary to the objectives pursued by EU legislation. Thus an ‘irregularity’ within the meaning of EU legislation may consist of irregular or fraudulent operations which are interlinked and whose total financial impact exceeds EUR 10 000, even though each operation remains below the threshold.⁶¹

⁵⁹ However, Member States have to report annually to the Commission on all amounts resulting from any irregularity, even in cases covered by exceptions.

⁶⁰ Delegated Regulations; for full reference see footnote 6.

⁶¹ Irregularities of different kinds committed by the same economic operator and concerning one operation/action/project may be reported jointly, see Section 9.3.

The reporting provisions provide for exceptions (see above). These exceptions do not apply, in particular, to cases of irregularities preceding a bankruptcy and cases of suspected fraud, which must be reported.

ERDF, ESF, Cohesion Fund and EMFF, CPR

Regulation (EU) No 1303/2013, Article 122(2) provides for exceptions to the reporting requirement in the following cases:

(a) cases where the irregularity consists solely of the failure to execute, in whole or in part, an operation included in the co-financed operational programme owing to the bankruptcy of the beneficiary;

(b) cases brought to the attention of the managing authority or certifying authority by the beneficiary voluntarily and before detection by either authority, whether before or after the payment of the public contribution;

(c) cases which are detected and corrected by the managing authority or certifying authority before inclusion of the expenditure concerned in a statement of expenditure submitted to the Commission.

8.2. Specific exceptions from reporting

In the past, the Commission and the Member States were occasionally confronted with situations which did not comply with the legislation in force but where it was considered that either the definition of irregularity set out above was inappropriate or that the reporting of this kind of irregularity was without added value.

In the light of these experiences, the Commission has simplified the sectoral rules on the reporting of irregularities, introducing a number of exceptions.

EAGF, EAFRD, FEAD and AMIF/ISF

Similar exceptions to reporting are these:

Commission Delegated Regulation (EU) 2015/1971 provides for exceptions to reporting for the EAGF and the EAFRD.

Regulation (EU) 2015/1972 provides for exceptions to reporting for the Fund for European Aid to the Most Deprived the Delegated.

Commission Delegated Regulation (EU) 2013/1973 provides for exceptions to the reporting for the Asylum, Migration and Integration Fund, and for the instrument for financial support for police cooperation, preventing and combating crime, and crisis management.

8.3. The concept of ‘bankruptcy’

Under the reporting obligations on expenditure, cases of ‘simple bankruptcy’ do not have to be reported, except irregularities preceding a bankruptcy and cases of suspected fraud, which must be reported.

‘Simple bankruptcy’ should be understood as failure to execute, partially or totally, an operation co-financed by the EU budget owing to the bankruptcy of the final beneficiary and/or the final recipient, neither preceded by an irregularity nor involving suspected fraud.

‘Bankruptcy’ means insolvency proceedings within the meaning of Article 2(a) of Regulation (EC) No 1346/2000.⁶² Cases of insolvency and bankruptcy are the cause of an irregularity within the meaning of Regulation (EC, Euratom) No 2988/95, if they:

- a) involve a breach of EU legislation (e.g. very typically, non-implementation of contractual obligations)
- b) have a potential impact on the EU budget.

⁶² Article 122(2)(a) of Regulation (EU) No 1303/2013; Article 30(2)(a) of Regulation (EU) No 223/2014; and Article 3(3)(a) of Commission Delegated Regulations (EU) Nos 2015/1971 and 2015/1973.

Bankruptcy, even where it is not fraudulent, could lead to a breach within the meaning of Article 1 of Regulation (EC, Euratom) No 2988/95. By its very nature, it does not have the character of ‘an event beyond the control of the operator’⁶³ as laid down in case-law.

It goes without saying that insolvency or bankruptcy does not limit the actions of the authorities and has, in any event, to be reported in the annual statement, for the purposes of financial follow-up. These notifications enable the Commission to decide whether appropriate measures for protecting the financial interest of the EU budget should be taken.

The reporting provisions provide for exceptions (see above). These exceptions do not apply, in particular, to cases of irregularities preceding a bankruptcy and cases of suspected fraud, which must be reported.

⁶³ The case-law of the Court of Justice defines ‘force majeure’ as ‘abnormal and unforeseeable circumstances, outside the control of the operator concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided’. Judgment of the Court (First Chamber) of the Court of Justice of 17.10.2002 — Isabel Parras Medina e Consejería de Agricultura y Medio Ambiente de la Junta de Comunidades de Castilla-La Mancha (Case C-208/01) and Judgment of the Court (Fourth Chamber) of 9.8.1994 — Belgian State v Boterlux SPRL (Case C-347/93) on a preliminary question.

9. REPORTING AND CLOSING THE IRREGULARITY

In EU legislation the deadlines for meeting the reporting obligation vary, based on the type of the irregularity report (initial; follow-up or special report).

Legal basis

Article 2 of the Commission Implementing Regulations (EU) No 2015/1974, 2015/1975, 2015/1976 and 2015/1977 sets out the schedule for reporting irregularities:

(1) Within two months following the end of each quarter, Member States shall send to the Commission initial report on irregularities referred to in Article 3 of Delegated Regulation (EU) 2015/1970.

(2) Member States shall send to the Commission the follow-up report referred to in Article 4 of Commission Delegated Regulation (EU) (2015/1970/1971/1972/1973) as soon as possible after obtaining the relevant information.

(3) A Member State shall immediately report to the Commission irregularities discovered or supposed to have occurred, indicating any other Member States concerned, where the irregularities may have repercussions outside its territory.

9.1. Initial reporting

The Member States are required to send the first report on a newly established irregularity no later than two months following the end of the quarter in which the primary finding (PACA) was made. However, the Irregularity Management System (IMS) allows earlier reporting. This regular reporting activity helps to spread the administrative burden and to ensure timeliness.

9.1.1. Cases with no initial obligation to report

Irregularities which initially are below the reporting thresholds or are among the exceptions to reporting to the Commission are recorded with the date of the PACA and are not reported to the Commission (OLAF). In some cases, after a certain period of time (which can even be

years), new findings emerge and some of these irregularities become reportable to the Commission.

In order to avoid statistical distortions in ‘reporting efficiency’, i.e. the average period of time between the establishment of an irregularity and its reporting to the Commission, and to avoid the impression that the Member State concerned did not comply with the reporting rules, the date on which information became known leading to a change in the irregularity’s classification as reportable to the Commission is entered in IMS as the detection date. The date when the irregularity was actually detected but was not yet reportable is entered in the comments section.

