Commission Delegated Regulation (EU) 2016/568 of 29 January 2016 supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council with regard to the conditions and procedures to determine whether amounts which are irrecoverable shall be reimbursed by Member States concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund

COMMISSION DELEGATED REGULATION (EU) 2016/568

of 29 January 2016

supplementing Regulation (EU) No 1303/2013 of the European Parliament and of the Council with regard to the conditions and procedures to determine whether amounts which are irrecoverable shall be reimbursed by Member States concerning the European Regional Development Fund, the European Social Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund

THE EUROPEAN COMMISSION,

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

Having regard to 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[(1)] and in particular the fifth subparagraph of Article 122(2) thereof,

Whereas:

(1) In accordance with the fourth subparagraph of Article 122(2) of Regulation (EU) No 1303/2013, when an amount unduly paid to a beneficiary cannot be recovered and this is as a result of fault or negligence on the part of a Member State, the Member State is responsible for reimbursing the amount concerned to the budget of the Union.

(2) The document on irrecoverable amounts submitted by the certifying authority to the Commission, as part of the annual accounts in accordance with Article 137(1)(b) and Article 138(a) of Regulation (EU) No 1303/2013 each year from 2016 until and including 2025, establishes the irrecoverable amounts at the level of each priority. That document should also include explicit information regarding the amounts that should not, according to the Member State, be reimbursed to the Union budget, in particular by demonstrating the administrative and legal measures taken by the Member State to effectively pursue the recovery of the irrecoverable amounts. However, as that document refers to amounts previously included in certified accounts submitted to the Commission, it should be submitted for the first time in 2017.

Changes to legislation: Commission Delegated Regulation (EU) 2016/568 is up to date with all changes known to be in force on or before 24 December 2020. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes

(3) In accordance with point (b) of Article 126 and with Article 137(1) of Regulation (EU) No 1303/2013, deductions made before submission of certified accounts cannot be considered as recoveries if they relate to the expenditure included in the final interim payment application of a given accounting year for which the accounts are prepared. It should therefore be clarified that the information on irrecoverable amounts submitted under this Delegated Regulation should only concern amounts already included in certified accounts previously submitted to the Commission.

(4) To allow the Commission to decide whether the irrecoverable amounts should be reimbursed to the Union budget, the Member State should submit the required information, at the level of each operation and beneficiary, before the deadline set for the submission of accounts in Article 59(5) of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council[(2)]. In accordance with that provision, it should be possible to extend also the deadline for the document on irrecoverable amounts.

(5) It is necessary to establish criteria that will enable the Commission to assess whether a Member State has been at fault or negligent in the recovery during the administrative and legal measures. The presence of one or more of these criteria should not automatically mean that the Member State has in fact been at fault or negligent.

(6) For reasons of legal certainty, the Commission should conclude its assessment by a given deadline, and Member States should react to the Commission's assessment by another given deadline. For the same reasons, the Commission should be able to conclude its assessment even where the Member State does not provide additional information. However, in the cases preceding a bankruptcy or of suspected fraud, as referred to in the third subparagraph of Article 122(2) of Regulation (EU) No 1303/2013, the deadlines should not apply.

(7) Pursuant to the second sentence of the fourth subparagraph of Article 122(2) of Regulation (EU) No 1303/2013, a Member State may decide not to recover from a beneficiary an amount unduly paid at the level of an operation in the accounting year concerned that does not exceed EUR 250, not including interest, in contribution from the Funds. In this case, the amount does not need to be reimbursed to the budget of the Union. No information will be requested on such *de minimis* amounts.

(8) With regard to programmes under the European territorial cooperation goal subject to Regulation (EU) No 1299/2013 of the European Parliament and of the Council[(3)], that Regulation does not establish a different system with regard to amounts referred to in the second sentence of the fourth subparagraph of Article 122(2) of Regulation (EU) No 1303/2013. It is therefore for the Member States and third countries participating in a given European territorial cooperation programme to decide that neither the lead beneficiary nor the programme's managing authority is obliged to recover an amount unduly paid that does not exceed EUR 250, not including interest, in contribution from the Funds,

HAS ADOPTED THIS REGULATION:

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Article 1

Submission of information on irrecoverable amounts

1 Where a Member State considers that an amount unduly paid to a beneficiary, previously included in certified accounts submitted to the Commission, is irrecoverable, and where it has concluded that this amount should not be reimbursed to the Union budget, the certifying authority shall submit a request to the Commission to confirm that conclusion.

