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(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COUNCIL REGULATION (EC) No 485/2008

of 26 May 2008

on scrutiny by Member States of transactions forming part of the system of financing by the European Agricultural Guarantee Fund

(Codified version)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 37 thereof,

Having regard to the proposal from the Commission,

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

Whereas:

(1) 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 ⁽²⁾ has been substantially amended several times ⁽³⁾. In the interests of clarity and rationality the said Regulation should be codified.

(2) Under Article 9 of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy ⁽⁴⁾, the Member States are to take the measures necessary to ensure effective protection of the financial interests of the Community, and particularly in order to check the genuineness and compliance of operations financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD), to prevent and pursue irregularities and to recover sums lost as a result of irregularities or negligence.

(3) Scrutiny of the commercial documents of undertakings receiving or making payments can be a very effective means of surveillance of transactions forming part of the system of financing by the EAGF. This scrutiny supplements other checks already carried out by the Member States. Furthermore, national provisions relating to scrutiny which are more extensive than those provided for in this Regulation are not affected by it.

(4) 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.

(5) The undertakings to be scrutinised should 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 EAGF.

(6) Furthermore, it is necessary to provide for a minimum number of inspections of commercial documents. This number should 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 EAGF. This method may be established by referring to the number of undertakings of a certain financial importance in the system of financing by the EAGF.

(7) The powers of the officials responsible for scrutiny and the obligations on undertakings to make commercial documents available to such officials for a specified period and to supply such information as may be requested by them should be defined. It should also be stipulated that commercial documents may be seized in certain cases.

⁽¹⁾ Opinion of 19 June 2007 (not yet published in the Official Journal).

⁽²⁾ OJ L 388, 30.12.1989, p. 18. Regulation as last amended by Regulation (EC) No 2154/2002 (OJ L 328, 5.12.2002, p. 4).

⁽³⁾ See Annex I.

⁽⁴⁾ OJ L 209, 11.8.2005, p. 1. Regulation as last amended by Regulation (EC) No 1437/2007 (OJ L 322, 7.12.2007, p. 1).

- (8) It is necessary to organise cooperation among the Member States on account of the international structure of agricultural trade and with a view to the functioning of the internal market. It is also necessary for a centralised documentation system concerning undertakings receiving or making payments established in third countries to be set up at Community level.
- (9) 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. Scrutiny can thus be concentrated on sectors or undertakings where the risk of fraud is high.
- (10) 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. The officials belonging to that department may make inspections of undertakings in accordance with this Regulation.
- (11) The departments carrying out scrutiny pursuant to this Regulation should be organised independently of the departments carrying out scrutiny prior to payment.
- (12) Information collected during the scrutiny of commercial documents should be protected by professional secrecy.
- (13) 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 European Agricultural Guarantee Fund (EAGF), or their representatives, hereinafter 'undertakings', in order to ascertain whether transactions forming part of the system of financing by the EAGF have actually been carried out and have been executed correctly.

2. This Regulation shall not apply to measures covered by the integrated administration and control system falling within Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers ⁽¹⁾. The Commission shall, in accordance with the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005, establish a list of other measures to which this Regulation does not apply.

3. For the purposes of this Regulation the following definitions shall apply:

- (a) 'commercial documents' means 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 so far as these documents or data relate directly or indirectly to the transactions referred to in paragraph 1;
- (b) 'third party' means any natural or legal person directly or indirectly connected with transactions carried out within the financing system by the EAGF.

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 scrutinised. 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 EAGF, *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 7, 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 EAGF, amounted to more than EUR 150 000 for the EAGF financial year preceding the beginning of the period of scrutiny in question.

⁽¹⁾ OJ L 270, 21.10.2003, p. 1. Regulation as last amended by Commission Regulation (EC) No 293/2008 (OJ L 90, 2.4.2008, p. 5).

3. In relation to each current scrutiny period, Member States shall, without prejudice to their obligations defined in paragraph 1, select the undertakings to be scrutinised 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.

