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COUNCIL REGULATION (EEC) No 4045/89

of 21 December 1989

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 and repealing Directive 77/435/EEC

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▼B**COUNCIL REGULATION (EEC) No 4045/89****of 21 December 1989****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 and repealing Directive 77/435/EEC**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic 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, under Article 8 of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy ⁽³⁾, as last amended by Regulation (EEC) No 2048/88 ⁽⁴⁾, the Member States take the measures necessary to satisfy themselves that transactions financed by the European Agricultural Guidance and Guarantee Fund (EAGGF) are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence;

Whereas scrutiny of the commercial documents of undertakings received or making payments can be a very effective means of surveillance of transactions forming part of the system of financing by the Guarantee Section of the EAGGF; whereas this scrutiny supplements other inspections already carried out by the Member States; whereas, furthermore, national provisions relating to scrutiny which are more extensive than those provided for in the Regulation are not affected by this Regulation;

Whereas Member States must be encouraged to reinforce the scrutiny of commercial documents of undertakings receiving or making payments which they have carried out in accordance with Directive 77/435/EEC ⁽⁵⁾;

Whereas the implementation by Member States of the rules arising from Directive 77/435/EEC has disclosed the need for certain provisions of that Directive to be amended on the basis of experience gained; whereas in view of the nature of the provisions concerned the amendments should be included in a Regulation;

Whereas the documents used as a basis for such scrutiny should be determined in such a way as to enable a full scrutiny to be carried out;

Whereas the undertakings to be scrutinized must be selected on the basis of the nature of the transactions carried out on their responsibility and the breakdown of the undertakings receiving or making payments according to their financial importance in the system of financing by the Guarantee Section of the EAGGF;

Whereas, furthermore, it is necessary to provide for a minimum number of inspections of commercial documents; whereas this number must be determined by a method which precludes substantial differences between the Member States by virtue of differences in the structure of their expenditure under the Guarantee Section of the EAGGF; whereas this method may be established by referring to the number of undertakings of a certain importance in the system of financing by the Guarantee Section of the EAGGF;

Whereas the powers of the officials responsible for scrutiny and the obligations on undertakings to make commercial documents available

⁽¹⁾ OJ No C 192, 29. 7. 1987, p. 15.

⁽²⁾ OJ No C 291, 20. 11. 1989, p. 105.

⁽³⁾ OJ No L 94, 28. 4. 1970, p. 13.

⁽⁴⁾ OJ No L 185, 15. 7. 1988, p. 1.

⁽⁵⁾ OJ No L 172, 12. 7. 1977, p. 17.

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to such officials for a specified period and to supply such information as may be requested by them should be defined; whereas it should also be stipulated that commercial documents may be seized in certain cases;

Whereas it is necessary to organize cooperation among the Member States on account of the international structure of agricultural trade and with a view to the completion of the internal market; whereas it is also necessary for a centralized documentation system concerning undertakings receiving or making payments established in third countries to be set up at Community level;

Whereas, while it is the responsibility of the Member States in the first instance to adopt their scrutiny programmes, it is necessary that these programmes be communicated to the Commission so that it can assume its supervisory and coordinating role and to ensure that the programmes are adopted on the basis of appropriate criteria; whereas scrutiny can thus be concentrated on sectors or undertakings where the risk of fraud is high;

Whereas the departments carrying out scrutiny pursuant to this Regulation must be organized independently of the departments carrying out scrutiny prior to payment;

Whereas it is essential that each Member State have a special department responsible for monitoring the application of this Regulation and for coordinating the scrutiny carried out in accordance with this Regulation; whereas the officials belonging to that department may make inspections of undertakings in accordance with this Regulation;

Whereas encouragement for reinforcing the departments responsible for the application of this Regulation should be provided in the form of a temporary, degressive Community contribution towards the expenditure incurred by Member States in engaging extra staff and towards the costs of training staff and equipping the departments;

