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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 3094/94

of 12 December 1994

amending Regulation (EEC) No 4045/89 on scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 43 thereof,

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

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

Whereas Council Regulation (EEC) No 4045/89 ⁽³⁾ provides for the scrutiny by Member States of transactions forming part of the system of financing by the Guarantee Section of the European Agricultural Guidance and Guarantee Fund;

Whereas the rules for the selection of undertakings to be scrutinized laid down in Article 2 of the said Regulation should be modified to take account of developments in the use of risk analysis techniques in other control measures, and in order to give Member States greater flexibility in the selection of undertakings;

Whereas it is necessary to make clear that the commercial documents subject to scrutiny include records of production and of the nature of the products and records maintained in electronic data storage systems;

Whereas certain measures involving direct payments to producers, including those covered by the integrated administration and control system established by Regulation (EEC) No 3508/92 ⁽⁴⁾ should be excluded from the scope of Regulation (EEC) No 4045/89;

Whereas it is appropriate to ensure correspondence between the powers and duties of officials pursuant to Regulation (EEC) No 4045/89 and pursuant to Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in

connection with the financing of the common agricultural policy and the organization of an information system in this field ⁽⁵⁾;

Whereas the powers of the Member States to take action in relation to inadequate commercial documents and documents located outside the territory of the Community should be specified;

Whereas the procedures for mutual assistance provided in Article 7 of Regulation (EEC) No 4045/89 should be strengthened;

Whereas, for the fifth year of application of the said Regulation, there is a need for greater flexibility in the allocation of the contribution by the Community to the additional expenditure provided for under Articles 13, 14 and 15, provision should be made for the aggregation of the amounts available under Articles 13 and 14 and their allocation to the different types of expenditure without distinction;

Whereas, if officials carrying out scrutinies are accompanied by officials of the Commission or of other Member States, it is necessary to make clear the status of the latter,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 4045/89 is hereby amended as follows:

1. Article 1 (2) shall be replaced by the following:

‘2. For the purposes of this Regulation “commercial documents” shall mean all books, registers, vouchers and supporting documents, accounts, production and quality records, and correspondence relating to the undertaking’s business activity, as well

⁽¹⁾ OJ No C 175, 28. 6. 1994, p. 7.

⁽²⁾ Opinion delivered on 18 November 1994 (not yet published in the Official Journal).

⁽³⁾ OJ No L 388, 30. 12. 1989, p. 18.

⁽⁴⁾ OJ No L 355, 5. 12. 1992, p. 1. Regulation as amended by Regulation (EC) No 165/94 (OJ No L 24, 29. 1. 1994, p. 6).

⁽⁵⁾ OJ No L 67, 14. 3. 1991, p. 11.

as commercial data, in whatever form they may take, including electronically stored data, in so far as these documents or data relate directly or indirectly to the transactions referred to in paragraph 1.;

2. the following paragraphs shall be added to Article 1 :

'3. For the purposes of this Regulation "third party" shall mean any natural or legal person directly or indirectly connected with transactions carried out within the financing system by the EAGGF Guarantee Section.

4. This Regulation shall not apply to measures covered by the integrated administration and control system established by Regulation (EEC) No 3508/92 (*). The Commission shall, in accordance with Article 19, establish a list of other measures to which this Regulation does not apply.

(*) OJ No L 355, 5. 12. 1992, p. 1.;

3. in the first subparagraph of Article 2 (2), 'ECU 60 000' shall be replaced by 'ECU 100 000', and 'calendar year' by 'EAGGF financial year';

4. the second and third subparagraphs of Article 2 (2) shall be deleted;

5. in Article 2 (2) the following subparagraphs shall be inserted after the first subparagraph :

'In relation to each current scrutiny period, commencing with the 1995/96 scrutiny period, Member States shall, without prejudice to their obligations defined in paragraph 1, select the undertakings to be scrutinized on the basis of risk analysis in the export refunds sector, and for all other measures where it is practicable to do so. The Member States shall submit to the Commission their proposals for the use of risk analysis. The proposals shall include all relevant information concerning the approach to be followed, the techniques, the criteria and the method of implementation; they shall be presented not later than 1 December of the year prior to commencement of the scrutiny period for which they are to be applied. The Member States shall take account of the comments of the Commission on the proposals, which shall be given within eight weeks of their receipt.

For the scrutiny period 1995/96, the proposals for risk analysis shall be sent to the Commission not later than 1 February 1995.

For measures for which a Member State considers the use of risk analysis not to be practicable, it shall be compulsory for undertakings the sum of whose receipts or payments or the sum of those two amounts within the system of financing by the Guarantee Section of the EAGGF was more than

ECU 300 000 and which were not scrutinized in accordance with this Regulation during either of the two preceding scrutiny periods, to be scrutinized.;

6. in the last subparagraph of Article 2 (2), 'ECU 10 000' shall be replaced by 'ECU 30 000';

7. in Article 2 (4), the second subparagraph shall be replaced by the following :

'Scrutiny shall cover a period of at least 12 months ending during the previous scrutiny period; it may be extended for periods, to be determined by the Member State, preceding or following the 12-month period.;

8. in Article 2 (5), 'Article 6 of Regulation (EEC) No 283/72' shall be replaced by 'Article 6 of Regulation (EEC) No 595/91 (*)', and the following footnote shall be added : '(*) OJ No L 67, 14. 3. 1991, p. 11.;

9. in Article 3 (1) the phrase preceding the indents and the first and second indents shall be replaced by the following :

'1. The accuracy of primary data under scrutiny shall be verified by the number of cross-checks, including, where necessary, the commercial documents of third parties, appropriate to the degree of risk presented, including, *inter alia* :

