

COMMISSION REGULATION (EC) No. 1768/95

(of 24 July 1995)

IMPLEMENTING RULES ON THE AGRICULTURAL EXEMPTION PROVIDED
FOR IN ARTICLE 14(3) OF COUNCIL REGULATION (EC) No. 2100/94
ON COMMUNITY PLANT VARIETY RIGHTS

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights (the basic Regulation)¹, and in particular Article 14(3) thereof,

Whereas Article 14 of the basic Regulation provides for a derogation from Community plant variety right for the purposes of safeguarding agricultural production (agricultural exemption);

Whereas the conditions to give effect to this derogation and to safeguard the legitimate interests of the breeder and of the farmer shall be established in implementing rules, on the basis of criteria laid down in Article 14(3) of the basic Regulation;

Whereas this Regulation establishes those conditions in specifying, in particular, the obligations of farmers, processors and holders resulting from the aforesaid criteria;

Whereas these obligations relate essentially to the payment, by farmers, of an equitable remuneration to the holder for the use made of the derogation, to the supply of information, to the safeguarding of the identity of the product of the harvest entered for processing with that resulting from processing as well as to the monitoring of compliance with the provisions on the derogation;

Whereas, also, the definition of 'small farmers' who shall not be required to pay a remuneration to the holder for the use made of the derogation, is completed in particular in respect of farmers growing certain fodder plants and potatoes;

Whereas the Commission will thoroughly monitor, throughout the Community, the effects which the definition of 'small farmers' as laid down in the basic Regulation and, in particular concerning the implications of set aside and—in the case of potatoes—the maximum size of the area, in this Regulation may produce with regard to the role of the remuneration as specified in Article 5(3) of this Regulation, and where necessary, make the appropriate proposals or take the appropriate steps with a view to establishing Community-wide coherence in respect of the ratio between the use of licensed propagating material and that of the product of the harvest under the derogation provided for in Article 14 of the basic Regulation;

Whereas, however, it has not yet been possible to assess the extent to which use has been made of comparable derogations under the current legislations of Member States, in relation

¹ OJ No. L 227, 1.9.1994, p. 1.

with the amounts currently charged for the licensed production of propagating material of varieties protected under the aforesaid legislations of Member States;

Whereas, therefore, the Commission can at present not properly define, within the scope of the discretion left to the Community legislator under Article 14(3) of the basic Regulation, the level of the equitable remuneration which must be sensibly lower than the amount charged for the licensed production of propagating material;

Whereas, however, the initial level as well as the system for subsequent adaptations should be specified as soon as possible and not later than 1 July 1997;

Whereas, moreover, this Regulation aims at specifying the connection between the Community plant variety right and the rights which derive from the provisions of Article 14 of the basic Regulation, on the one hand, and that between the authorization granted to the farmer and his holding, on the other hand;

Whereas, finally, the consequences of not fulfilling obligations which derive from the provisions concerned should be clarified;

Whereas the Administrative Council has been consulted;

Whereas the provisions provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plant Variety Rights,

HAS ADOPTED THIS REGULATION:

CHAPTER 1 GENERAL PROVISIONS

Article 1

Scope

1. This Regulation establishes the implementing rules on the conditions to give effect to the derogation provided for in Article 14(1) of the basic Regulation.
2. The conditions shall apply to the rights and their exercise, and to the obligations and their fulfillment, of the holder within the meaning of Article 13(1) of the basic Regulation, as well as to the authorization and its use, and to the obligations and their fulfillment, of the farmer, to the extent that such rights, authorization and obligations derive from the provisions of Article 14 of the basic Regulation. They shall also apply in respect of rights, authorization and obligations which derive from the provisions of Article 14(3) of the basic Regulation for others.
3. Unless otherwise specified in this Regulation, the details relating to the exercise of the rights, to the use of the authorizations or to the fulfillment of the obligations shall be governed by the law of the Member State, including its international private law, in which the farmer's holding on which the derogation is used, is located.

