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(Legislative acts)

REGULATIONS

REGULATION (EU) No 539/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 16 June 2010****amending Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund as regards simplification of certain requirements and as regards certain provisions relating to financial management**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 177 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (3) Given the differences between the European Regional Development Fund and the Cohesion Fund and the objectives with regard to the definition of the environment, it is appropriate, for reasons of coherence and consistency, to apply a single threshold for the purpose of the definition of a major project. Given the importance of the investments in the environment, including those under the threshold provided for in this Regulation, the Member States should ensure appropriate monitoring of all such investments and inform the Commission in the annual implementation reports on operational programmes.
- (4) It is also necessary to allow a major project to be covered by more than one operational programme in order to enable the implementation of such a major project covering different regions and objectives. This is of particular relevance in the case of investments with national or Union importance.
- (5) It is necessary to make available financial engineering instruments in the measures for energy efficiency and renewable energy taking into account the importance of those measures in the Union and national priorities.
- (6) In order to facilitate the adaptation of operational programmes to respond to the current financial and economic crisis, the Member States should provide an analysis justifying the revision of an operational programme instead of an evaluation.
- (7) In line with the principle of sound financial management and the applicable national rules, revenues generated by operations should be taken into account when the public contribution is calculated. It is necessary to simplify the monitoring of revenues in order to align it with the overall programming cycle.
- (1) OJ C 128, 18.5.2010, p. 95.
- (2) Position of the European Parliament of 5 May 2010 (not yet published in the Official Journal) and decision of the Council of 3 June 2010.

- (8) For reasons of legal certainty it is necessary to clarify that expenditure becomes eligible from the date of the submission to the Commission of a request for revision of an operational programme only where it falls under a new category of expenditure added at the moment of the revision of that operational programme.
- (9) The scope of the provisions on the durability of operations should be clarified. It is appropriate, in particular, to limit the application of those provisions, in so far as they concern actions falling within the scope of assistance from the European Social Fund (ESF), to actions falling under the State aid rules with an obligation to maintain investment. Furthermore, it is necessary to exclude the application of those provisions to operations which, after completion, undergo a substantial modification as a result of the cessation of productive activity due to a non-fraudulent bankruptcy.
- (10) It is necessary to clarify and simplify the information required for annual reporting on the financial implementation of an operational programme. It is therefore appropriate to align the financial information required in the annual report on implementation of an operational programme with information provided in the statement of expenditure and to clarify the definition of financial indicators.
- (11) In order to simplify the payment of advances to beneficiaries of State aid and to limit the financial risks associated with such a payment, the scope of the admissible guarantees should be redefined.
- (12) Due to exceptional circumstances and given the serious and unprecedented impact of the current economic and financial crisis on the budgets of the Member States, an additional pre-financing instalment for 2010 is needed for the Member States worst hit by the crisis in order to allow for a regular cash flow and to facilitate payments to beneficiaries during the implementation of programmes.
- (13) The requirements for statements of expenditure concerning financial engineering instruments should be simplified. In particular, management fees in addition to management costs should be considered as eligible expenditure.
- (14) For reasons of consistency, it is appropriate that Member States re-use the amounts corrected on an operation included in a partial closure in the case of irregularities detected by the Member States themselves.
- (15) It is appropriate to extend the deadline for the calculation of the automatic decommitment of the annual budget commitment related to the 2007 total annual contribution so as to improve the absorption of funds committed for certain operational programmes. Such flexibility is necessary due to the slower than expected start-up and late approval of programmes.
- (16) On the basis of experience it is appropriate to apply the reduction of amounts subject to the automatic decommitment rule by the amounts concerned for a major project from the date of the submission to the Commission of the application for a major project that fulfils all the requirements of this Regulation.
- (17) In order to allow Member States to benefit from the simplification measures during the whole programming period and to ensure equal treatment, it is necessary to apply certain amendments retroactively.
- (18) Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund ⁽¹⁾ was amended by Regulation (EC) No 397/2009 ⁽²⁾ which introduced the eligibility rules for expenditure on energy efficiency and the use of renewable energy in existing housing in all Member States. Therefore it is appropriate to apply the amendments related to energy efficiency and the use of renewable energy from the date of the entry into force of Regulation (EC) No 397/2009.
- (19) Once an application for a major project that fulfils all the requirements of this Regulation has been submitted, the amounts covered by the application should be protected from automatic decommitment. Such protection should apply to all major project applications submitted from the beginning of the programming period and should apply retroactively, especially in view of the current financial crisis.
- (20) As the unprecedented crisis affecting international financial markets necessitates a rapid response in order to counter the effects on the economy as a whole, other amendments should enter into force on the day following that of the publication of this Regulation in the *Official Journal of the European Union*.
- (21) Council Regulation (EC) No 1083/2006 ⁽³⁾ should therefore be amended accordingly.
- (22) Following, inter alia, the change in the decision-making process resulting from the entry into force of the Treaty of Lisbon, amendments provided for by this Regulation have not been introduced in time to prevent the application of Article 93(1) of Regulation (EC) No 1083/2006 as amended by Regulation (EC) No 284/2009 ⁽⁴⁾. Pursuant to Article 11 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of

