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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	COMMISSION DELEGATED REGULATION (EU) .../... of 8.7.2015 supplementing Regulation (EU) 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

Delegations will find attached document C(2015) 4541 final.

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COMMISSION DELEGATED REGULATION (EU) .../...

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supplementing Regulation (EU) 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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Union and the Member States share responsibility for the protection of the Union's financial interests and the fight against fraud. Member States manage four-fifths of EU expenditure and collect Traditional Own Resources.

For the protection of its financial interests, EU legislation lays down reporting requirements for Member States as regards financial support in the area of shared management. Member States shall send regular reports to the Commission on detected fraudulent irregularities and other irregularities, the amount concerned and the progress of related administrative and legal proceedings. The information reported by the MS is included in the Commission report under Article 325 TFEU.

In the framework of the Multiannual Financial Framework for the period 2014–2020, the reporting requirements should be defined in the framework of delegated act(s). Four different basic acts (Regulation (EU) No 1303/2013, Regulation (EU) No 1306/2013, Regulation (EU) No 223/2014 and Regulation (EU) No 514/2014) provide the legal basis for the adoption of a delegated regulation on reporting requirements. Since all four delegated regulations in the package concern one topic specifically – the reporting of irregularities – and all concern the protection of the financial interest of the Union, it is of utmost importance that the same rules govern the same situation. A single delegated act would be desirable as a means to harmonise and simplify Member States' reporting of irregularities to the Commission. However, taking into account the empowerments in the different basic acts, and in order to guarantee a strong legal basis, it nonetheless appears necessary to adopt four separate delegated acts, harmonised to the maximum extent. Given that the parallel regulations cannot be merged; the provisions they contain must be identical, unless differences are justified by the underlying basic act.

Regulation (EU) No 514/2014 of the European Parliament and of the Council empowers the Commission to adopt delegated acts.

In accordance with Article 5(2) of Regulation (EU) No 514/2014, the purpose of this delegated act is to lay down additional obligations to be complied with by the Member States when they report to the Commission on irregularities and suspected fraud cases detected pursuant to that Article.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Consultations have been carried out between the European Parliament, the Council and the European Commission in line with paragraph 4 of the Common Understanding on delegated acts between the European Parliament, the Council and the European Commission

All elements of this delegated act were discussed at expert group meetings involving participants from all Member States. The dates, agendas and relevant documents for these meetings were duly notified to the European Parliament to enable them to take part in these meetings. The meetings took place on 2 December 2013, 29 April 2014 and 30 July 2014 in Brussels. The Asylum Migration Integration Fund experts were informed during the meeting on 6 June 2014 of the position of the anti-fraud experts group.

At these meetings, the Commission gave a full presentation of its draft provisions and a thorough exchange of views took place on all aspects of the draft delegated act. The meetings allowed the Commission to clarify its approach, to hear experts' views on the draft and to refine it accordingly. In particular, the Commission was able to clarify and specify rules in response to comments from experts. Experts were also able to submit written comments following the meeting. These questions and comments fed into the development of the relevant rules and further discussion at subsequent meetings.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 5(5) of Regulation (EU) No 514/2014 of the European Parliament and of the Council of 16 April 2014 provides that:

The Commission shall be empowered to adopt delegated acts in accordance with Article 58 concerning the obligations of Member States on the reporting of irregularities and the progress in the related administrative and legal proceeding.

COMMISSION DELEGATED REGULATION (EU) .../...

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 management¹, and in particular Article 5(5) thereof,

Whereas:

- (1) The purpose of this Regulation is to determine which irregularities Member States should report to the Commission. In order to allow the Commission to perform its tasks concerning the protection of the financial interests of the Union, in particular to allow the Commission to perform risk analysis, it should also be established which data are to be provided.
- (2) Financial interests of the Union should be protected in the same way irrespective of the fund used to deliver the objectives for which it was established. To that end Regulation (EU) No 514/2014, as well as Regulations (EU) No 1303/2013², (EU) No 1306/2013³, and (EU) No 223/2014⁴ of the European Parliament and of the Council, empower the Commission to adopt rules on the reporting of irregularities. To ensure that identical rules apply in respect of all the funds governed by those Regulations, it is necessary that this Regulation contains provisions identical to those

¹ OJ L 150, 20.5.2014, p. 112.

² 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 laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006 (OJ L 347, 20.12.2013, p. 320).

³ 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, p. 549).

⁴ 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, 12.03.2014, p. 1).

in Commission Delegated Regulations (EU) .../...⁵ [*Delegated Regulation supplementing Regulation (EU) No 1303/2013*], (EU) .../...⁶ [*Delegated Regulation supplementing Regulation (EU) No 1306/2013*] and (EU) .../...⁷ [*Delegated Regulation supplementing Regulation (EU) No 223/2014*].