4. 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 EAGF was more than EUR 350 000 and which were not scrutinised in accordance with this Regulation during either of the two preceding scrutiny periods, to be scrutinised.

5. Undertakings the sum of whose receipts or payments amounted to less than EUR 40 000 shall be scrutinised 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.

6. In appropriate cases, the scrutiny provided for in paragraph 1 shall be extended to natural and legal persons with whom 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.

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

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. The scrutiny carried out pursuant to this Regulation shall not prejudice the checks undertaken pursuant to Articles 36 and 37 of Regulation (EC) No 1290/2005.

Article 3

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

- (a) comparisons with the commercial documents of suppliers, customers, carriers and other third parties;
- (b) physical checks, where appropriate, upon the quantity and nature of stocks;
- (c) comparison with the records of financial flows leading to or consequent upon the transactions carried out within the financing system by the EAGF; and
- (d) checks, in relation to bookkeeping, or records of financial movements showing, at the time of the scrutiny, that the documents held by the paying agency as justification for the payment of aid to the beneficiary are accurate.

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.

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

Article 4

Undertakings shall keep the commercial documents 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

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.

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.

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 in future such records as are 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 scrutinised 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 scrutinised, 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.

Article 6

1. Member States shall ensure that officials responsible for scrutiny are 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 penalise natural or legal persons who fail to fulfil their obligations under this Regulation.

Article 7

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

(a) 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;

(b) where an undertaking or third party is established in a Member State 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 the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005.

Where two or more Member States include in the programme sent in under Article 10(2) a proposal for joint action involving extensive mutual assistance, the Commission may, on request, allow a reduction of up to a maximum of 25 % of the minimum number of scrutinise as determined under Article 2(2) to (5) for the Member States concerned.

2. During the first three months following the EAGF financial year of payment, Member States shall send a list of the undertakings referred to in paragraph 1(a) 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 scrutinise some of the undertakings on that list in accordance with 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.

An overview of such requests shall be sent to the Commission on a quarterly basis, within one month after the end of each quarter. The Commission may demand that a copy of individual requests be provided.

3. During the first three months following the EAGF 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. An overview of such specific requests shall be sent to the Commission on a quarterly basis within one month after the end of each quarter. The Commission may demand that a copy of individual requests be provided.

The scrutiny request shall be met not later than six months after its receipt; the results of the scrutiny shall be communicated without delay to the requesting Member State and to the Commission. The communication to the Commission shall be on a quarterly basis within one month after the end of each quarter.

5. In accordance with the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005, the Commission shall determine minimum requirements regarding the contents of the requests referred to in paragraphs 2 and 4 of this Article.

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.

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

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

3. The Commission shall evaluate annually the progress achieved, in its annual report on the administration of the funds referred to in Article 43 of Regulation (EC) No 1290/2005.

Article 10

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

2. Each year, before 15 April, the Member States shall send the Commission their programme as referred to in paragraph 1 and shall specify:

(a) the number of undertakings to be scrutinised and their breakdown by sector on the basis of the amounts relating to them;

(b) 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 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.

Article 11

1. In each Member State a special department shall be responsible for monitoring the application of this Regulation and for:

- (a) the performance of the scrutiny provided for herein by officials employed directly by that special department; or
- (b) 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 organised 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:

- (a) 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;
- (b) administering the scrutiny reports and any other documents relating to the scrutinies carried out and provided for under this Regulation;
- (c) 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) to (5), is less than 10.

Article 12

The amounts in euro appearing in this Regulation shall be converted, where appropriate, 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 Union*.

Article 13

Detailed rules for the application of this Regulation shall be adopted where necessary, in accordance with the procedure referred to in Article 41(2) of Regulation (EC) No 1290/2005.

Article 14

Articles 36 and 37 of Regulation (EC) No 1290/2005 shall apply to the scrutiny of specific expenditure financed by the Community under this Regulation.

Article 15

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 organised under this Regulation and to the data held, including those stored in the data-processing systems. Those data shall be provided upon request on an appropriate data support medium.