⁽¹⁾ OJ L 210, 31.7.2006, p. 1.

⁽²⁾ OJ L 126, 21.5.2009, p. 3.

⁽³⁾ OJ L 210, 31.7.2006, p. 25.

⁽⁴⁾ OJ L 94, 8.4.2009, p. 10.

the European Communities ⁽¹⁾ (the Financial Regulation), decommitments made by the Commission would therefore result in cancelling appropriations for the financial year 2007, which should be spread over the financial years 2008 to 2013 in accordance with the rules introduced by this Regulation. It is therefore appropriate, as a transitional measure, to allow for the reconstitution, as necessary, of the relevant appropriations for the purposes of implementing the decommitment rules as amended by this Regulation,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1083/2006 is hereby amended as follows:

(1) Article 39 is replaced by the following:

'Article 39

Content

As part of an operational programme or operational programmes, the ERDF and the Cohesion Fund may finance expenditure comprising a series of works, activities or services intended in itself to accomplish an indivisible task of a precise economic or technical nature which has clearly identified goals and whose total cost exceeds EUR 50 million (hereinafter a major project).;

(2) Article 40 is amended as follows:

(a) in the first paragraph, the introductory part is replaced by the following:

'The Member State or the managing authorities shall provide the Commission with the following information on major projects:',

(b) point (d) is replaced by the following:

'(d) a timetable for implementing the major project and, where the implementation period is expected to be longer than the programming period, the phases for which Union co-financing is requested during the 2007 to 2013 programming period;'

(3) in Article 41, paragraphs 1 and 2 are replaced by the following:

'1. The Commission shall appraise the major project, if necessary consulting outside experts, including the EIB, in the light of the factors referred to in Article 40, its

consistency with the priorities of the operational programme or programmes concerned, its contribution to achieving the goals of those priorities and its consistency with other Union policies.

2. The Commission shall adopt a decision as soon as possible but no later than three months after the submission by the Member State or the managing authority of a major project, provided that it is submitted in accordance with Article 40. That decision shall define the physical object, the amount to which the co-financing rate for the priority axis of the operational programme or programmes concerned applies, and the annual plan or plans of financial contribution from the ERDF or the Cohesion Fund.;

(4) Article 44 is amended as follows:

(a) the first paragraph is replaced by the following:

'As part of an operational programme, the Structural Funds may finance expenditure in respect of an operation comprising contributions to support any of the following:

(a) financial engineering instruments for enterprises, primarily small and medium-sized ones, such as venture capital funds, guarantee funds and loan funds;

(b) urban development funds, that is, funds investing in public-private partnerships and other projects included in an integrated plan for sustainable urban development;

(c) funds or other incentive schemes providing loans, guarantees for repayable investments, or equivalent instruments, for energy efficiency and use of renewable energy in buildings, including in existing housing.;

(b) in the second paragraph, the introductory part is replaced by the following:

'Where such operations are organised through holding funds, that is, funds set up to invest in several venture capital funds, guarantee funds, loan funds, urban development funds, funds or other incentive schemes providing loans, guarantees for repayable investments, or equivalent instruments, for energy efficiency and use of renewable energy in buildings, including in existing housing, the Member State or the managing authority shall implement them through one or more of the following forms:'

⁽¹⁾ OJ L 248, 16.9.2002, p. 1.

