COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the application of Regulation (EC) No 1469/95 (black list)

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1. AIMS OF THE DOCUMENT

Council Regulation (EC) No 1469/95[1] established a system for identifying economic operators representing a serious risk for the Community budget in the field of the EAGGF Guarantee Section and a notification system between the Member States via the Commission. Implementing provisions were adopted by Regulation (EC) No 745/96[2].

The objectives of the Regulation were to establish a mechanism allowing national administrations to be warned about operators presenting a serious fraud risk and to take appropriate preventive measures (reinforced controls, suspension of payment, and exclusion from Community aid).

As required by Article 7 of Regulation (EC) No 1469/95, the Commission submitted a report on the application of this Regulation to the European Parliament and the Council in July 1997.[3] The Commission announced that there would later be a second report to evaluate the applicability and actual application of the Regulation by the Member States and to identify the difficulties in applying it.

2. INTRODUCTION

Since the Regulation was adopted in 1995, a number of similar instruments have been incorporated in the basic legislation. Thus there is a parallel instrument in the Financial Regulation applicable to the general budget of the European Communities.[4] Article 95 provides that *each institution must establish a central database containing details of candidates and tenderers* who are to be excluded from participation in a procurement procedure by reason of being in bankruptcy, winding-up or administration proceedings or having been convicted of an offence concerning their professional conduct or having been guilty of grave professional misconduct or not having fulfilled obligations relating to the payment of taxes or social security contributions, or who have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests, or who have been declared to be in serious breach of contract for failure to comply with their contractual obligations following another procurement or grant award procedure.

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1 Council Regulation (EC) No 1469/95 of 22 June 1995 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, OJ L 145, 29.6.1995, p.1.

2 Commission Regulation (EC) No 745/96 of 24 April 1996 laying down detailed rules for the application of Council Regulation (EC) No 1469/95 on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF, OJ L 102, 25.4.1996, p.15.

3 COM (97) 417 final.

4 Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002, OJ L 248, 16.09.2002.

Administrative or financial penalties may be imposed on candidates or tenderers who are in one of the cases of exclusion, after they have been given the opportunity to present their observations (Article 96). Similar rules apply to recipients of grants (Article 114).

3. STATISTICAL ANALYSIS OF REPORTS BASED ON THE REGULATION

- By 30.6.1997, the Commission had received four notifications from three Member States, including one for 1996. This period was covered by the first Commission report to Parliament and the Council. By the end of 1997, the number rose to 13.
- In 1998, Member States sent five notifications to the Commission.
- In 1999, no notifications were received.
- In 2000, the Commission received 15 notifications.
- In 2001, there were two notifications to the Commission.
- In 2002, eight notifications were sent to the Commission.
- In 2003, only one notification was sent to the Commission.
- In 2004, no notifications were received.
- No notifications have been received so far in 2005.

4. LOW FREQUENCY OF NOTIFICATIONS : COMPARATIVE DATA

If we compare this figure with the number of irregularity cases detected either by the Member States or by the Commission (OLAF), the question arises whether the genuine number of operators who ought to be considered "unreliable" is actually rather higher.

– For 2004 alone, for example, 19 irregularities were notified on the basis of Regulation (EEC) No 595/91 concerning export refunds, each one separately exceeding the amount of €100 000. During the same period, the Commission (OLAF) opened 21 cases in the field of the EAGGF Guarantee Section. Some of these new cases involve organised crime, involving economic operators that can hardly be described as "reliable".

5. A FEW POINTS FOR CONSIDERATION REGARDING THE INFREQUENT APPLICATION OF THE REGULATION

The Commission has embarked on a dialogue with the Member States in the Working Group on Irregularities and Mutual Assistance – Agricultural Products and at bilateral meetings to ascertain why the Member States make such limited use of the possibilities offered by Regulation No 1469/95. The results of this dialogue can be summarised as follows:

- The identification and notification system entered into force on 6.7.1995 but was actually applicable only to irregularities first detected after 30.6.1996, given that the fundamental

principles of law prohibited retroactive application. The number of reports should have risen appreciably with time but did not in fact do so.