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 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, neither the officials of the Commission, nor the officials of the Member State referred to in paragraph 3, shall 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 16

Regulation (EEC) No 4045/89, as amended by the Regulations listed in Annex I, is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and shall be read in accordance with the correlation table in Annex II.

Article 17

This Regulation shall enter into force on the 20th day following 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 Brussels, 26 May 2008.

For the Council
The President
D. RUPEL

ANNEX I

REPEALED REGULATION WITH ITS SUCCESSIVE AMENDMENTS

Council Regulation (EEC) No 4045/89
(OJ L 388, 30.12.1989, p. 18).

Council Regulation (EC) No 3094/94
(OJ L 328, 20.12.1994, p. 1).

Council Regulation (EC) No 3235/94
(OJ L 338, 28.12.1994, p. 16).

Council Regulation (EC) No 2154/2002
(OJ L 328, 5.12.2002, p. 4).

Article 1(1) only

ANNEX II

CORRELATION TABLE

Regulation (EEC) No 4045/89	This Regulation
Article 1(1)	Article 1(1)
Article 1(2)	Article 1(3), introductory wording, and Article 1(3)(a)
Article 1(3)	Article 1(3)(b)
Article 1(4)	Article 1(2)
Article 1(5)	—
Article 2(1)	Article 2(1)
Article 2(2), first subparagraph	Article 2(2)
Article 2(2), second subparagraph	Article 2(3)
Article 2(2), third subparagraph	—
Article 2(2), fourth subparagraph	Article 2(4)
Article 2(2), fifth subparagraph	Article 2(5)
Article 2(3)	Article 2(6)
Article 2(4)	Article 2(7)
Article 2(5)	Article 2(8)
Article 3(1), introductory wording	Article 3(1), introductory wording
Article 3(1), first indent	Article 3(1)(a)
Article 3(1), second indent	Article 3(1)(b)
Article 3(1), third indent	Article 3(1)(c)
Article 3(1), fourth indent	Article 3(1)(d)
Article 3(2)	Article 3(2)
Article 3(3)	Article 3(3)
Article 4	Article 4
Article 5	Article 5
Article 6	Article 6
Article 7(1), first subparagraph, introductory wording	Article 7(1), first subparagraph, introductory wording
Article 7(1), first subparagraph, first indent	Article 7(1), first subparagraph, (a)
Article 7(1), first subparagraph, second indent	Article 7(1), first subparagraph, (b)
Article 7(1), second subparagraph	Article 7(1), second subparagraph
Article 7(1), third subparagraph	Article 7(1), third subparagraph
Article 7(2), (3), (4) and (5)	Article 7(2) to (5)
Article 8	Article 8
Article 9(1)	Article 9(1), first subparagraph
Article 9(2)	Article 9(1), second subparagraph
Article 9(3)	Article 9(2)

Regulation (EEC) No 4045/89	This Regulation
Article 9(4)	Article 9(3)
Article 9(5)	—
Article 10(1)	Article 10(1)
Article 10(2), introductory wording	Article 10(2), introductory wording
Article 10(2), first indent	Article 10(2)(a)
Article 10(2), second indent	Article 10(2)(b)
Article 10(3), (4) and (5)	Article 10(3), (4) and (5)
Article 11(1), first subparagraph, introductory wording	Article 11(1), first subparagraph, introductory wording
Article 11(1), first subparagraph, first indent	Article 11(1), first subparagraph, (a)
Article 11(1), first subparagraph, second indent	Article 11(1), first subparagraph, (b)
Article 11(1), second subparagraph	Article 11(1), second subparagraph
Article 11(2) and (3)	Article 11(2) and (3)
Article 11(4), introductory wording	Article 11(4), introductory wording
Article 11(4), first indent	Article 11(4)(a)
Article 11(4), second indent	Article 11(4)(b)
Article 11(4), third indent	Article 11(4)(c)
Article 11(5) and (6)	Article 11(5) and (6)
Article 18	Article 12
Article 19	Article 13
Article 20	Article 14
Article 21	Article 15
Article 22	—
—	Article 16
Article 23	Article 17
—	Annex I
—	Annex II