(5) Article 48(3) is replaced by the following:

'3. During the programming period, Member States shall carry out evaluations linked to the monitoring of operational programmes in particular where that monitoring reveals a significant departure from the goals initially set. Where proposals are made for the revision of operational programmes, as referred to in Article 33, analyses shall be provided on the reasons for the revision, including any implementation difficulties, and the expected impact of the revision, including that on the strategy of the operational programme. The results of such evaluations or analyses shall be sent to the monitoring committee for the operational programme and to the Commission.'

(6) in Article 55, paragraphs 3 and 4 are replaced by the following:

'3. Where it is objectively not possible to estimate the revenue in advance, the net revenue generated within five years of the completion of an operation shall be deducted from the expenditure declared to the Commission.

4. Where it is established that an operation has generated net revenue that has not been taken into account under paragraphs 2 and 3, such net revenue shall be deducted by the certifying authority at the latest on submission of the documents for the operational programme referred to in Article 89(1)(a). The application for payment of the final balance shall be corrected accordingly.'

(7) in Article 56(3), the second subparagraph is replaced by the following:

'Where a new category of expenditure as referred to in Table 1 of Part A of Annex II to Commission Regulation (EC) No 1828/2006 (*) is added at the time of the revision of an operational programme referred to in Article 33 of this Regulation, any expenditure falling under such category shall be eligible from the date of the submission to the Commission of the request for revision of the operational programme.

(*) 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, p. 1.);

(8) Article 57 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. The Member State or managing authority shall ensure that an operation comprising investment in infrastructure or productive investment retains the contribution from the Funds only if it does not, within five years from its completion, undergo a substantial modification which is caused by a change in the nature of ownership of an item of infrastructure or the cessation of a productive activity and which affects the nature or the implementation conditions of the operation or gives to a firm or a public body an undue advantage.

Actions falling within the scope of assistance from the ESF shall be considered as not having retained the contribution only where they are subject to an obligation for maintenance of investment under the applicable rules on State aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union and where they undergo a substantial modification as a result of the cessation of productive activity within the period laid down in those rules.

Member States may reduce the time limit set out in the first subparagraph to three years in cases concerning the maintenance of investments by small and medium-sized enterprises.'

(b) the following paragraph is added:

'5. Paragraphs 1 to 4 shall not apply to any operation which undergoes a substantial modification as a result of the cessation of the productive activity due to a non-fraudulent bankruptcy.'

(9) in Article 67(2), point (b) is replaced by the following:

(b) quantification of the financial indicators referred to in Article 66(2) expressing the cumulative financial implementation of the operational programme, detailing for each priority axis the following:

(i) the total amount of certified eligible expenditure paid by beneficiaries and the corresponding public contribution;

(ii) the ratio between the total amount of certified eligible expenditure paid by the beneficiaries and the total funding of the programme including Union funding and national counterpart.

Where appropriate, financial implementation in areas receiving transitional support shall be presented separately within each operational programme;'

(10) Article 78 is amended as follows:

(a) in paragraph 2:

(i) point (a) is replaced by the following:

'(a) they shall be subject to a guarantee provided by a bank or other financial institution established in a Member State;'

(ii) the following subparagraph is added:

'A facility provided as a guarantee by a public entity or by the Member State itself shall be considered equivalent to a guarantee referred to in point (a) in the first subparagraph.'

(b) in paragraph 6:

(i) point (d) is replaced by the following:

'(d) eligible management costs or fees; and';

(ii) the following point is added:

'(e) any loans or guarantees for repayable investments from funds or other incentive schemes providing loans, guarantees for repayable investments, or equivalent instruments, for energy efficiency and use of renewable energy in buildings, including in existing housing.'