— comparisons with the commercial documents of suppliers, customers, carriers and other third parties,

— physical checks, where appropriate, upon the quantity and nature of stocks, and';

10. the following paragraph shall be added to Article 3 :

'3. In the selection of transactions to be checked, full account shall be taken of the degree of risk presented.;

11. Article 5 (1) shall be replaced by the following :

'1. The persons responsible for the undertaking, or a third party, shall ensure that all commercial documents and additional information are supplied to the officials responsible for the scrutiny or to the persons empowered for that purpose. Electronically stored data shall be provided on an appropriate data support medium.;

12. the following paragraph shall be added to Article 5 :

'3. Where, during scrutiny carried out pursuant to this Regulation, the commercial documents maintained by the undertaking are considered inadequate for scrutiny purposes, the undertaking shall be directed to maintain future such records as required by the Member State responsible for the scrutiny, without prejudice to obligations laid down in other Regulations relating to the sector concerned.

Member States shall determine the date as of which such records are to be established.

Where all or part of the commercial documents required to be scrutinized pursuant to this Regulation are located with an undertaking in the same commercial group, partnership or association of undertakings managed on a unified basis as the undertaking scrutinized, whether located inside or outside Community territory, the undertaking shall make available these commercial documents to officials responsible for the scrutiny, at a place and time to be determined by the Member States responsible for carrying out the scrutiny.';

13. Article 7 shall be replaced by the following :

Article 7

1. Member States shall assist each other for the purposes of carrying out the scrutiny provided for in Articles 2 and 3 :

- where an undertaking or third party is established in a Member State other than that in which payment of the amount in question has or should have been made or received,
- or other than that in which the documents and information required for scrutiny are to be found.

The Commission may coordinate joint actions involving mutual assistance between two or more Member States. Provisions for such coordination shall be established in accordance with Article 19.

2. During the first three months following the EAGGF financial year of payment, Member States shall send a list of the undertakings referred to in the first subparagraph of paragraph 1 to each Member State in which such an undertaking is established. The list shall contain all the details necessary to enable the Member State of destination to identify the undertakings and to undertake its scrutiny obligations. The Member State of destination shall be responsible for the scrutiny of such undertakings in accordance with Article 2.

A copy of each list shall be sent to the Commission.

The Member State receiving or making the payment may ask the Member State in which the undertaking is established to scrutinize some of the undertakings on that list pursuant to Article 2, indicating why it is necessary to make such a request and in particular the risks associated with it.

The Member State receiving the request shall take due account of the risks associated with the undertaking, which shall be communicated by the requesting Member State.

The requested Member State shall inform the requesting Member State of the follow-up accorded to the request. Where scrutiny of an undertaking on the

list takes place, the requested Member State that carried out the scrutiny shall inform the requesting Member State of the results of that scrutiny at the latest three months after the end of the scrutiny period.

A copy of each such request shall be sent to the Commission.

3. During the first three months following the EAGGF financial year of payment, Member States shall send the Commission a list of undertakings established in a third country for which payment of the amount in question has or should have been made or received in that Member State.

4. If additional information is required in another Member State as part of the scrutiny of an undertaking in accordance with Article 2, and in particular cross-checks in accordance with Article 3, specific scrutiny requests may be made indicating the reasons for the request. A copy of each such specific request shall be sent to the Commission.

The scrutiny request shall be fulfilled not later than six months after its receipt by the requested Member State; the results of the scrutiny shall be communicated without delay to the requesting Member State and to the Commission.

5. In accordance with Article 19 the Commission shall determine minimum requirements regarding the contents of the requests referred to in paragraphs 2 and 4.';

14. in Article 9 (5), '1991' shall be replaced by '1996', and the second sentence deleted;

15. in Article 10 (3), 'six' shall be replaced by 'eight';

16. Article 10 (6) shall be deleted;

17. in Article 16 the following paragraph shall be inserted :

'1a. For the fifth year of application of this Regulation, the amounts of the overall Community contribution referred to in Articles 13 and 14 shall be aggregated. Within the limits of this aggregation, the Community will contribute without distinction, at a rate of 25 %, towards the expenditure incurred by Member States as provided for in Articles 13, 14 and 15.';

18. Article 21 shall be amended as follows :

(a) the present text shall become paragraph 1 and the following sentence shall be added :

'They shall be provided upon request on an appropriate data support medium.';

(b) the following paragraphs shall be added :

'2. The scrutinies referred to in Article 2 shall be carried out by the officials of the Member States.

Officials of the Commission may participate in these scrutinies. They may not themselves exercise the powers of scrutiny accorded to national officials ; however, they shall have access to the same premises and to the same documents as the officials of the Member States.

3. In the case of scrutinies taking place under Article 7, officials of the requesting Member State may be present, with the agreement of the requested Member State, at the scrutiny in the requested Member State and have access to the same premises and the same documents as the officials of that Member State.

Officials of the requesting Member State present at scrutinies in the requested Member State must at all times be able to furnish proof of their offi-

cial capacity. The scrutinies shall at all times be carried out by officials of the requested Member State.

4. Where national provisions concerning criminal procedure reserve certain acts for officials specifically designated by the national law, the officials of the Commission, and the officials of the Member State referred to in paragraph 3, shall not take part in these acts. In any event, they shall not take part in, in particular, visits to the home or the formal interrogation of persons in the context of the criminal law of the Member State. They shall, however, have access to information thus obtained.'

Article 2

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

It shall apply with effect from the 1995/96 scrutiny period.

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

Done at Brussels, 12 December 1994.

For the Council

The President

J. BORCHERT