9.1.2. Limitation period for reporting

EU law does not provide for any limitation period for the reporting obligation, so the obligation does not expire. However, it would be reasonable to align the deadline for reporting with the conservation period for supporting documents following the closure of the programme/action concerned. For cases of ‘suspected fraud’, the limitation period should coincide with the limitation period for the offence concerned provided for in national legislation.

9.2. Special/urgent reports

Where it is feared that an irregularity discovered or supposed to have occurred may have repercussions outside the territory of the reporting Member State, a special/urgent report indicating the other Member States concerned must be sent to the Commission **immediately**.

How to reflect this in IMS

As a practical approach, IMS enables Member States to move the switch box for field 1.13 from NO (0) to YES (1).

9.3. **Compiling multiple irregularity reports (joint reports)**

The rule is that the reports should cover individual cases. However, Member States have the possibility of combining reports in some situations, e.g.:

- if an economic operator commits more than one type of irregularity in relation to the same measure, these irregularities could be put together in one joint irregularity report, taking into consideration the total value of the irregularities;
- if an economic operator commits irregularities concerning projects from different programming periods (e.g. 2007-2013 and 2014-2020) and/or different Funds, the reporting should be done individually by programming period and by Fund, with cross-references to the linked cases.⁶⁴

9.4. **Follow-up reports**

Member States have a duty to provide information in follow-up reports on the initiation, conclusion or abandonment of any procedures or proceedings for imposing administrative measures, administrative penalties or criminal penalties, and on the outcome of those procedures or proceedings. The follow-up reports should be sent as soon as possible after the reporting authority of the Member State obtains the relevant information on the follow-up of the case (information not available at the time of initial reporting or data to be rectified; information on the initiation, conclusion or abandonment of the relevant proceedings).

In particular, with regard to irregularities for which penalties have been imposed, Member States must also indicate:

- (a) whether the penalties are of an administrative or a criminal nature;
- (b) whether the penalties result from a breach of Union or national law, and details of the penalties;
- (c) whether fraud was established.

⁶⁴ For the time being, IMS does not provide a facility for a multiple programming period or multiple funds at the same time.

9.5. Closure of the case

After finalising any proceedings and informing the Commission of their outcome, Member States should complete and finalise the reporting and close the case.

Other examples of closing a case after finalisation the procedures could be:

- the beneficiary fulfils an obligation, in a case where the irregularity was non-fulfilment of the obligation;
- the financial correction procedure is finalised;
- the possibility of compulsory collection of the irregular amount expires;
- the beneficiary is removed from the trade register;
- the managing authority discovers the irregularity before payment and the funding agreement is cancelled or the beneficiary agrees to cover the financial consequences of the irregularity.

For cases related to structural policies (Structural and Cohesion Funds), for the 2000-2006 and earlier programming periods, the Commission (OLAF, following a request from the Directorate-General concerned⁶⁵) closes the cases in IMS. For the 2007-2013 programming period, the Member State concerned closes the cases in IMS when all proceedings/procedures have been concluded at national level, including the reimbursement of the amount concerned to the EU budget.

9.6. Cancellation of the case

When updating the initial report, Member States can also indicate that, following further inquiries, the case initially reported as irregular did not constitute a breach of the relevant provisions after all, and cancel the case.

⁶⁵ For such cases, IMS is also used to follow-up recovery.

How to do it in IMS

When updating a case, a 'request' option is available to cancel the case.

Bear in mind that making such a request will permanently erase from IMS all information which could lead to identification of the project (and, consequently, of the beneficiary) initially reported as affected by irregularity. Once sent to the Commission/OLAF, the information is no longer recoverable.

10. FINANCIAL ASPECTS OF THE IRREGULARITY

Legal basis

Article 3(2) of Commission Delegated Regulations (EU) No 2015/1970, 2015/1971, 2015/1972 and 2015/1973 require Member States to provide the following information:

(l) the total amount of expenditure of the operation concerned, expressed in terms of the Union's contribution, the national contribution and the private contribution;

(m) the amount affected by the irregularity, expressed in terms of the Union's contribution and the national contribution;

(n) in the case of suspected fraud, and where no payment of the public contribution has been made to the beneficiary, the amount which would have been unduly paid, had the irregularity not been identified, expressed in terms of the Union's contribution and the national contribution;

(o) the nature of the irregular expenditure;

(p) the suspension of payments, where applicable, and the possibility of recovery of amounts paid.

10.1. The total amount of expenditure

The total amount of expenditure refers to the total financing of the project or operation concerned (the EU's and Member State's shares of the public contribution, and the private contribution). Not only the irregular amount, but the whole budget of the approved project should be stated.⁶⁶

10.2. The amount of the irregularity

The amount of the irregularity (irregular sum) should be calculated by combining the actual and potential financial impact of the case, covering not only the expenditure already unduly paid to the final beneficiaries/declared to the Commission, but also the affected amounts

⁶⁶ Annex IV.4 to these guidelines provide for concrete examples.

before declaration. Any amount considered ineligible because an irregularity was detected in connection with the co-financed project or operation (from the EU's and the Member State's share of the public contribution) should be reported.

In some cases the actual irregular amount may differ from the total amount of the invoice/contract affected by the irregularity. For example, in public procurement-related irregularities, Member States are entitled to apply proportional and percentage-based financial corrections (according to the scale of the irregularity, in line with Commission guidance). In such cases, the amount set in the financial correction decision can be regarded as the financial impact of the irregularity and that amount should be stated in the report.

11. EUROPEAN TERRITORIAL COOPERATION PROGRAMMES (INTERREG) AND IRREGULARITY REPORTING

Legal basis

Article 3(4) of Commission Delegated Regulation (EU) No 2015/1970:

'Irregularities relating to operational programmes under the European territorial cooperation goal shall be reported by the Member State in which the expenditure is paid out by the beneficiary in implementing the operation. The Member State shall inform the managing authority, the certifying authority for the programme and the audit authority.'