Whereas it is necessary for an estimate to be made of the amount of the Community financing required for implementing this measure; whereas such amount forms part of the financial forecast appearing in point II of the Interinstitutional Agreement on budgetary discipline and improvement of the budgetary procedure⁽¹⁾ of 29 June 1988; whereas the appropriations actually available will be determined under the budgetary procedure in compliance with that agreement;

Whereas information collected during the scrutiny of commercial documents must be protected by professional secrecy;

Whereas arrangements should be made for an exchange of information at Community level so that the results of the application of this Regulation can be used to greater effect,

HAS ADOPTED THIS REGULATION:

Article 1

1. This Regulation relates to scrutiny of the commercial documents of those entities receiving or making payments relating directly or indirectly to the system of financing by the Guarantee Section of the EAGGF, hereinafter called 'undertakings', in order to ascertain whether transactions forming part of the system of financing by the Guarantee Section of the EAGGF have actually been carried out and have been executed correctly.

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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 as commercial data, in whatever form they may take, including electronically stored data, in

⁽¹⁾ OJ No L 185, 15. 7. 1988, p. 33.

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so far as these documents or data relate directly or indirectly to the transactions referred to in paragraph 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⁽¹⁾. The Commission shall, in accordance with Article 19, establish a list of other measures to which this Regulation does not apply.

▼B*Article 2*

1. Member States shall carry out systematic scrutiny of the commercial documents of undertakings taking account of the nature of the transactions to be scrutinized. Member States shall ensure that the selection of undertakings for scrutiny gives the best possible assurance of the effectiveness of the measures for preventing and detecting irregularities under the system of financing by the Guarantee Section of the EAGGF. *Inter alia* the selection shall take account of the financial importance of the undertakings in that system and other risk factors.

2. The scrutiny referred to in paragraph 1 shall apply, for each period of scrutiny referred to in paragraph 4 to a number of undertakings which may not be less than half the undertakings whose receipts or payments, or the sum thereof, under the system of financing by the Guarantee Section of the EAGGF, amounted to more than ►M1 ECU 100 000 ◀ for the ►M1 EAGGF financial year ◀ preceding the beginning of the period of scrutiny in question.

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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.

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Undertakings the sum of whose receipts or payments amounted to less than ►M1 ECU 30 000 ◀ shall be scrutinized in accordance with this Regulation only for specific reasons to be indicated by the Member States in their annual programme as referred to in Article 10 or by the Commission in any proposed amendment to that programme.

⁽¹⁾ OJ No L 355, 5. 12. 1992, p. 1.

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3. In appropriate cases, the scrutiny provided for in paragraph 1 shall be extended to natural and legal persons with which undertakings within the meaning of Article 1 are associated and to such other natural or legal persons as may be relevant for the pursuit of the objectives set out in Article 3.

4. The scrutiny period shall run from 1 July to 30 June of the following year.

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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.

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5. The scrutiny carried out pursuant to this Regulation shall not prejudice the inspections undertaken pursuant to ►**M1** Article 6 of Regulation (EEC) No 595/91⁽¹⁾ ◀ or those undertaken pursuant to Article 9 of Regulation (EEC) No 729/70.

*Article 3***▼M1**

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

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- comparison with the records of financial flows leading to or consequent upon the transactions carried out within the financing system by the EAGGF Guarantee section.

2. In particular, where undertakings are required to keep particular book records of stock in accordance with Community or national provisions, scrutiny of these records shall, in appropriate cases include a comparison with the commercial documents and, where appropriate, with the actual quantities in stock.

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

▼B*Article 4*

Undertakings shall keep the commercial documents referred to in Articles 1 (2) and 3 for at least three years, starting from the end of the year in which they were drawn up.

The Member States may prescribe a longer period for the retention of these documents.

*Article 5***▼M1**

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.

⁽¹⁾ OJ No L 67, 14. 3. 1991, p. 11.

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2. The officials responsible for the scrutiny or the persons empowered for that purpose may require that extracts or copies of the documents referred to in paragraph 1 be supplied to them.

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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.

▼B*Article 6*

1. Member States shall ensure that officials responsible for the scrutiny shall be entitled to seize commercial documents, or have them seized. This right shall be exercised with due regard for relevant national provisions and shall not affect the application of rules governing proceedings in criminal matters concerning the seizure of documents.