- (3) The definition of ‘irregularity’ used for the purposes of this Regulation should be that of Article 1(2) of Council Regulation (EC, Euratom) No 2988/95⁸. For the purposes of that definition, ‘economic operator’ should mean any natural or legal persons or other entity taking part in the implementation of assistance from the fund, with the exception of a Member State exercising its prerogatives as a public authority.
- (4) To enable a coherent application of the reporting requirements across the Member States it is necessary to define the term ‘suspected fraud’, taking into account the definition of fraud contained in 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 interests⁹, and the term ‘primary administrative or judicial finding’.
- (5) Regulations (EU) No 1303/2013 and (EU) No 223/2014 determine the reporting threshold below which irregularities do not need to be reported to the Commission and cases for which there is no need for reporting. In order to simplify and to align the provisions, and to strike a balance between the administrative burden on Member States and the common interest in the provision of accurate data for the purpose of analysis in the Union's fight against fraud, it is necessary to apply the same reporting threshold and the same derogations for the reporting of irregularities under Regulations (EU) No 1306/2013 and (EU) No 514/2014.
- (6) In order to ensure consistency of reporting it is necessary to establish criteria for determining when irregularities are to be initially reported and the data to be provided in such initial reports.
- (7) In order for the data provided to the Commission to be accurate, follow-up reporting is necessary. Member States should, therefore, provide the Commission with up-to-date-information on any significant progress in the administrative and legal procedures or proceedings related to each initial report.

⁵ Commission Delegated Regulation (EU) .../... of ... supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council with specific provisions for the reporting of irregularities concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund (OJ L [...], [...], p. [...]).

⁶ Commission Delegated Regulation (EU) .../... of ... 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 Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development and repealing Commission Regulation (EC) No 1848/2006 (OJ L [...], [...], p. [...]).

⁷ Commission Delegated Regulation (EU) .../... of ... 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 (OJ L [...], [...], p. [...]).

⁸ 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).

⁹ OJ C 316, 27.11.1995, p. 49.

- (8) In light of Directive 95/46/EC of the European Parliament and of the Council¹⁰ and Regulation (EC) No 45/2001 of the European Parliament and of the Council¹¹ the Commission and the Member States should, in relation to the information provided pursuant to this Regulation, prevent any unauthorised disclosure of, or access to, personal data. In addition, this Regulation should specify the purposes for which the Commission and the Member States may process that data.
- (9) The United Kingdom and Ireland are bound by Regulation (EU) No 514/2014 and are as a consequence bound by this Regulation.
- (10) Denmark is not bound by Regulation (EU) No 514/2014, nor by this Regulation.
- (11) As payments have already been made for the funds concerned and irregularities could occur, the provisions of this Regulation should apply immediately. This Regulation should therefore enter into force on the day following that of its publication in the *Official Journal of the European Union*,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter

This Regulation determines which irregularities are to be reported and establishes which data are to be provided by Member States to the Commission

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (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;
- (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.

¹⁰ 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 the free movement of such data (OJ L 281, 23.11.1995, p. 31).

¹¹ 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, 12.1.2001, p. 1).

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.
2. In the initial report Member States shall provide the following information:
 - (a) the name and the Common Identification Code (CCI) number of the national programme and the reference of the project;
 - (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;
 - (c) the region or area where the project has been carried out, identified using appropriate information such as the NUTS level;
 - (d) the provision or provisions which have been infringed;
 - (e) the date and source of the first information leading to the suspicion that an irregularity has been committed;
 - (f) the practices employed in committing the irregularity;
 - (g) where appropriate, whether the practice gives rise to suspected fraud;
 - (h) the manner in which the irregularity was discovered;
 - (i) where appropriate, the Member States and third countries involved;
 - (j) the period during which, or the date on which, the irregularity was committed;
 - (k) the date on which the primary administrative or judicial finding on the irregularity was established;
 - (l) the total amount of expenditure of the project 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.
3. By way of derogation from paragraph 1, the Member States shall not report to the Commission irregularities in relation to the following:
- (a) cases where the irregularity consists solely of the failure to execute, in whole or in part, a project owing to the bankruptcy of the beneficiary;
 - (b) cases brought to the attention of the responsible authority or the audit 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 responsible authority, or the audit authority, before inclusion of the expenditure concerned in a statement of expenditure submitted to the Commission.

In all other cases, in particular, those preceding a bankruptcy or in cases of suspected fraud, the detected irregularities and the associated preventive and corrective measures shall be reported to the Commission.

4. 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.

Article 4

Follow-up reporting

1. Where some of the information referred to in Article 3(2), in particular information concerning the practices employed in committing the irregularity and the manner in which it was discovered, is not available or needs to be rectified, Member States shall provide the missing or correct information in follow-up reports of irregularities to the Commission.
2. Member States shall keep the Commission informed on the initiation, conclusion or abandonment of any procedures or proceedings for imposing administrative measures, administrative penalties, or criminal penalties with regard to the reported irregularities, as well as the outcome of those procedures or proceedings. With regard to irregularities for which penalties have been imposed, Member States shall 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.
3. At the Commission's written request the Member State shall provide information in relation to a specific irregularity or group of irregularities.

Article 5

Use and processing of information

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.
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.
4. The information referred to in paragraph 2 may not be used for any purposes other than the protection of the Union's financial interests unless the authorities that have provided it have given their express consent.

Article 6

Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels, 8.7.2015

For the Commission
The President
Jean-Claude JUNCKER