Article 2

Safeguarding interests

1. The conditions referred to in Article 1 shall be implemented both by the holder, representing the breeder, and by the farmer in such a way as to safeguard the legitimate interests of each other.
2. The legitimate interests shall not be considered to be safeguarded if one or more of these interests are adversely affected without account being taken of the need to maintain a reasonable balance between all of them, or of the need for proportionality between the purpose of the relevant condition and the actual effect of the implementation thereof.

CHAPTER 2

THE HOLDER AND THE FARMER

Article 3

The holder

1. The rights and obligations of the holder which derive from the provisions of Article 14 of the basic Regulation, as specified in this Regulation, other than the right on an already quantifiable payment of the equitable remuneration referred to in Article 5, may not be the object of a transfer to others. However, they shall be included in the rights and obligations which are concerned by a transfer of the Community plant variety right in accordance with the provisions of Article 23 of the basic Regulation.
2. Rights referred to in paragraph 1 may be invoked by individual holders, collectively by several holders or by an organization of holders which is established in the Community at Community, national, regional or local level. An organization of holders may act only for its members, and only for those thereof which have given the respective mandate in writing to the organization. It shall act either through one or more of its representatives or through auditors accredited by it, within the limits of their respective mandates.
3. A representative of the holder or of an organization of holders as well as an accredited auditor shall:
 - (a) be domiciled or shall have his seat or an establishment within the territory of the Community, and
 - (b) be authorized by the holder or the organization in writing, and
 - (c) provide evidence for the conditions laid down in (a) and (b), either through reference to relevant information published by holders or communicated by holders to organizations of farmers, or otherwise, and produce, on request, a copy of the written authorization referred to in (b), to any farmer against whom he invokes the rights.

Article 4

The farmer

1. The authorization and obligations of the farmer which derive from the provisions of Article 14 of the basic Regulation, as specified in this regulation or in provisions adopted pursuant to this Regulation, may not be the object of a transfer to others. However, they shall be included in the rights and obligations which are concerned by a transfer of the holding of the farmer, unless, in respect of the obligation to pay the equitable remuneration referred to in Article 5, otherwise agreed in the act of transfer of the holding. The transfer of the authorization and obligations shall take effect at the same time at which the transfer of the holding takes effect.

2. An 'own holding' within the meaning of Article 14(1) of the basic Regulation shall be considered to be any holding or part thereof which the farmer actually exploits for plant growing, whether as his property or otherwise managed under his own responsibility and on his own account, in particular in the case of leaseholds. The disposal of a holding or part thereof for the purpose of exploitation by others shall be regarded as transfer within the meaning of paragraph 1.

3. The person or persons to whom the holding concerned belongs as property at the time at which the fulfillment of an obligation is claimed, shall be deemed to be the farmer, unless they provide the proof that another person is the farmer who must fulfill the obligation, in accordance with the provisions of paragraphs 1 and 2.

CHAPTER 3

REMUNERATION

Article 5

Level of remuneration

1. The level of the equitable remuneration to be paid to the holder pursuant to Article 14(3), fourth indent of the basic Regulation may form the object of a contract between the holder and the farmer concerned.

2. Where such contract has not been concluded or does not apply, the level of remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the same area.

If no licensed production of propagating material of the variety concerned has taken place in the area in which the holding of the farmer is located, and if there is no uniform level of the aforesaid amount throughout the Community, the level of remuneration shall be sensibly lower than the amount which is normally included, for the above purpose, in the price at which propagating material of the lowest category qualified for official certification, of that variety is sold in that area, provided that it is not higher than the aforesaid amount charged in the area in which that propagating material has been produced.

3. The level of remuneration shall be considered to be sensibly lower within the meaning of Article 14(3), fourth indent of the basic Regulation as specified in paragraph 2 above, if it does not exceed the one necessary to establish or to stabilize, as an economic factor determining the extent to which use is made of the derogation, a reasonably balanced ratio between the use of licensed propagating material and the planting of the product of the harvest of the respective varieties covered by a Community plant variety right. Such ratio shall be considered to be reasonably balanced, if it ensures that the holder obtains, as a whole, a legitimate compensation for the total use of his variety.