The competent authorities can grant other authorities from the same country direct access to their European territorial cooperation (ETC) cases in IMS. If the competent ETC authorities abroad (the managing authority, certifying authority and audit authority) do not have direct access to the specific cases reported to the Commission in relation to ETC programmes by a specific Member State, the preferred solution is the following:

- The national ETC coordinator sends relevant quarterly information on those cases to the dedicated AFISMail⁶⁷ box of the competent managing authorities, in the form of a file exported from IMS.
- The managing authority in question subsequently shares this information with the other competent authorities of the particular Member States (the certifying authority, the audit authority) in accordance with its own internal procedures and requirements. AFISMail can also be used for this purpose.

12. FINANCIAL INSTRUMENTS AND REPORTING

The 'contribution from the Funds' referred to in the Delegated Regulations on irregularity reporting includes support to financial instruments⁶⁸ from the funds, more specifically the ESI Funds.

⁶⁷ Anti-Fraud Information System (AFIS), see Section 14.

In addition, Article 140 of the Financial Regulation requires the Commission to ensure harmonised management of financial instruments, particularly in accounting, reporting, monitoring and financial risk management.

Article 37 of Regulation 1303/2013 requires the managing authorities, the bodies implementing funds of funds, and the bodies implementing financial instruments to comply with applicable law, in particular on state aid and public procurement. It follows from the provisions of that Article that irregularities regarding financial instruments must be reported insofar as ESI funds are used to support financial instruments, under one or more programmes.

The second subparagraph of Article 38(4) of Regulation 1303/2013 requires bodies implementing financial instruments to ensure compliance with applicable law, including rules covering the ESI Funds, state aid, public procurement and relevant standards and applicable legislation on the prevention of money laundering, the fight against terrorism and tax fraud.

Irregularities to do with financial instruments should be quantified in practice as follows:

The full amount linked to the financial instrument must be reported to IMS.

- If guarantees have been given, the full amount of the particular guarantee should be reported.
- Irregular amounts linked to contributions in kind in connection with financial instruments should be quantified according to the conditions laid down in Article 69(1) of Regulation 1303/2013.
- However, bear in mind that specific circumstances may also apply to irregularities linked to financial instruments.

⁶⁸ Financial instruments, as defined in Article 2 of Regulation (EU, Euratom) No 966/2012 (for full reference see footnote 33), are Union measures of financial support provided on a complementary basis from the budget in order to address one or more specific policy objectives of the Union.

13. CONFIDENTIALITY OF NATIONAL INVESTIGATIONS

Legal basis:

Article 3(5) of Commission Delegated Regulation (EU) No 2015/1970 and Article 3(4) of Commission Delegated Regulations (EU) No 2015/1971, 2015/1972 and 2015/1973:

'Where national provisions provide for the confidentiality of investigations, communication of the information shall be subject to the authorisation of the competent tribunal, court or other body in accordance with national rules.'

The obligation imposed by EU legislation to report irregularities may in principle only be limited by requirements in national legislation on confidentiality. Where national provisions provide for 'confidentiality of investigations', irregularity reporting is 'subject to the authorisation of the competent tribunal or court'.

However, given the basic requirement of loyal cooperation,⁶⁹ invoking the confidentiality rule to refuse to provide information must remain an exception. The confidentiality rule should rather be used for its purpose, which is primarily to ensure the presumption of innocence, the gathering of facts and the establishment of the facts related to an irregularity or suspected fraud.

The power conferred on the judicial authorities of Member States to decide whether or not to report for reasons of confidentiality of investigations must also be applied in a balanced manner. Provided the national legislation of a Member State does not constitute an obstacle, the judicial authorities must authorise the reporting of irregularities to give effect to EU legislation. It may, however, refuse to communicate any sensitive information (e.g. the identity of a suspected person) and confine itself to reporting facts which do not jeopardise

⁶⁹ See Article 4(3) of the Treaty of the European Union.

Refusing to communicate information on the grounds of the confidentiality of national investigations must remain an exception.

the confidentiality of the proceedings (e.g. the amounts involved, the measure and the programme concerned).

Furthermore, there must not be an overlap with certain national legal provisions which would lead to a systematic refusal to report cases of irregularity (suspected or established). This would be contrary to

the principle of uniform application of EU law since, in some Member States, the rules on the confidentiality of investigations do not prevent information being exchanged between public authorities (judicial or administrative), on a 'need to know' basis, in carrying out their duties.

Consequently, confidentiality of investigations cannot be invoked 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 on to a judicial authority. Confidentiality of investigations may be used only when the matter has actually been referred to a judicial authority for investigation and this authority has not approved the communication of information to the Commission in a case of irregularity. This also applies to any information that may have been gathered by the administrative authority responsible after legal proceedings have been opened.

14. CURRENCY OF REPORTING

Legal basis:

Article 4 of Commission Implementing Regulations (EU) No 2015/1974, 2015/1975, 2015/1976 and 2015/1977 requires the Member States to report amounts in euros.

Member States which have not adopted the euro as their currency have to convert amounts in national currency into euros using the exchange rate specified in the sectorial Regulations. Where the expenditure has not been registered in the accounts of the certifying authority, the most recent monthly accounting exchange rate, published electronically by the Commission at the moment of initial reporting, shall be used.

There are three different financial scenarios in which an irregularity may be discovered:

1. An irregularity is discovered ‘**before payment**’ — before any irregular expenditure was entered in the accounts of the paying authority or before any of the irregular amounts was entered in the accounts of the certifying authority of the operational programme.
2. An irregularity is discovered ‘**after payment**’ — after all of the irregular expenditure was entered in the accounts of the paying authority or after all of the irregular amounts were entered in the accounts of the certifying authority of the operational programme. This situation suggests use of multiple rates.
3. An irregularity is discovered ‘**after and before payment**’ — after part of the irregular amount was entered in the accounts of the paying authority or part was entered in the accounts of the certifying authority of the operational programme. In addition, part of the irregular amount was still not entered in the accounts of the paying authority or part was not entered in the accounts of the certifying authority of the operational programme. This situation suggests use of multiple rates.

Regulation (EU) No 1303/2013 directly implies a requirement to use multiple exchange rates for cases of irregularities to be reported after payment.

In addition, regarding the use of exchange rates, e.g. for the cohesion policy funds, there are different rules for each programming period:

For the 2000-2006 programming period, Article 12 of Regulation (EC) No 1681/94 as amended by Regulation (EC) No 2035/2005, and Article 12 of Regulation No 1831/94 as amended by Regulation (EC) No 2168/2005 state as follows:

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.

