

COUNCIL REGULATION (EC) No 873/2004
of 29 April 2004
amending Regulation (EC) No 2100/94 on Community plant variety rights

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Whereas:

- (1) Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights ⁽²⁾ creates a Community regime for plant varieties, co-existing with national regimes, which allows for the grant of industrial property rights, valid throughout the Community (Community plant variety rights).
- (2) The implementation and application of this regime are carried out by a Community office with legal personality, known as the Community Plant Variety Office (the Office).
- (3) The term 'compulsory licence' should have the same meaning and content as the current term 'compulsory exploitation right'.
- (4) Only the Office is entitled to grant a compulsory licence for a plant variety which is protected by a Community plant variety right.
- (5) The Community's legal framework for the protection of biotechnological inventions, established in Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions ⁽³⁾ lays down in Article 12 rules for the grant of non-exclusive compulsory licences where protected plant varieties, including Community plant varieties, incorporate patented inventions, and vice versa.
- (6) Article 29 of Regulation (EC) No 2100/94, while providing in general for the grant of compulsory licences for Community plant varieties on grounds of public interest, does not expressly refer to the licences to be provided in accordance with Article 12 of Directive 98/44/EC.

- (7) Considering the need to ensure transparency and coherence of the system of compulsory cross-licensing it is appropriate to amend the rules established by Regulation (EC) No 2100/94, making express reference and setting out the specific conditions relating to compulsory licences provided for in Directive 98/44/EC.
- (8) Considering the national scope of the protection for biotechnological inventions according to Directive 98/44/EC it is necessary to ensure that the national patent holder be granted a cross-licence for a plant variety right only in the Member State(s) where he/she can claim a patent for a biotechnological invention.
- (9) The Treaty provides for no powers, other than those in Article 308 thereof, for the adoption of this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Article 29 of Regulation (EC) No 2100/94 shall be replaced by the following:

'Article 29

Compulsory licensing

1. Compulsory licences shall be granted to one or more persons by the Office, on application by that person or those persons, but only on grounds of public interest and after consulting the Administrative Council referred to in Article 36.

2. On application by a Member State, by the Commission or by an organisation set up at Community level and registered by the Commission, a compulsory licence may be granted, either to a category of persons satisfying specific requirements, or to anyone in one or more Member States or throughout the Community. It may be granted only on grounds of public interest and with the approval of the Administrative Council.

⁽¹⁾ Opinion of 13 January 2004 (not yet published in the Official Journal).

⁽²⁾ OJ L 227, 1.9.1994, p. 1. Regulation as last amended by Regulation (EC) No 1650/2003 (OJ L 245, 29.9.2003, p. 28).

⁽³⁾ OJ L 213, 30.7.1998, p. 13.

3. The Office shall, when granting the compulsory licence pursuant to paragraphs 1, 2, 5 or 5a, stipulate the type of acts covered and specify the reasonable conditions pertaining thereto as well as the specific requirements referred to in paragraph 2. The reasonable conditions shall take into account the interests of any holder of plant variety rights who would be affected by the grant of the compulsory licence. The reasonable conditions may include a possible time limitation, the payment of an appropriate royalty as equitable remuneration to the holder and may impose certain obligations on the holder, the fulfilment of which are necessary to make use of the compulsory licence.

4. On the expiry of each one-year period after the grant of the compulsory licence pursuant to paragraphs 1, 2, 5 or 5a, and within the possible time limitation set out in paragraph 3, any of the parties to proceedings may request that the decision on the grant of the compulsory licence be cancelled or amended. The sole grounds for such a request shall be that the circumstances determining the decision taken have in the meantime undergone change.

5. On application, a compulsory licence shall be granted to the holder in respect of an essentially derived variety if the criteria set out in paragraph 1 are met. The reasonable conditions referred to in paragraph 3 shall include the payment of an appropriate royalty as equitable remuneration to the holder of the initial variety.

5a. On application, a compulsory licence for the non-exclusive use of a protected plant variety pursuant to Article 12(2) of Directive 98/44/EC shall be granted to the holder of a patent for a biotechnological invention, subject

to payment of an appropriate royalty as equitable remuneration, provided that the patent holder demonstrates that:

- (i) he/she has applied unsuccessfully to the holder of the plant variety right to obtain a contractual licence; and
- (ii) the invention constitutes significant technical progress of considerable economic interest compared with the protected plant variety.

Where, in order to enable him/her to acquire or exploit his/her plant variety right, a holder has been granted a compulsory licence in accordance with Article 12(1) of Directive 98/44/EC for the non-exclusive use of a patented invention, a non-exclusive cross-licence on reasonable terms to exploit the variety shall be granted, on application, to the holder of the patent for that invention,

The territorial scope of the licence or cross-licence referred to in this paragraph shall be limited to the part or parts of the Community covered by the patent.

6. The implementing rules pursuant to Article 114 may specify certain other examples of licences in the public interest referred to in paragraphs 1, 2 and 5a, and moreover lay down details for the implementation of paragraphs 1 to 5a.

7. Compulsory licences may not be granted by Member States in respect of a Community plant variety right.'

Article 2

This Regulation shall enter into force on the 20th 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 all Member States.

Done at Luxembourg, 29 April 2004.

For the Council
The President
M. McDOWELL