Article 6

Individual obligation to payment

1. Without prejudice to the provisions of paragraph 2, the individual obligation of a farmer to pay the equitable remuneration shall come to existence at the time when he actually makes use of the product of the harvest for propagating purposes in the field.

The holder may determine the date and the manner of payment. However, he shall not determine a date of payment which is earlier than the date on which the obligation has come to existence.

2. In the case of a Community plant variety right granted pursuant to Article 116 of the basic Regulation, the individual obligation of a farmer entitled to invoke the provisions of Article 116(4) second indent of the basic Regulation shall come to existence at the time when he actually makes use of the product of the harvest for propagating purposes in the field after 30 June 2001.

Article 7

Small farmers

1. An area on which plants are grown within the meaning of Article 14(3) third indent of the basic Regulation shall be an area which has been planted for regular cultivation and harvesting. In particular, forest land, permanent pastures established for a duration of more than five years, permanent natural green land and assimilated cases as determined in the Standing Committee on Plant Variety Rights shall not be considered to be areas on which plants are grown.

2. Areas of the holding of the farmer on which plants have been grown, but which are land set aside, on a temporary or permanent basis, in the marketing year starting on 1 July and ending on 30 June of the subsequent calendar year ('the marketing year'), in which the payment of the remuneration would be due, shall be considered to be areas on which plants are still grown, if subsidies or compensatory payments are granted by the Community or by the Member State concerned in respect of that set aside.

3. Without prejudice to the provisions laid down in Article 14(3), third indent, first sub-indent of the Basic Regulation, small farmers in the case of other plant species (Article 14(3), third indent, second sub-indent of the Basic Regulation) shall be considered to be farmers who

(a) in the case of fodder plants coming under that latter provision: irrespective of the area on which they grow plants other than those fodder plants, do not grow those fodder plants for a duration of not more than five years on an area bigger than the area which would be needed to produce 92 tonnes of cereals per harvest,

(b) in the case of potatoes: irrespective of the area on which they grow plants other than potatoes, do not grow potatoes on an area bigger than the area which would be needed to produce 185 tonnes of potatoes per harvest.

4. The calculation of the areas referred to in paragraphs 1, 2 and 3 shall be made, for the territory of each Member State,

- in the case of plant species to which Council Regulation (EEC) No. 1765/92² applies, and in the case of fodder plants other than those already coming under the provisions thereof, in accordance with the provisions of that Regulation, and in particular Articles 3 and 4 thereof, or with provisions adopted pursuant to that Regulation, and
- in the case of potatoes, on the basis of the average yield per hectare established in the Member State concerned, in accordance with the statistical information delivered pursuant to Council Regulation (EEC) No. 959/93³ concerning statistical information to be supplied by Member States on crop products other than cereals.

5. A farmer who claims to be a ‘small farmer’ shall, in the case of dispute, provide the proof that the requirements for this category of farmers are met. However, the requirements for a ‘small producer’ within the meaning of Article 8(1) and (2) of Council Regulation (EEC) No. 1765/92 shall not be applicable for that purpose, unless the holder agrees to the contrary.

CHAPTER 4 INFORMATION

Article 8

Information by the farmer

1. The details of the relevant information to be provided by the farmer to the holder pursuant to Article 14(3), sixth indent of the basic Regulation may form the object of a contract between the holder and the farmer concerned.

2. Where such contract has not been concluded or does not apply, the farmer shall, without prejudice to information requirements under other Community legislation or under legislation of Member States, on request of the holder, be required to provide a statement of relevant information to the holder. The following items shall be considered to be relevant:

- (a) the name of the farmer, the place of his domicile and the address of his holding,

² OJ No. L 181, 1.7.1992, p. 12.

³ OJ No. L 98, 24.4.1993, p. 1.