For the 2007-2013 programming period, Article 81 of Regulation (EC) No 1083/2006, and Regulation (EC) No 1828/2006 as amended by Regulation (EC) No 846/2009, state as follows:

Member States which have not adopted the euro (...) shall convert into euro the amounts of expenditure incurred in national currency. This amount shall be converted into euro using the monthly accounting exchange rate of the Commission in the month during which the expenditure was registered in the accounts of the certifying authority of the operational programme concerned.

For the 2014-2020 programming period, Article 133 of Regulation No 1303/2013 and Article 4 of Implementing Regulation No 2015/1974 state that:

*For irregularities discovered after inclusion into the declaration to the Commission, the exchange rate of the **month of the inclusion of the expenditure into a declaration** should be used.*

For irregularities where the expenditure has not

For unification and simplification reasons, for reporting irregularities the Member States concerned can use one exchange rate instead of several, as follows:

- by observing the rule introduced by Regulation (EC) 1828/2006, as amended by Regulation (EC) No 846/2009, enabling the use of a single exchange rate for all programming periods;
- by applying the same rules to 'after and before payment' cases as to 'after payment' cases;
- by applying the same rule to 'before payment' cases in 2014-2020 to all programming periods.

been registered in the accounts of the certifying authority, the most recent monthly accounting exchange rate published **at the moment of initial reporting**, should be used.

15. DATA PROTECTION

Legal basis

Article 3(2)(b) and Article 5 of Commission Delegated Regulations (EU) Nos 2015/1970, 2015/1971, 2015/1972 and 2015/1973:

A. Member States shall provide the following information:

Article 3 — Initial reporting

2 — In the initial report Member States shall provide the following information:

(b) the identity of the natural or legal persons concerned, or both, or of any other entity having a role in the commission of the irregularity and their role, except where that information is irrelevant for the purposes of combating irregularities, given the nature of the irregularity concerned.

B. Information provided under this Regulation shall be protected:

Article 5 — Use and processing of information

2. Information provided under this Regulation shall be covered by professional confidentiality and protected in the same way as it would be protected by the national legislation of the Member State that provided it and by the provisions applicable to the Union's institutions. Member States and the Commission shall take all necessary precautions to ensure that the information remains confidential.

3. The information referred to in paragraph 2 may not, in particular, be disclosed to persons other than those in the Member States or within the Union's institutions whose duties require that they have access to it, unless the Member State providing it has given its express consent.

Personal data held by the Member States is covered by the national legislation on data protection currently transposing Directive No 95/46.⁷⁰ In April 2016 the Council adopted Regulation (EU) 2016/679⁷¹ on the protection of natural persons with regard to the

⁷⁰ OJ L 281, 23.11.1995, p. 31.

⁷¹ OJ L 119, 4.5.2006, p. 1.

processing of personal data and of the free movement of such data. This new Regulation will apply to Member State authorities from 25 May 2018.

In certain fields the collection and transmission of personal data to the Commission is required by EU law, specifically under Article 3(2)(b) of Commission Delegated Regulations (EU) Nos 2015/1970, 2015/1971, 2015/1972 and 2015/1973.⁷² This data can be collected only for specific, explicit and legitimate purposes, as laid down in Article 5 of these Delegated Regulations and Directive No 95/46, and its transmission to the Commission should be compatible with this goal.

The details to be provided to the Commission are based on a formal obligation contained in the specific sectoral EU Regulations referred to above. The Commission is formally responsible for: (a) ensuring compatibility with the aims set out in those Regulations; and (b) the disclosure of personal data to persons within the Union's institutions whose duties require that they have access to it.

Commission departments have been obliged since 1 January 1999 to comply with Article 16⁷³ of the TFEU Treaty and since 1 February 2001 to comply with the specific obligations laid down in Regulation (EC) No 45/2001⁷⁴ of the EP/Council on data protection. That Regulation applies to all personal data held by the EU institutions and bodies, including personal data originating in the Member States or from any other internal or external source.

Given that legal framework, there is no need to insert additional general provisions on data protection in sectoral legislation concerning personal data made available through Member States' reporting to Commission departments.

With regard to irregularity reporting, the Commission provides a secure electronic communication tool for the Member States to help them meet their irregularity reporting obligations for shared implementation funds (agricultural, structural and investment,

⁷² See footnote 5.

⁷³ Ex Article 286 TEC.

⁷⁴ OJ L 8, 12.1.2001, p. 1.

fisheries, Asylum and integration and FEAD), and for pre-accession assistance funds (in indirect implementation).

The Irregularity Management System (IMS) is a secure electronic tool for reporting, management and analysis of irregularities. IMS is part of the Anti-fraud Information System (AFIS) developed and maintained by OLAF.

AFIS is an umbrella platform for a set of anti-fraud applications operated by OLAF under a common technical infrastructure aimed at timely and secure exchange of fraud-related information between Member States' administrations, as well as storage and analysis. Thus the AFIS Project encompasses two major areas; mutual assistance in customs matters, and irregularity management.

The reported data provided by Member States is held for at least five years and up to three years after the closure of the irregularity case and the closure of the corresponding EU-financed programme/measure.

For each IMS user with access to the IT tool, the following personal data are held within the system: login ID, given name, family name, email and administration the user belongs to, preferred interface language, application preferences and role. Personal data are stored and maintained in a secure electronic directory accessible only to duly authorised AFIS applications and are accessible to the OLAF staff responsible for managing the registration process and for the management of users and technical issues. The data are held as long as the users are officially allowed to access the application, and are reviewed periodically to ascertain their validity. Once a user is deleted, the user's creation/modification/deletion record is kept for a maximum of 10 years.

IMS users have the right to access the information OLAF holds and request rectification, blocking or erasure of the data by contacting the controller (olaf-fmb-data-protection@ec.europa.eu). Users also have recourse to the European data protection supervisor if they consider that their data protection rights have been breached by OLAF.

16. TRANSMISSION OF IRREGULARITY REPORTS

Legal basis

Article 3 of Commission Implementing Regulations (EU) No 2015/1974, 2015/1975, 2015/1976 and 2015/1977 sets out the reporting format:

The information referred to in Articles 3 and 4 of Delegated Regulations (EU) 2015/1970, 2015/1971, 2015/1972 and 2015/1973 shall be sent by electronic means, using the Irregularity Management System, established by the Commission.

Under this Article, information related to the reporting of irregularities must be sent by electronic means, using the Irregularity Management System (IMS) set up by the Commission. No information, including cover letters, should be sent by post or email. All information must be sent via IMS.