2. Member States shall adopt appropriate measures to penalize natural or legal persons who fail to fulfil their obligations under this Regulation.

▼M1*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.

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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.

▼B*Article 8*

1. Information collected in the course of scrutiny as provided for in this Regulation shall be protected by professional secrecy. It may not be communicated to any persons other than those who, by reason of their duties in the Member States or in the institutions of the Communities, are required to have knowledge thereof for the purposes of performing those duties.

2. This Article shall not prejudice national provisions relating to legal proceedings.

Article 9

1. Before 1 January following the scrutiny period Member States shall send the Commission a detailed report on the application of this Regulation.

2. The report must set out any difficulties encountered and the measures taken to overcome them and put forward, where appropriate, suggestions for improvements.

3. The Member States and the Commission shall have regular exchanges of views on the application of this Regulation.

4. The Commission will evaluate annually the progress achieved, in its annual report on the administration of the funds referred to in Article 10 of Regulation (EEC) No 729/70.

5. The Commission shall submit before 31 December
 ►M1 1996 ◀ a report on the application of this Regulation.
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Article 10

1. Member States shall draw up programmes for scrutinies to be carried out pursuant to Article 2 during the subsequent scrutiny period.

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2. Each year, before 15 April, the Member States shall send the Commission their programme as referred to in paragraph 1 and shall specify:
 - the number of undertakings to be scrutinized and their breakdown by sector on the basis of the amounts relating to them,
 - the criteria adopted for drawing up the programme.
3. The programmes established by the Member States and forwarded to the Commission, shall be implemented by the Member States, if, within ►**M1** eight ◀ weeks, the Commission has not made known its comments.
4. Amendments made by the Member States to the programmes shall be subject to the same procedure.
5. Exceptionally, at any stage, the Commission may request the inclusion of a particular category of undertaking in the programme of one or more Member States.

▼M1**▼B***Article 11*

1. In each Member State not later than 1 January 1991 a special department is to be made responsible for monitoring the application of this Regulation and for,

- the performance of the scrutiny provided for herein by officials employed directly by that special department, or
- the coordination and general surveillance of the scrutiny carried out by officials belonging to other departments.

Member States may also provide that scrutinies to be carried out pursuant to this Regulation are allocated between the special department and other national departments, provided that the former is responsible for their coordination.

2. The department or departments responsible for the application of this Regulation must be organized in such a way as to be independent of the departments or branches of departments responsible for the payments and the scrutiny carried out prior to payment.

3. In order to ensure that this Regulation is properly applied the special department referred to in paragraph 1 shall take all the measures necessary.

4. The special department shall be responsible in addition for:

- training the national officials responsible for carrying out the scrutiny referred to in this Regulation, in order to enable them to acquire sufficient knowledge for performing their duties,
- administering the scrutiny reports and any other documents relating to the scrutinies carried out and provided for under this Regulation,
- the preparation and communication of the reports referred to in Article 9 (1) and the programmes referred to in Article 10.

5. The special department shall be entrusted by the Member State concerned with all the powers necessary to perform the tasks referred to in paragraphs 3 and 4.

It shall consist of a sufficient number of officials who are suitably trained to carry out those tasks.

6. This Article shall not apply when the minimum number of undertakings to control, in accordance with Article 2 (2), is less than 10.

Article 12

The Community shall participate under the conditions set out ►**M2** in Articles 13, 14, 15 and 16a ◀ in the financing of the additional expenditure actually incurred by the Member States and linked to:

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- the reduction of the threshold for calculating the number of scrutiny checks to be carried out,
- the mobilization of means intended to improve the quality of scrutiny.

Article 13

1. The Community shall contribute towards the expenditure actually incurred by Member States in remunerating additional personnel recruited as from 1 January 1990 and intended to be employed only:

- on the staff of the special department referred to in Article 11, or
- on the staff of other national departments, provided that such personnel is employed solely in performing the scrutiny provided for in this Regulation.