(b) the fact whether the farmer has made use of the product of the harvest belonging to one or more varieties of the holder for planting in the field or fields of his holding,

(c) if the farmer has made such use, the amount of the product of the harvest belonging to the variety or varieties concerned, which has been used by the farmer in accordance with Article 14(1) of the basic Regulation,

(d) under the same condition, the name and address of the person or persons who have supplied a service of processing the relevant product of the harvest for him for planting,

(e) if the information obtained under (b), (c) or (d) cannot be confirmed in accordance with the provisions of Article 14, the amount of licensed propagating material of the varieties concerned used as well as the name and address of the supplier or suppliers thereof, and

(f) in the case of a farmer invoking the provisions of Article 116(4) second indent of the Basic Regulation, whether he has already used the variety concerned for the purpose described in Article 14(1) of the Basic Regulation without payment of a remuneration, and if so, since when.

3. The information under paragraph 2(b), (c), (d) and (e) shall refer to the current marketing year, and to one or more of the three preceding marketing years for which the farmer had not previously provided relevant information on request made by the holder in accordance with the provisions of paragraphs 4 or 5.

However, the first marketing year to which the information refers, shall be not earlier than the one in which the first of such requests for information was made in respect of the variety or varieties and the farmer concerned, or, alternatively, in which the farmer acquired propagating material of the variety or varieties concerned, if this was accompanied by information at least on the filing of the application for the grant of a Community plant variety right or on the grant of such right as well as on possible conditions relating to the use of that propagating material.

In the case of varieties coming under the provisions of Article 116 of the Basic Regulation and in respect of farmers entitled to invoke the provisions of Article 116(4), second indent of the basic Regulation, the first marketing year shall be 2001/02.

4. In his request, the holder shall specify his name and address, the variety or varieties in respect of which he is interested in information, as well as the reference or references to the relevant Community plant variety right or rights. If required by the farmer, the request shall be made in writing, and evidence for holdership shall be provided. Without prejudice to the provisions of paragraph 5, the request shall be made directly to the farmer concerned.

5. A request which has not been made directly to the farmer concerned, shall be considered to comply with the provisions of paragraph 4, third sentence, if it is sent to farmers through the following bodies or persons, with their prior agreement respectively:

- organizations of farmers or cooperatives, concerning all farmers who are members of such organization or cooperative, or,

- processors, concerning all farmers to whom they have supplied a service of processing the relevant product of the harvest for planting, in the current marketing year and in the three preceding marketing years, starting in the marketing year as specified in paragraph 3, or,
 - suppliers of licensed propagating material of varieties of the holder, concerning all farmers to whom they have supplied such propagating material in the current marketing year and in the three preceding marketing years, starting in the marketing year as specified in paragraph 3.
6. For a request made in accordance with the provisions of paragraph 5, the specification of individual farmers is not required. The organizations, cooperatives, processors or suppliers may be authorized by the farmers concerned to forward the required information to the holder.

Article 9

Information by the processor

1. The details of the relevant information to be provided by the processor to the holder pursuant to Article 14(3), sixth indent of the basic Regulation may form the object of a contract between the holder and the processor concerned.
2. Where such contract has not been concluded or does not apply, the processor shall, without prejudice to information requirements under other Community legislation or under legislation of Member States, on request of the holder, be required to provide a statement of relevant information to the holder. The following items shall be considered to be relevant:
 - (a) the name of the processor, the place of his domicile and the name and address registered for his business;
 - (b) the fact whether the processor has supplied a service of processing the product of the harvest belonging to one or more varieties of the holder for planting, where the variety or varieties were declared or otherwise known to the processor;
 - (c) if the processor has supplied such service, the amount of the product of the harvest belonging to the variety or varieties concerned, which has been processed for planting, by the processor, and the total amount resulting from that processing;
 - (d) the dates and places of the processing referred to in (c); and
 - (e) the name and address of the person or persons to whom he has supplied the service of processing referred to in (c), and the respective amounts.
3. The information under paragraph 2(b), (c), (d) and (e) shall refer to the current marketing year and to one or more of the three preceding marketing years for which the holder has not yet made an earlier request in accordance with the provisions of paragraphs 4 or 5; however, the first marketing year to which the information refers, shall be the one in which the first of such requests was made in respect of the variety or varieties and the processor concerned.

