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Council Regulation (Euratom, EC) 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

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COUNCIL REGULATION (EURATOM, EC) 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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 235 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

(1) Whereas it is essential, for the credibility of the Community, to step up the efforts to counter fraud and other irregularities committed against the Community budget;

(2) Whereas Article 209a of the Treaty establishing the European Community makes it clear that the protection of the Communities' financial interests is primarily the responsibility of the Member States, without prejudice to other provisions of the Treaty;

(3) Whereas Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (3) established a common legal framework for all the fields of the Communities' activity;

(4) Whereas Article 1 (2) of the said Regulation includes a definition of 'irregularity' and whereas the sixth recital of that Regulation stipulates that irregular conduct includes fraudulent actions as defined in the Convention on the protection of the European Communities' financial interests (4);

(5) Whereas Article 10 of that Regulation provided for subsequent adoption of additional general provisions relating to on-the-spot inspections and checks;

(6) Whereas, without prejudice to the checks carried out by the Member States in accordance with Article 8 of Regulation (EC, Euratom) No 2988/95 and in the interests of efficiency, it is appropriate to adopt additional general provisions concerning on-the-spot checks and inspections by the Commission that do not affect the application of Community sectoral rules as referred to in Article 9 (2) of the said Regulation;

(7) Whereas implementation of the provisions of this Regulation is subject to identification of the objectives that justify their application, especially where, owing to the scale of fraud, which is not confined to one country and frequently involves organized rings, or where, on account of the special nature of the situation in a Member State, those objectives cannot, in view of the seriousness of the damage done to the Communities' financial interests or to the credibility of the Union, be fully realized by the Member States alone and can therefore be better achieved at Community level;

(8) Whereas on-the-spot checks and inspections may not exceed what is necessary to ensure the correct application of Community law;

(9) Whereas they shall also be carried out without prejudice to the provisions applicable in each Member State relating to the protection of the essential interests of State security;

(10) Whereas, in accordance with the principle of sincere cooperation of the Community implicit in Article 5 of the EC Treaty and in the light of the case-law of the Court of Justice of the European Communities, it is important that Member States' administrations and Commission departments cooperate genuinely and provide one another with the necessary assistance in the preparation and performance of on-the-spot checks and inspections;

(11) Whereas it is necessary to define the conditions under which Commission inspectors are to exercise their powers;

(12) Whereas those on-the-spot checks and inspections are carried out with due regard to the fundamental rights of the persons concerned and to the rules on professional secrecy and the protection of personal data; whereas in that regard it is important that the Commission ensure that its inspectors comply with Community and national provisions on the protection of personal data, in particular those laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (5);

(13) Whereas, if action to combat fraud and irregularities is to be effective, the Commission must carry out inspections on the premises of those economic operators who may have been involved, directly or indirectly, in the irregularity in question and on the premises of other economic operators who might be concerned by that irregularity; whereas, in the event of the application of this Regulation, the Commission should ensure that those economic operators are not simultaneously subjected, in respect of the same acts, to similar checks and inspections carried out by the Commission or by the Member States on the basis of Community sectoral rules or national legislation;

(14) Whereas the Commission inspectors must have access to all the information on the transactions concerned on the same terms as national administrative inspectors; whereas the reports by the Commission inspectors, signed, if appropriate, by the national inspectors, must be drawn up taking into account the procedural requirements laid down in the law of the Member State concerned; whereas they must be admitted as evidence in the administrative and judicial proceedings of the Member State where it proves necessary to use them and have an identical value to the reports drawn up by national administrative inspectors;

(15) Whereas, in cases where there is a risk of evidence disappearing, or where economic operators oppose on-the-spot checks or inspections by the Commission, it is for the Member States to take the necessary precautionary or implementing measures in accordance with their legislation;

(16) Whereas this Regulation affects neither Member States' powers regarding the prosecution of criminal offences nor the rules governing mutual assistance between Member States on criminal matters;

(17) Whereas the Treaties contain no powers for the adoption of this Regulation other than those provided for in Article 235 of the EC Treaty and Article 203 of the Euratom Treaty,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation lays down the additional general provisions within the meaning of Article 10 of Regulation (EC, Euratom) No 2988/95 which are applicable to on-the-spot administrative checks and inspections carried out by the Commission in order to protect the financial interests of the Communities against irregularities as defined in Article 1 (2) of the said Regulation.

Without prejudice to the provisions of the Community sectoral rules, this Regulation shall apply to all areas of the Communities' activity.

This Regulation shall not affect Member States' powers regarding the prosecution of criminal offences or the rules governing mutual assistance in criminal matters between Member States.

Article 2

The Commission may carry out on-the-spot checks and inspections pursuant to this Regulation:

- for the detection of serious or transnational irregularities or irregularities that may involve economic operators acting in several Member States, or
- where, for the detection of irregularities, the situation in a Member State requires on-the-spot checks and inspections to be strengthened in a particular case in order to improve the effectiveness of the protection of financial interests and so to ensure an equivalent level of protection within the Community, or
- at the request of the Member State concerned.

Article 3

Where the Commission decides to carry out on-the-spot checks and inspections under this Regulation, it shall ensure that similar checks and inspections are not being carried out at the same time in respect of the same facts with regard to the economic operators concerned on the basis of Community sectoral regulations.