The Irregularity Management System enables Member States to report irregularities related to expenditure to the Commission. The IMS is part of the Anti-Fraud Information System (AFIS) (see Section 15).

In addition, information requested from the entities referred to in Article 108(2)(d) of the Financial Regulation⁷⁵ must be sent only through the Irregularity Management System, in accordance with the sector-specific rules. For the use of IMS data for the early detection and exclusion system (EDES), see Annex III.

⁷⁵ Regulation (EU, Euratom) No 966/2012 as amended (for full reference see footnote 33) and Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015, L 342, 29.12.2015, p. 7.

ANNEX I — REPORTING PROVISIONS RELATING TO EXPENDITURE FOR THE PREVIOUS PROGRAMMING PERIOD

II. 1 Agriculture

Commission Regulation (EC) No 1848/2006 of 14 December 2006 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organisation of an information system in this field and repealing Council Regulation (EEC) No 595/91.

II. 2 Structural and Cohesion Funds

For the periods 1989-1993, 1994-1999, and 2000-2006

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 organisation of an information system in this field, Official Journal L 178, 12.7.1994, p. 43, as amended by Regulation (EC) No 2035/2005 of 12 December 2005, OJ L 328, 15.12.2005, p. 8.

This Regulation applies to the Structural Funds; European Regional Development Fund (ERDF), European Social Fund (ESF), European Agriculture Guidance and Guarantee Fund (EAGGF) — Section Guidance and Financial Instrument for Fisheries Guidance (FIFG)

Commission Regulation (EC) No 1831/94 of 26 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the Cohesion Fund, and the organisation of an information system in this field, OJ L 191, 27.07.1994, p. 9, as amended by Regulation No 2168/2005 of 23 December 2005, OJ L 345, 28.12.2005, p. 15.

For the period 2007-2013

Commission Regulation (EC) No 1828/2006 of 8 December 2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund, OJ L 371, 27.12.2006 as amended by Regulation (EC) No 846/2006.

II. 3 Fisheries

For the period 2007-2013

Commission Regulation (EC) No 498/2007 of 26 March 2007 laying down detailed rules for the implementation of Council Regulation (EC) No 1198/2006 on the European Fisheries Fund, OJ L 120, 10.05.2007, p. 1, as amended by Regulation (EU) No 1249/2010, OJ L 341, 23.12.2010, p. 3.

ANNEX II — THE CONCEPT OF AN IRREGULARITY SIGNAL

A number of Member States have introduced the notion of an ‘irregularity signal’ in their internal reporting procedures. It should be stressed that this notion is not provided for in the EU Regulations, therefore not binding on Member States. Nonetheless, IMS has been adapted for the Member States that decide to apply it.

An **irregularity signal** is to be understood as ‘any information received from any source about the existence of an irregularity before the assessment of this information’ (e.g. an allegation of irregularity).

The information available in an irregularity signal may or may not be sufficient to definitely confirm the existence of an irregularity or a suspected fraud and needs to be assessed, as the obligation to report starts from the ‘first written assessment’ (see Section 7 below).

National authorities must therefore be reminded that at any point in time when they notice elements leading to an irregularity signal, in conducting activities and related routine checks, they should investigate the case further, if competent, or report the information to the relevant authority.

In some Member States the following procedure is used to handle ‘irregularity signals’

After receiving the signal (suspicion of irregularity) the managing authority or intermediate body drafts a note/memo with the information received. After approval of the note/memo by the head of institution, the institution has 30 working days to perform the procedure for establishing the irregularity (e.g. on-the-spot check) and after the process is finished they have to take a decision.

Decisions on irregularity may have two outcomes:

- **Decision on established irregularity (PACA)** or
- **Decision on absence of irregularity**

Decision on established irregularity represents a primary finding or PACA. It is completed by the competent person (e.g. project manager) of the competent body (managing authority or intermediate body) and the result of the control is the report. If the report contains information about the irregularity, the decision on established irregularity is drafted

and signed by the head of the institution (the managing authority or intermediate body). After the approval of the decision, irregularity reporting starts within IMS.

Decision on absence of irregularity means a written assessment made by the competent body (the managing authority or intermediate body), based on concrete facts, concluding the absence of irregularity.

All signals and decisions on established irregularities/decisions on absence of irregularities are recorded within the internal Register of Irregularities, which includes the whole management life cycle of an irregularity case. Furthermore, the Register contains dates, names, project information, amounts, modus operandi, measures taken by the institution, etc.

ANNEX III — EARLY DETECTION AND EXCLUSION SYSTEM (EDES)

The Early Detection and Exclusion System (EDES) is the new system established to reinforce the protection of the Union's financial interests and to ensure sound financial management. From January 2016 it replaced the previous Early Warning System and Central Exclusion Database as a repository of information on potentially unreliable contractors and beneficiaries.

Legal basis: The EDES rules are to be found in the revised Financial Regulation (Articles 105a - 108 of the Financial Regulation (FR) and Articles 143 and 144 of the Rules of Application (RAP))⁷⁶.

Article 143 — Functioning of the database for the early detection and exclusion system (Articles 108(1), (2), (3), (4) and (12) of the Financial Regulation)

In order to ensure the functioning of the database referred in Article 108(1) of the Financial Regulation, the institutions, offices, bodies, agencies and entities referred to in points (c), (d) and (e) of Article 108(2) of the Financial Regulation shall designate authorised persons.

Where applicable, these authorised persons shall provide the information referred to in Article 108(3) of the Financial Regulation. They shall be granted access in accordance with paragraphs 4 and 12 of Article 108 of the Financial Regulation.

Authorised persons already designated by the entities referred to in point (d) of Article 108(2) of the Financial Regulation in accordance with the sector-specific rules may be used for the purposes of Article 108(12) of the Financial Regulation.

Information requested from the entities referred to in point (d) of Article 108(2) of the Financial Regulation shall be sent only through the Irregularity Management System which is the automated information system established by the Commission currently in use for reporting of fraud and irregularities, in accordance with the sector-specific rules.

*For the purpose of Article 108(4) of the Financial Regulation, the information sent through this automated information system shall be made available by the Commission in the database referred to in Article 108(1) of the Financial Regulation.

⁷⁶ Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, OJ L 362, 31.12.2012, p. 1, as amended by Commission Delegated Regulation (EU) 2015/2462 of 30 October 2015, OJ L 342, 29.12.2015, p. 7.

* The fifth subparagraph of Article 143 shall apply from 1 January 2017.