4. The provisions of Article 8(4) shall apply *mutatis mutandis*.
5. A request which has not been made directly to the processor concerned, shall be considered to comply with the provisions of Article 8(4), third sentence, if it is sent to processors through the following bodies or persons, with their prior agreement respectively:
 - organizations of processors in the Community which are established at Community, national, regional or local level, concerning all processors who are members of, or represented in, such organization,
 - farmers, concerning all processors who have supplied a service of processing the relevant product of the harvest to them for planting, in the current marketing year and in the three preceding marketing years, starting in the marketing year as specified in paragraph 3.
6. For a request made in accordance with the provisions of paragraph 5, the specification of individual processors is not required. The organizations or farmers may be authorized by the processors concerned to forward the required information to the holder.

Article 10

Information by the holder

1. The details of the information to be provided by the holder to the farmer pursuant to Article 14(3), fourth indent of the basic Regulation may form the object of a contract between the farmer and the holder concerned.
2. Where such contract has not been concluded or does not apply, the holder shall, without prejudice to information requirements under other Community legislation or under legislation of Member States, on request of the farmer from whom the holder has claimed the payment of the remuneration referred to in Article 5, be required to provide a statement of relevant information to the farmer. The following items shall be considered to be relevant:
 - the amount charged for the licensed production of propagating material of the lowest category qualified for official certification, of the same variety in the area in which the holding of the farmer is located, or,
 - if no licensed production of propagating material of the variety concerned has taken place in the area in which the holding of the farmer is located, and if there is no uniform level of the aforesaid amount throughout the Community, the amount which is normally included, for the above purpose, in the price at which propagating material of the lowest category qualified for official certification, of that variety is sold in that area, as well as the aforesaid amount charged in the area in which that propagating material has been produced.

Article 11

Information by official bodies

1. A request for information on the actual use of material, by planting, of specific species or varieties, or on the results of such use, which a holder addresses to an official body, must be made in writing. In this request, the holder shall specify his name and address, the variety or varieties in respect of which he is interested in information and the type of information he seeks. He shall also provide evidence for his holdership.

2. The official body may, without prejudice to the provisions of Article 12, withhold the requested information only if

- it is not involved in the monitoring of agricultural production, or
- it is not allowed, under Community rules or rules of Member States governing the general discretion applicable in respect of activities of official bodies, to provide such information to holders, or
- it is under its discretion, pursuant to the Community legislation or the legislation of Member States under which the information has been collected, to withhold such information, or
- the requested information is not or no longer available, or
- such information cannot be obtained through ordinary performance of the tasks of the official body, or
- such information can only be obtained with additional burden or costs, or
- such information relates specifically to material which does not belong to varieties of the holder.

The official bodies concerned shall inform the Commission on the manner in which they exercise the discretion referred to in the third indent above.

3. In providing the information, the official body shall not differentiate between holders. The official body may provide the requested information in making copies available to the holder, which have been produced from documents containing information additional to that relating to material belonging to varieties of the holder, provided that it is ensured that any possibility to identify individuals protected under the provisions referred to in Article 12 has been removed.

4. If the official body takes the decision to withhold the requested information, it shall inform the requesting holder thereof in writing and indicate the reason for this decision.

Article 12

Protection of personal data

1. Any person who is providing or receiving information under the provisions of Articles 8, 9, 10 or 11 shall be subject, in respect of personal data, to the provisions of Community legislation or of legislation of Member States on the protection of individuals with regard to the processing and free movement of personal data.
2. Any person receiving information under the provisions of Articles 8, 9, 10 or 11 shall not, without prior consent of the person who has supplied the information, pass any of this information to another person or use it for any purpose other than for the exercise of the Community plant variety right or for the use of the authorization provided for in Article 14 of the Basic Regulation, respectively.