2. The Community financial contribution shall be at the rate of 50 % for the first three years and 25 % for the fourth and fifth years, for a period of five years starting from 1 January 1990, up to an overall amount of:

- ECU 500 000 per year for the first three years and ECU 250 000 for the fourth and fifth years in the case of Germany, Spain, France, Italy, the Netherlands and the United Kingdom,
- ECU 250 000 per year for the first three years and ECU 125 000 for the fourth and fifth years in the case of Belgium, Denmark, Greece, Ireland and Portugal, and
- ECU 50 000 per year for the first three years and ECU 25 000 for the fourth and fifth years in the case of Luxembourg.

3. For the purposes of this Regulation 'remuneration' means the salaries after tax, of the officials responsible for the application of this Regulation and the travel costs necessitated by the performance of their duties.

The Community contribution to the remuneration expense of staff shall be decided for each Member State at a fixed rate.

Article 14

The Community shall contribute towards the expenditure incurred by Member States in training the staff of the departments responsible for the application of this Regulation at the rate of 50 % for the first three years and 25 % for the fourth and fifth years, for a period of five years with effect from 1 January 1990, up to an overall amount of:

- ECU 100 000 per year for the first three years and ECU 50 000 for the fourth and fifth years in the case of Germany, Spain, France, Italy, the Netherlands and the United Kingdom,
- ECU 50 000 per year for the first three years and ECU 25 000 for the fourth and fifth years in the case of Belgium, Denmark, Greece, Ireland and Portugal, and
- ECU 10 000 per year for the first three years and ECU 5 000 for the fourth and fifth years in the case of Luxembourg.

Article 15

The Community shall contribute towards the expenditure actually incurred by the Member States in respect of the purchase of data processing and office equipment required by the departments responsible for the application of this Regulation, at the rate of 100 % up to a maximum amount of:

- ECU 100 000 for Germany, Spain, France, Italy, the Netherlands and the United Kingdom,
- ECU 60 000 for Belgium, Denmark, Greece, Ireland and Portugal, and
- ECU 20 000 for Luxembourg.

▼B*Article 16*

1. The maximum amount of Community expenditure deemed necessary for carrying out the measure introduced by this Regulation shall be ECU 6 080 000 for the first year, ECU 5 160 000 for the second and third years and ECU 2 580 000 for the fourth and fifth years.

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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.

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2. The budgetary authority shall determine appropriations available for each financial year.

▼M2*Article 16a*

The Community shall contribute towards the expenditure referred to in Articles 13, 14 and 15 incurred by Austria, Finland and Sweden over a period of three years from 1 January 1995, at the rate of 50 %, without distinguishing between the type of expenditure, up to a maximum annual amount of ECU 360 000 for each of those States.

▼B*Article 17*

The annual amount of expenditure borne by the Community shall be fixed by the Commission on the basis of data provided by the Member States.

Article 18

The amounts in ecus appearing in this Regulation shall be converted into national currencies by applying the rate of exchange operating on the first working date of the year when the scrutiny period begins and published in the C series of the *Official Journal of the European Communities*.

Article 19

Detailed rules for the application of this Regulation shall be adopted where necessary, in accordance with the procedure laid down in Article 13 of Regulation (EEC) No 729/70.

Article 20

Article 9 of Regulation (EEC) No 729/70 shall apply to the scrutiny of specific expenditure financed by the Community under this Regulation.

Article 21

►**M1** 1. ◀ In accordance with the relevant national laws, Commission officials shall have access to all documents prepared either with a view to or following the scrutiny organized under this Regulation and to the data held, including those stored in the data processing systems. ►**M1** They shall be provided upon request on an appropriate data support medium. ◀

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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.

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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 official 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.

▼B*Article 22*

1. Directive 77/435/EEC shall be repealed with effect from 1 January 1990. The scrutiny carried out from that date under that Directive shall be deemed to be carried out in accordance with this Regulation.

2. References made to Directive 77/435/EEC shall be deemed to be made to this Regulation.

Article 23

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 1 January 1990.

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