The purpose of EDES

The purpose of EDES is to protect the Union's financial interests against unreliable economic operators. In particular, EDES ensures:

- early detection of an economic operator representing risks threatening the Union's financial interests;
- exclusion of an economic operator from receiving Union funds ([Article 106\(1\) of the FR](#));
- imposition of a financial penalty on an economic operator ([Article 106\(13\) of the FR](#));
- publication, in the most severe cases, on the Commission's internet site of information related to the exclusion, and where applicable the financial penalty, in order to reinforce their deterrent effect ([Articles 106\(16\) and 106\(17\) of the FR](#)).

What kind of information is stored in EDES?

EDES is composed of an exclusion branch and an early detection branch. The exclusion branch records cases of bankruptcy, winding down and similar procedures that disqualify economic operators from participation in EU calls for tender and proposals. It also records administrative penalties imposed by the Commission (Authorising Officers) on economic operators for reasons of *established*⁷⁷ fraud, grave professional misconduct or serious breach of contract, resulting in the exclusion of those economic operators from EU direct funding for a certain period of time and/or in financial penalties levied on them. The early detection branch allows Authorising Officers to flag economic operators that could pose a threat to EU financial interests, because these economic operators are *suspected* of fraud, grave professional misconduct, etc. Flagged economic operators are not excluded from EU funding but may have to go through more intense monitoring and verification. A flagging will be deleted after one year unless an exclusion procedure has been initiated against the economic operator concerned.

How does EDES work?

⁷⁷ Established through a final judicial or administrative decision – Article 106(1)(c) or (d) of the FR – or in the sense that the Authorising Officer considers the relevant facts established and that those facts have been the subject of a preliminary classification in law and a recommendation by the Panel referred to in Article 108 FR, see Article 106(2) FR. The notion of an established misconduct in this sense is thus larger in scope than that of 'established fraud' in the context of irregularity reporting, see Section 6.3 of this Handbook.

Information is fed into EDES by the Authorising Officers of all EU institutions and bodies. Entrusted entities (under indirect implementation of the EU budget) and Member State authorities/bodies (under shared implementation of the EU budget) also contribute to the input of information into EDES through the Irregularity Management System (IMS) (partially filtered through Commission departments). Information may stem from court decisions on bankruptcy, etc., from audits conducted by Authorising Officers, entrusted entities and Member State authorities and from OLAF investigations. EDES may be consulted by all Authorising Officers of EU institutions and bodies and other legitimate users such as OLAF and DG BUDG, which is the business owner of EDES. In addition, the exclusion branch of EDES is also accessible to entrusted entities and Member States, which are, however, not automatically bound by an exclusion decision recorded in EDES.

How can EDES be useful to national authorities?

EDES allows the national competent authority to access the exclusion branch of EDES and check whether a given entity has already been reported for established or suspected cases of fraud and other types of misconduct. EDES is also a first port of call to check whether an entity has gone bankrupt or is being wound up. It should be borne in mind, though, that where a particular piece of information is recorded in, or indeed missing from EDES, EDES (like any administrative database) may not necessarily reflect the real-time situation. For more details about a given record, it will be necessary to contact the authority or body that created the record.

The use of IMS data for the purpose of EDES

Member States will report in IMS cases of fraud and irregularities, in accordance with the rules laid down in the sector-specific reporting provisions.⁷⁸ There will be no automatic transfer of IMS data to the EDES database.

As of 1 January 2017, the Commission (an authorising officer/contracting authority), other institutions, agencies, bodies, are able to verify, through EDES, in the context of e.g. procurement procedure, if there is a ‘hit’ for that economic operator with the information contained in IMS.

If there is a hit, the national competent reporting authority will be contacted by OLAF to update IMS information. Consequently, the responsible authorising officer will, where appropriate, start the exclusion procedure in accordance with the FR (with the prior recommendation of the panel ensuring due process and decision of an authorising officer) with the view to creating the exclusion case in the EDES database.

⁷⁸ See Section 2 of the main document.

How to access EDES?

‘All entities participating in the implementation of the budget in accordance with Articles 59 and 60 of the Financial Regulation shall be granted access by the Commission to the information on exclusion decisions under Article 106 to enable them to verify whether there is an exclusion in the system. They may take this information into account, as appropriate and on their own responsibility, when awarding contracts in the implementation of the budget (Art. 108(12) FR).’ Technically, access is given to designated persons in the Member States, which in turn can give rights to further authorised users which need them for the task of implementing the EU budget.

ANNEX IV — EXAMPLES

IV. 1 — Primary finding (PACA) — Facts generating the obligation to report

1) The beneficiary submitted an application for an advance payment for carrying out the project ‘Construction of a centre for relaxation, leisure and sport’. The beneficiary declared that the documents submitted as evidence of works carried out by the company were true and accurate. Administrative checks were carried out by the state fund for agriculture because of a signal to the Ministry of Agriculture concerning a suspicion of fraud committed by the beneficiary by providing false documents attached to the application for advance payment. The information was sent to the Prosecution Office to start preliminary checks and an irregularity classified as suspected fraud was reported.

2) The beneficiary declared in a common application for paying for a single area that he possessed and received subsidies for a certain piece of land. As stated in a court decision, it was obvious that the beneficiary was guilty of providing false data, according to the Penal Code. As a result of the penal proceedings the defendant was released from criminal liability pursuant to the Penal Code and an administrative penalty (a fine), was imposed. The irregularity classified as established fraud was reported and an agreement was signed to collect the unduly paid money. The debt was fully recovered and the case was closed.

When applying for payment, the beneficiary declared that he had fully completed the approved business plan and made the investment expected in it. During the on-the-spot checks and the administrative checks it was found that accounting documents had been presented with untrue data, there were discrepancies between the declared information and the real investment, and agricultural land had been declared without a contract. The information on the case was sent to the Prosecution Office. Pre-trial proceedings started for submitting untrue data, but were dismissed. A trial started for concealing data in violation of an obligation to present the data in order to receive funds belonging to the European Union. An irregularity classified as suspected fraud was reported.

3) In the context of managing and using the IPA II CBC programme, most of the established irregularities were classified as an ‘infringement of rules concerned with public procurement’. Irregularities were established by the relevant national authority during an on-the-spot check at the premises of the beneficiary. The modus operandi of the irregularity was that the beneficiaries, when performing secondary public procurement of the goods and equipment, did not check if the goods and equipment had the certificate of origin issued by the relevant Chamber of Economy. Upon establishing the irregularity, the relevant authority declared the expenditure concerned as ineligible and recovered the amount affected by the irregularity.