(c) paragraph 7 is replaced by the following:

'7. Interest generated by payments from operational programmes to funds as defined in Article 44 shall be used to finance any of the following:

- (a) urban development projects in the case of urban development funds;
- (b) financial engineering instruments for small and medium-sized enterprises;
- (c) in the case of funds or other incentive schemes providing loans, guarantees for repayable investments, or equivalent instruments, for energy efficiency and use of renewable energy in buildings, including in existing housing.

Resources returned to the operation from investments undertaken by funds as defined in Article 44 or left over after all guarantees have been honoured shall be reused by the competent authorities of the Member States concerned for the benefit of urban development projects, of small and medium-sized enterprises or for energy efficiency and use of renewable energy in buildings, including in existing housing;'

(11) Article 82(1) is amended as follows:

(a) in the second subparagraph, the following point is added:

'(f) for Member States that were granted loans in 2009 in accordance with Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term assistance for Member States' balances of payments (*) or for Member States with a decrease in GDP in 2009 of more than 10 % in real terms in comparison to 2008: in 2010, 2 % of the contribution from the Cohesion Fund and 4 % of the contribution from the ESF to the operational programme.

(*) OJ L 53, 23.2.2002, p. 1.;

(b) the following subparagraph is added:

'For the purpose of applying the criteria referred to in point (f) of the second subparagraph, GDP figures shall be based on Community statistics published in November 2009 (*).

(*) European Economic Forecast Autumn 2009 (European Economy. No 10, 2009; Office for Official Publications of the EC, Luxembourg);'

(12) in Article 88(3), the following subparagraph is added:

'However, in cases where irregularities in operations which have been subject to a declaration of partial closure are detected by the Member State, Article 98(2) and (3) shall apply. The statement of expenditure referred to in paragraph 2(a) of this Article shall be adjusted accordingly;'

(13) Article 93 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. The Commission shall automatically decommit any part of the amount calculated in accordance with the second subparagraph in an operational programme that has not been used for payment of the pre-financing or interim payments or for which an application for payment has not been sent in conformity with Article 86 by 31 December of the second year following the year of budget commitment under the programme, with the exception mentioned in paragraph 2.

For the purpose of the automatic decommitment, the Commission shall calculate the amount by adding one sixth of the annual budget commitment related to the 2007 total annual contribution to each of the 2008 to 2013 budget commitments.'

(b) the following paragraph is inserted:

'2a. By way of derogation from the first subparagraph of paragraph 1 and from paragraph 2, the deadlines for automatic decommitment shall not apply to the annual budget commitment related to the 2007 total annual contribution.;

(14) Article 94 is replaced by the following:

'Article 94

Period of interruption for major projects and aid schemes

1. Where the Member State submits a major project application which meets all the requirements laid down in Article 40, the amounts potentially concerned by automatic decommitment shall be reduced by the annual amounts concerned by such major projects.

Where the Commission takes a decision to authorise an aid scheme, the amounts potentially concerned by automatic decommitment shall be reduced by the annual amounts concerned by such aid schemes.

2. For the annual amounts referred to in paragraph 1, the starting date for the calculation of the automatic decommitment deadlines referred to in Article 93 shall

be the date of the subsequent decision necessary in order to authorise such major projects or aid schemes.'

Article 2

Transitional measures

In order to meet the exceptional circumstances of the transition to the decommitment rules introduced by this Regulation, appropriations which have been cancelled because of decommitments made by the Commission for the financial year 2007 in the implementation of Article 93(1) and Article 97 of Regulation (EC) No 1083/2006 as amended by Regulation (EC) No 284/2009, pursuant to Article 11 of the Financial Regulation, shall be reconstituted to the extent necessary for the implementation of the second subparagraph of Article 93(1) of Regulation (EC) No 1083/2006 as amended by this Regulation.

Article 3

Entry into force

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

However, Article 1(5) and (7) shall apply from 1 August 2006, points (8), (10)(a), (10)(b)(i), (13) and (14) of Article 1 shall apply from 1 January 2007 and points (4), (10)(b)(ii) and (10)(c) of Article 1 shall apply from 10 June 2009.

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

Done at Strasbourg, 16 June 2010.

For the European Parliament
The President
J. BUZEK

For the Council
The President
D. LÓPEZ GARRIDO