- When Regulation (EC) No 1469/95 was adopted, the Community legislature wanted to ensure that only the really important cases were covered, and the Regulation therefore contains a series of conditions limiting its scope to three specific fields, with a requirement that the established or suspected irregularity must be committed deliberately or through serious negligence, plus the condition introduced by Regulation (EC) No 745/96 that the irregularity must relate to an amount higher than €100 000.

- The Member States point out that they face difficult questions of interpretation of the law. They often decide to refrain from making a notification until they have irrefutable evidence. This particularly concerns the concept of "serious negligence",[5] which is unknown in some Member States, the definition of the economic operators concerned, and more particularly the inclusion of persons or firms which did not commit the irregularity themselves but took part in it or are liable for the irregularity or responsible for preventing it, and the definition of the stage of the investigation or proceeding at which the Member States are obliged to notify the Commission ("preliminary administrative or judicial report").

- Since the relevant economic operators, who are on a "black list" and are the subject of one of the three measures provided for by the Regulation do all they can to avoid any impact on their economic activity, the Member States' competent authorities fear that putting an economic operator on a "black list" and notifying the Commission and other Member States, might expose them to the risk of a claim for damages.

6. AVENUES TO BE EXPLORED

(1) Nature of the measures to be envisaged: thought could be given to first solving the legal difficulties mentioned by certain Member States. In particular, it would be worth making a distinction between a warning and prevention mechanism, and a penalty mechanism. There are good grounds for considering that, if the Regulation's legal framework made it possible to make a clear distinction between the two objectives, irregularity cases would be notified more systematically.

(2) With regard to the warning and prevention mechanism, thought could be given to establishing a link between the notifications under Article 3 of Regulation (EEC) No 595/91 and the preventive measures (reinforced controls). This would facilitate the implementation of such a warning and prevention mechanism as it would be distinct from the penalty procedure and would effectively establish a "Grey List" of operators requiring individual monitoring, along with the introduction of a legal basis for precautionary measures such as the compulsory provision of security. Two warning levels could be established in this prevention mechanism: a first level entailing transmission of unreliable operators to the Commission alone, with an indication of the irregular practices which have been observed in the past or about which there are currently strong suspicions; and a second level entailing information for

[5] Article 1(2)(a) of Regulation (EC) No 1469/95; fourth indent of Article 3(3) of Regulation (EC) No 745/96.

the other Member States when, for example because of transnational operations, there might be specific risks for several of them.

In the case of operators who have in the past committed irregularities established by a final decision, where reinforced controls will not suffice to rule out the risk of new irregularities, the question further arises whether it is possible in the warning mechanism triggering reinforced controls to suspend payments on a precautionary basis, provided the measure in question is not a penalty measure and the procedural guarantees provided for by the national law of the Member States are observed.

(3) With regard to the penalty mechanism, thought should be given to the possibility of adopting specific provisions in the framework defined by Regulation (EC, EURATOM) No 2988/95,[6] supplemented if need be by information transmission measures, parallel to those established in the warning mechanism. The advisability and, if the case arises, the content of such a penalty mechanism, should be treated as a separate subject to be considered in greater detail later.

(4) Scope: it should be noted that the three fields provided for by the initial Black List Regulation with regard to the expenditure financed by the EAGGF Guarantee Section currently appear rather limitative:

- before the 1992 reform of the CAP, the bulk of EAGGF Guarantee Section expenditure concerned intervention storage and export refunds. Since then, the various CAP reforms have resulted in a system in which support is mainly via direct payments to farmers. These payments are efficiently controlled via an "integrated administration and control system" ("IACS"), also comprising a penalty mechanism;

- irregularities can concern both the expenditure side and the revenue side.