4) In the context of managing and using the IPA II CBC programme, an irregularity was established when the beneficiary's final report was reviewed by the relevant national authority (intermediate body level 2). During the documentation check, it established an irregularity which had elements of suspected fraud. A meeting was organised between the intermediate body and the Service for Combating Irregularities and Fraud and relevant AFCOS network bodies (the State Attorney Office and Ministry of Interior). The conclusion of the meeting was that all relevant documents should be sent to the State Attorney Office for judicial proceedings and the intermediate body which established the irregularity should initiate the recovery procedure. The modus operandi of the irregularity was that the beneficiary had an arrangement with the economic operator regarding the procurement of the goods. After the State Attorney Office had taken appropriate action regarding the suspected fraud, its conclusion was to dismiss the case. However, in the context of the administrative proceedings, the beneficiary repaid the irregular amount in accordance with the recovery decision of the intermediate body.

5) In the context of managing and using ERDF funds for the period 2007-2013, an irregularity with elements of suspected fraud was established by the managing authority when conducting an on-the-spot check. During the handling of the case, meetings were held between the managing authority, the Service for Combating Irregularities and Fraud and relevant AFCOS network bodies (e.g. the State Attorney Office and Ministry of Interior) regarding appropriate actions by the relevant body in respect of the suspected fraud. The modus operandi of the irregularity is that during work on the reconstruction of railroads the economic operator used material that was of poorer quality than the material stipulated in the contract. The irregularity was classified as suspected fraud and was reported to the State Attorney Office and OLAF. Additionally, the managing authority asked the economic operator to recover the irregular amount concerned.

6) At an Administrative Verification by the managing authority on 9 December 2015 (date of discovery — PACA DATE) it was found that implementation was not consistent with the project technical sheet and physical object. Due to this finding, an administrative act was issued for the withdrawal of the project. On 18 December 2015 the expenditure was deducted from the operational programme. The administrative act for recovery was adopted on 18 December 2015. On 14 January 2016, the competent tax office was notified that a debt was owed by the municipality concerned in connection with the recovery of funding. The irregularity was reported in IMS on 14 January 2016.

The beneficiary appealed to the competent Court of Auditors, which was informed of the case by the management authority on 8 March 2016. The decision of the Court of Auditors is pending to date.

So in the first case, which refers to an ERDF project and to the administrative verification that was carried out by the managing authority, PACA DATE is the date on which the administrative act for the exclusion of the project from the operational programme was issued.

7) The project was selected for the operational programme ‘Development of Human Resources 2007-2013’. The national control authority, EDEL, carried out an on-the-spot check of the project and it was found that there was not sufficient evidence of implementation for a certain part of the project. The national control authority issued the audit report (PACA DATE). Due to the report findings, specific amounts of expenditure were excluded as ineligible. The administrative act for reimbursement was issued a few days later.

The second case refers to a European Social Fund project and to the on-the-spot check which was carried out by the national audit authority. The PACA DATE is the date on which the audit report was issued. The report included the type of irregularity and the ineligible amount and it was communicated to the beneficiary.

8) The measure was launched by the operational programme ‘Rural Development Programme 2007-2013’. Joint Ministerial Decision 704/2008 set up the terms and conditions for the measure’s implementation.

The competent service, a region’s forestry and rural affairs service, carried out on-the-spot checks and administrative controls and issued a report on compliance with the obligations under the Joint Ministerial Decision. According to the report, the beneficiary failed to meet its obligations, as it did not submit the request for the second and third payment in time.

The beneficiary was called upon to submit objections to the findings or, failing that, to return the first payment. In March 2016, the general secretary of a EU region issued the administrative act for the recovery of the amount.

In the third case, which refers to a project of the European Agricultural Fund for Rural Development and to the administrative control carried out by the payments body, PACA DATE is the date of the administrative document in which the irregularity and the ineligible amount was first recorded and in respect of which the beneficiary had the opportunity, under national law, to submit objections.

9) Types of ‘written assessments’ considered for the purposes of PACA in one Member State are the following:

- a report following checks carried out during an on-the-spot control;
- a report issued following management verifications during administrative checks performed by the managing authority (e.g. desk-based checks);
- a report following administrative verifications by the intermediate body;
- a report following an audit on the operation concerned by the audit authority;
- a report following a financial investigation carried out by the AFCOS service;
- a report following a financial investigation carried out by OLAF in the Member State.

IV. 2 — Classification of an irregularity as suspected fraud

10) In one Member State, the following procedure is followed for closing cases of suspected fraud if criminal proceedings are abandoned:

In cases of suspected fraud (IRQ3), managing authorities are obliged to send the case to the Prosecutor's Office. If the prosecutor takes a decision that there are not enough grounds to open an investigation or abandons an investigation that has been opened, the managing authority has to perform an administrative check and to make a decision according to the following three options:

- **to cancel the case as no irregularity.** This is possible only if the prosecution service says that there is no crime and the administrative check says that there is no infringement.
- **to continue the administrative proceedings on the case, keeping it as suspected fraud (IRQ3).** This happens if, after the administrative check, the managing authority is still of the opinion that there is a suspicion of fraud, although the prosecution service says that there is no crime. The case may be closed after the administrative proceedings are concluded.
- **to continue the administrative proceedings on the case, reclassifying it as an irregularity (IRQ2).** This happens if, after the administrative check, the managing authority considers that there are no grounds for suspicion of fraud but there is still an irregularity. The case may be closed after the administrative proceedings finish.

Nota bene: based on the 'best practice' outlined above, it is important to keep in mind that some cases of 'suspected fraud' could remain in the IMS as 'suspected fraud' even after the prosecutor has decided not to prosecute. This may occur in cases where the reasons for refraining from prosecution are low public interest, insufficient evidence to start criminal proceedings or time-barring. However, if the prosecutor very clearly states that no fraud or no infringement has occurred, the status of the case should be changed to 'irregularity' or to 'no irregularity', with consequences later for the cancellation of case.

11) Case of a research project

Combination of aid is not easy to detect, especially when it is checked only against a statement by the beneficiary. The intermediate bodies dealing with research projects financed with EU or national funds use a common data base which allows them to search for coincidences in the names of projects and researchers. The cross-checking of data is included in the management verification checklist. When verifying a specific research project, the following facts were detected:

- The beneficiary had applied for assistance in different calls for proposals, some financed by Structural Funds, and others by the national budget.