2 The certifying authority shall submit a request referred to in paragraph 1, at the level of each operation, in the form set out in the Annex to this Regulation by way of the electronic data exchange system laid down in Article 74(4) of Regulation (EU) No 1303/2013.

3 The Member State shall submit a request established in accordance with paragraphs 1 and 2 each year from 2017 until and including 2025 by 15 February with regard to the previous accounting year. The Commission may exceptionally extend the deadline to 1 March, upon request by the Member State concerned.

Article 2

Conditions for determining fault or negligence on the part of the Member States

The following criteria are indicative of fault or negligence on the part of the Member State:

(a) the Member State did not submit any description of the administrative and legal measures, with dates, taken by the Member State to recover the relevant amount (or to reduce or cancel the level of support or withdraw the document in accordance with Article 125(3)(c) of Regulation (EU) No 1303/2013, where such a withdrawal is subject to a separate procedure);

(b) the Member State did not provide any copy of the first and any subsequent recovery order (and of any copy of the letter reducing or cancelling the level of support or withdrawing the document in accordance with Article 125(3)(c) of Regulation (EU) No 1303/2013, where such withdrawal is subject to a separate procedure);

(c) the Member State did not provide the date of the last payment of the public contribution to the beneficiary of the given operation and a copy of proof of this payment;

(d) the Member State, after detection of the irregularity, made one or more undue payments to the beneficiary in relation to the part of the operation that was affected by the irregularity;

(e) the Member State did not send the letter reducing the level of support or withdrawing the document in accordance with Article 125(3)(c) of Regulation (EU) No 1303/2013, where such withdrawal is subject to a separate procedure, or take any equivalent decision within 12 months of the detection of the irregularity;

(f) the Member State did not initiate the recovery procedure within 12 months of the grant being definitively reduced or cancelled (either after an administrative or judicial procedure or by agreement of the beneficiary);

(g) the Member State did not exhaust all recovery possibilities available through the national institutional and legal framework;

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(h) the Member State did not provide documents related to insolvency and bankruptcy procedures, when applicable;

(i) the Member State did not reply to the Commission's request for further information in accordance with Article 3.

Article 3

Procedure to determine whether an irrecoverable amount shall be reimbursed by Member States

1 Based on the information submitted by the Member State in accordance with Article 1 of this Regulation, the Commission shall assess each case in order to conclude whether the failure to recover an amount is a result of fault or negligence on the part of the Member State, taking due account of specific circumstances and the institutional and legal framework of the Member State. Where one or more of the criteria listed in Article 2 is fulfilled, the Commission may still conclude that the Member State has not been at fault or negligent.

2 By 31 May of the year in which the accounts are submitted, the Commission may:

a request the Member State in writing to submit further information on the administrative and legal measures taken to recover any Union contribution unduly paid to beneficiaries; or

b request the Member State in writing to continue its recovery procedure.

Where the Commission has taken the option referred to in point (a) of the first subparagraph, paragraphs 5 to 8 shall apply.

3 If the Commission does not act pursuant to and by the deadline set in paragraph 2, the Union contribution shall not be reimbursed by the Member State.

4 The deadline set in paragraph 2(a) and (b) shall not apply to those irregularities preceding a bankruptcy or to cases of suspected fraud.

5 The Member State shall reply within 3 months to the Commission's request for information sent pursuant to paragraph 2.

6 If the Member State does not submit further information as requested pursuant to paragraph 2, the Commission shall continue its assessment based on the information available.

7 Within 3 months of receiving the reply from the Member State, or, in the absence of a reply by the deadline, the Commission shall inform the Member State where it concludes that the Union contribution should be reimbursed by the Member State setting out the basis for its conclusion, and requesting the Member State to provide its observations within 2 months. If the Commission does not act pursuant to and by the deadline set in the preceding sentence, the Union contribution shall not be reimbursed by the Member State.

8 Within the 6 months following the deadline for observations by the Member State set out in paragraph 7, the Commission shall conclude its assessment based on the information available and, when it maintains its conclusion that the Union contribution shall be reimbursed by the Member State, shall adopt a decision. If the Commission does not act pursuant to and by the deadline set in the preceding sentence, the Union contribution shall not be reimbursed by the Member State.