Where necessary, an extension of the Black List warning mechanism could be considered for, e.g., structural measures (ERDF, Cohesion Fund, ESF and FIFG) and in the area of own resources.

At a later stage, a link with the Early Warning System (EWS) of the Commission could also be implemented.

7. TAKING DATA PROTECTION LEGISLATION INTO ACCOUNT

When Regulation (EC) No 1469/95 was adopted, both the Council and the Commission were aware that the Black List mechanism was politically and legally highly sensitive in view of the possible detrimental effects for operators if the proper precautions were missing. The legislature accordingly subordinated the use of the mechanism to a number of precautions, in particular with regard to the confidentiality of notifications, professional secrecy and compliance with national rules on criminal procedure. Likewise, the principle of the adversarial procedure, with a preliminary hearing and the right of appeal of the operators concerned, for the measures provided for by Article 3(1)(c) and possibly (b), stress the legislator's concern to protect fundamental rights and the general principles of law. Above all,

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[6] 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, p.1.

the adoption of penalty measures was subordinated to the prior completion of any formalities prescribed by national law.

Parliament and Council Regulation (EC) No 45/2001 of 18 December 2000[7] established new specific obligations with regard to personal data processing. The data collected under the Black List regulation naturally falls within the scope of this Regulation. However, in view of the specific nature and purpose of Regulation No 1469/95, the exceptions and limitations provided for by Article 20(1)(a), (b) and (e) of Regulation No 45/2001 should apply. Nevertheless, possible adjustments in relation to Regulation (EC) No 45/2001 and Directive 95/46/EC will have to be considered.

8. CONCLUSIONS

The annual Commission reports on fraud prevention show that there is still a need for the Community to set up effective means of fraud prevention. The European Parliament and the Council, like the Commission, rightly stress the need to start with prevention. An identification and notification system such as that established by Regulation (EC) No 1469/95 is used primarily for prevention. None of the Member States disputes its objectives. Nevertheless, there is no denying that the current rules and regulations in force do not ensure that it can apply effectively and efficiently.

To remedy this, the Commission sees several avenues to be explored:

1-improve the functioning of the existing instruments, by means of new legislation replacing the current regulation and clarifying the concepts covered:

- clarification of the concept of “serious negligence",

- possible amendment of the quantitative threshold of €100 000;

- revision of the definition of the economic operators concerned in order to include consortia, always in compliance with the general principles of law;

- adaptation of the rules and regulations in relation to the provisions concerning the access to information and data protection (Regulations (EC) Nos 45/2001 and 1049/2001)

- distinction between the prevention mechanism and the penalty mechanism: Regulations (EC) Nos 1469/95 and 745/96 do not distinguish these two concepts, which are separate but complementary objectives. Since in many Member States the imposition of penalties demands compliance with substantial legal formalities that are more complex than those that might apply to a warning and prevention mechanism, it will be necessary to consider whether they should be dissociated from the mechanism by making a reference, if necessary, to separate regulations;

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[7] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.01.2001, p. 1).

- introduction in Community law, without prejudice to national procedural provisions, of the legal possibility of taking precautionary measures pending the completion of administrative and judicial procedures (guarantees)

2-introduce a new legislation for a new system with a different scope: once the legal questions relating to Community law and national legislations have been settled, possible extension of the scope of the warning and prevention mechanism to the Structural Funds, and to own resources where and to the extent it could appear necessary.

3-repeal the current legislation, once the discussion on the two other avenues of reform is completed.

With this report the Commission wishes to consult all the Member States, in line with the recommendations made recently by the Court of Auditors,[8] and the European Parliament in order to prompt a wide-ranging debate on the question. This report should provide the basis for the discussion with the institutions concerned and make it possible to draw conclusions on the necessary guidelines and the nature of the proposals to be made for the improvement of the existing mechanism.

[8] Point 80 of Special Report N° 3/2004 on recovery of irregular payments under the Common Agricultural Policy together with the Commission's replies, OJ C 269, 4.11.2004, p.1.