- The list of researchers included several persons who had been working in different projects, with an abnormally high number of total number of hours worked in some months.
- There were also similarities in the names of the projects approved, which were receiving assistance from different sources (different grant calls).

The police cooperated with one of the intermediate bodies to carry out an administrative investigation of the situation. The irregularities should be reported as suspected fraud when the administrative investigation is launched (*initiation of administrative and/or judicial proceedings in order to establish the presence of intentional behaviour*), and certainly when it is decided to submit the case to the prosecutor.

12) Case of training courses financed by the ESF

In this case, the suspected fraud related to failure to run a number of training courses. The audit body had detected an abnormally high number of courses followed by the same people, according to the attendance lists provided by the beneficiary. The data were also cross-checked with information available from the intermediate body for other training courses, for which the beneficiary had also received funds. The audit body carried out checks, contacting the attendees, and learned that, in most cases, they had in fact attended only one course. The case file was sent to the prosecutor and the total amount of the EU assistance was reported as suspected fraud. As legally required by the call for proposals, the beneficiary presented an audit report on the implementation of the project and the costs incurred, but this had been issued by a known person to the beneficiary.

13) Case of a training project financed by the ESF

The regulatory bases of the call for proposals required an audit report on the implementation of the project and the costs incurred. During an audit of the operations, it was confirmed that the audit report had been issued by a person related to the beneficiary. When the supporting documents and financial statements of the beneficiary were examined, the following irregularities were detected:

- non-declared revenues;
- amortisation and other non-eligible costs had been allocated to the project;
- direct costs (salaries) and indirect costs (rent) were disproportionate;
- the number of attendees according to the attendance list and certificates issued was lower than the number declared.

14) A contracting authority systematically favoured certain suppliers by means of inappropriate award criteria. Further irregularities were detected:

- The beneficiary had presented invoices for new equipment which was in fact second-hand. The supplier and the beneficiary were related.
- The beneficiary sold grain as officially certified seed in an EU Member State, using false official labels. The grain was sold to farmers, who obtained additional aid for wheat production.

15) After three charges were brought by the specialised Office of the State Prosecutor of one Member State in 2012 and 2013, judgments were issued in cases A and B, which became final, against a total of 5 natural entities and 1 legal entity, while a conviction against 1 natural person is not yet final.

In both cases, companies providing tourism and hospitality services entered into agreements with the Ministry of the Economy on the co-funding of their planned investments in the construction of new facilities or the renovation of old facilities using funds from the European Regional Development Fund. Together with the company that was to perform the construction work, they set up a scheme that enabled them, by submitting fraudulent data, to support claims for unjustified payment of funds under those agreements.

The director of the construction company and the company's director of construction operations enabled the drafting of business documents/interim construction invoices that showed that the company had performed certain work for the contracting company which it had not actually performed. The construction supervisor confirmed the interim invoices, validating them as claims for payment for works. The contracting companies settled these claims with money that the construction company had previously transferred to them under bogus short-term loan agreements. Therefore, in effect, the contractor's work had not been done, and it was not paid for by the companies that contracted the construction work.

Pursuant to the co-funding agreement, the tourist companies then asked the Ministry to reimburse the portion of the costs that they had allegedly incurred in payment for construction services. As evidence, they submitted false interim invoices and summary payment slips for the work performed, thus deceiving the Ministry into paying EUR 3.7 million to the first company and EUR 1.8 million to the second.

Legal entity B repaid the criminal proceeds during bankruptcy proceedings at the request of the Ministry. With regard to A, the Supreme Court annulled the decision on the forfeiture of criminal proceeds because the Ministry and the legal entity that benefited from the proceeds reached a settlement with regard to a claim for damages by the injured party, which takes precedence over forfeiture.

IV. 3 — Errors and irregularities caused by administrative acts

16) An interim payment is made, but the managing authority transfers less money than the amount required by the beneficiary due to an administrative mistake. There is no financial impact because there is no wrongly spent money. The economic operator is not involved in the infringement. These two elements of the definition of 'irregularity' are missing, and

therefore no irregularity has occurred. Such cases are instead considered an error and there is no obligation to report them.

17) Over several years, public procurement law in a Member State shortened the time limit for the receipt of tenders to 10 days before the deadline. Many beneficiaries obeyed the national law and did not meet the requirement in Article 38(4) of Directive 2004/18, until the error was detected and corrected. In that case, economic operators did not commit an infringement because state institutions have a duty to align the national rules with the requirements of the Directives. The ineligible payments are recorded as errors; they are not established as or reported as irregularities.

18) The managing authority's guidelines for one particular aid scheme do not mention the requirement to put up a billboard. Consequently, many beneficiaries receive aid but do not meet the requirement in Article 8 of Commission Regulation 2006/1828. The Member State refunds these payments when the error is detected and corrected. In that case, the economic operators have the obligation to comply with the requirements of the Commission Regulations, which are directly applicable. As a result, irregularities should be established for each operation.

IV. 4 — Financial impact

19) The beneficiary carried out an economic development project with the approved budget of EUR 70 000. The public contribution to the project was EUR 59 500 (EU share: EUR 50 575; Member State share: EUR 8 925; private contribution: EUR 10 500). During the first level control it was established that consulting services purchased for EUR 14 000 (EU share: EUR 10 115, Member State share: EUR 1 785; private contribution EUR 2 100) during project implementation from EU co-financing was ineligible for administrative reasons. The managing authority paid part of the funding for the consulting services to the final beneficiary and the expenditure had already been declared to the Commission (paid public contribution EUR 8 000; EU share: EUR 6 800; Member State share: EUR 1 200). Under EU legislation the following information should be provided in an irregularity report concerning the financial aspects of the case:

	EU-share		National-share		Public contribution		Private-share		Total
8.1 Amount of expenditure	50.575,00	+	8.925,00	=	59.500,00	+	10.500,00	=	70.000,00
8.2 Amount of irregularity	10.115,00	+	1.785,00	=	11.900,00				
8.2.1 whereof not paid	3.315,00	+	585,00	=	3.900,00				
8.2.2 whereof paid	6.800,00	+	1.200,00	=	8.000,00				
8.3 Amount to recover	6.800,00	+	1.200,00	=	8.000,00				