In addition, it shall take into account the inspections in progress or already carried out in respect of the same facts with regard to the economic operators concerned, by the Member State on the basis of its legislation.

Article 4

On-the-spot checks and inspections shall be prepared and conducted by the Commission in close cooperation with the competent authorities of the Member State concerned, which shall be notified in good time of the object, purpose and legal basis of the checks and inspections, so that they can provide all the requisite help. To that end, the officials of the Member State concerned may participate in the on-the-spot checks and inspections.

In addition, if the Member State concerned so wishes, the on-the-spot checks and inspections may be carried out jointly by the Commission and the Member State's competent authorities.

Article 5

On-the-spot checks and inspections shall be carried out by the Commission on economic operators to whom Community administrative measures and penalties pursuant to Article 7 of Regulation (EC, Euratom) No 2988/95 may be applied, where there are reasons to think that irregularities have been committed.

In order to make it easier for the Commission to carry out such checks and inspections, economic operators shall be required to grant access to premises, land, means of transport or other areas, used for business purposes.

Where strictly necessary in order to establish whether an irregularity exists, the Commission may carry out on-the-spot checks and inspections on other economic operators concerned, in order to have access to pertinent information held by those operators on facts subject to on-the-spot checks and inspections.

Article 6

1. On-the-spot checks and inspections shall be carried out on the Commission's authority and responsibility by its officials or other servants, duly empowered, hereinafter called 'Commission inspectors'. Persons placed at the disposal of the Commission by the Member States as national experts on secondment may assist in such checks and inspections.

Commission inspectors shall exercise their powers on production of a written authorization showing their identity and position, together with a document indicating the subject-matter and purpose of the on-the-spot check or inspection.

Subject to the Community law applicable, they shall be required to comply, with the rules of procedure laid down by the law of the Member State concerned.

2. Subject to the agreement of the Member State concerned, the Commission may seek the assistance of officials from other Member States as observers and call on outside bodies acting under its responsibility to provide technical assistance.

The Commission shall ensure that the aforementioned officials and bodies give every guarantee as regards technical competence, independence and observance of professional secrecy.

Article 7

1. Commission inspectors shall have access, under the same conditions as national administrative inspectors and in compliance with national legislation, to all the information and documentation on the operations concerned which are required for the proper conduct of the on-the-spot checks and inspections. They may avail themselves of the same inspection facilities as national administrative inspectors and in particular copy relevant documents.

On-the-spot checks and inspections may concern, in particular:

- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators,
- computer data,
- production, packaging and dispatching systems and methods,
- physical checks as to the nature and quantity of goods or completed operations,
- the taking and checking of samples,
- the progress of works and investments for which financing has been provided, and the use made of completed investments,
- budgetary and accounting documents,
- the financial and technical implementation of subsidized projects.

2. Where necessary, it shall be for the Member States, at the Commission's request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence.

Article 8

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

Such information may not be communicated to persons other than those within the Community institutions or in the Member States whose functions require them to know it nor may it be used by Community institutions for purposes other than to ensure effective protection of the Communities' financial interests in all Member States. Where a Member State intends to use for other purposes information obtained by officials participating under its authority as observers, in accordance with Article 6 (2), in on-the-spot checks and inspections, it shall seek the agreement of the Member State where that information was obtained.

2. The Commission shall report as soon as possible to the competent authority of the State within whose territory an on-the-spot check or inspection has been performed any fact or suspicion relating to an irregularity which has come to its notice in the course of the on-the-spot check or inspection. In any event the Commission shall be required to inform the aforementioned authority of the result of such checks and inspections.

3. Commission inspectors shall ensure that in drawing up their reports account is taken of the procedural requirements laid down in the national law of the Member State concerned. The material and supporting documents as referred to in Article 7 shall be annexed to the said reports. The reports thus prepared shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall be of identical value to such reports. Where an inspection is carried out jointly, pursuant to the second subparagraph of Article 4, the national inspectors who took part in the operation shall be asked to countersign the report drawn up by the Commission inspectors.

4. The Commission shall ensure that, when implementing this Regulation, its inspectors comply with Community and national provisions on the protection of personal data, in particular those laid down in Directive 95/46/EC of the European Parliament and of the Council.

5. Where on-the-spot checks or inspections are performed outside Community territory, reports shall be prepared by Commission inspectors in conditions which would enable them to constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary.

Article 9

Where the economic operators referred to in Article 5 resist an on-the-spot check or inspection, the Member State concerned, acting in accordance with national rules, shall give Commission inspectors such assistance as they need to allow them to discharge their duty in carrying out an on-the-spot check or inspection.

It shall be for the Member States to take any necessary measures, in conformity with national law.

Article 10

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

It shall apply from 1 January 1997.

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

Done at Brussels, 11 November 1996.

For the Council

The President

R. QUINN

(1) OJ No C 84, 21. 3. 1996, p. 10.

(2) OJ No C 166, 10. 6. 1996, p. 102 and Opinion delivered on 23 October 1996 (not yet published in the Official Journal).

(3) OJ No L 312, 23. 12. 1995, p. 1.

(4) OJ No C 316, 27. 11. 1995, p. 48.

(5) OJ No L 281, 23. 11. 1995, p. 31.