CHAPTER 5

OTHER OBLIGATIONS

Article 13

Obligations in the case of processing outside the holding of the farmer

1. Without prejudice to the restrictions which Member States may have established pursuant to Article 14(3) second indent of the basic Regulation, the product of the harvest of a variety which is covered by a Community plant variety right shall not, without the prior consent of the holder, be moved from the holding on which it was obtained, for the purpose of being processed for planting, unless the farmer:
 - (a) has implemented appropriate measures to ensure identity of the product entered for processing with that resulting from processing; and
 - (b) makes sure that the actual processing is carried out by a processor for the supply of services of processing the product of the harvest for planting, who has:
 - either been registered under legislation of the Member State concerned adopted on the grounds of public interest, or has undertaken to the farmer to notify this activity, as far as varieties covered by a Community plant variety right are concerned, to the competent body established, designated or authorized in the Member State for that purpose, either by an official body or by an organization of holders, farmers or processors, for subsequent inclusion in a list established by the said competent body, and
 - has undertaken to the farmer to also implement appropriate measures to ensure identity of the product entered by the farmer for processing with that resulting from processing.
2. For the purpose of the listing of processors as specified in paragraph 1, Member States may lay down requirements of qualification to be met by processors.

3. The registers and the lists referred to in paragraph 1 shall be published or be made available to organizations of holders, farmers and processors respectively.

4. The lists referred to in paragraph 1 shall be established not later than 1 July 1997.

CHAPTER 6

MONITORING BY THE HOLDER

Article 14

Monitoring of farmers

1. For the purpose of monitoring, by the holder, compliance with the provisions of Article 14 of the basic Regulation as specified in this Regulation, as far as the fulfillment of obligations of the farmer is concerned, the farmer shall, on request of the holder:

(a) provide evidence supporting his statements of information under Article 8, through disclosure of available relevant documents such as invoices, used labels, or any other appropriate device such as that required pursuant Article 13(1)(a), relating to:

- the supply of services of processing the product of the harvest of a variety of the holder for planting, by any third person, or
- in the case of Article 8(2)(c), the supply of propagating material of a variety of the holder,

or through the demonstration of land or storage facilities.

(b) make available or accessible the proof required under Article 4(3) or 7(5).

2. Without prejudice to other Community legislation or to legislation of Member States, farmers shall be required to conserve any of such document or device referred to in paragraph 1 for at least the period of time specified in Article 8(3), provided that, in the case of used labels, the information by which the propagating material referred to in Article 8(3) second subparagraph was accompanied included the advice for the conservation of the label relating to that material.

Article 15

Monitoring of processors

1. For the purpose of monitoring, by the holder, compliance with the provisions of Article 14 of the basic Regulation as specified in this Regulation, as far as the fulfillment of obligations of the processor is concerned, the processor shall, on request of the holder, provide evidence supporting his statements of information under Article 9, through disclosure of available relevant documents such as invoices, devices suitable for the identification of material, or any other appropriate device such as that required pursuant to Article 13(1)(b), second indent, or samples of processed material, relating to his supply of services of

processing the product of the harvest of a variety of the holder to farmers for planting, or through the demonstration of processing or storage facilities.

2. Without prejudice to other Community legislation or to legislation of Member States, processors shall be required to conserve any of such document or device referred to in paragraph 1 for at least the period of time specified in Article 9(3).

Article 16

Manner of monitoring

1. The monitoring shall be carried out by the holder. He may make appropriate arrangements to ensure assistance from organizations of farmers, processors, cooperatives or other circles of the agricultural community.

2. Conditions relating to the methods of monitoring laid down in agreements between organizations of holders and of farmers or processors, which are established in the Community at Community, national, regional or local level respectively, shall be used as guidelines, if these agreements have been notified to the Commission in writing by authorized representatives of the relevant organizations and published in the 'Official Gazette' issued by the Community Plant Variety Office.

CHAPTER 7

INFRINGEMENT AND SPECIAL CIVIL LAW CLAIMS

Article 17

Infringement

The holder may invoke the rights conferred by the Community plant variety right against a person who contravenes any of the conditions or limitations attached to the derogation pursuant to Article 14 of the basic Regulation as specified in this Regulation.

Article 18

Special civil law claims

1. A person referred to in Article 17 may be sued by the holder to fulfill his obligations pursuant to Article 14(3) of the basic Regulation as specified in this Regulation.

2. If such person has repeatedly and intentionally not complied with his obligation pursuant to Article 14(3) fourth indent of the basic Regulation, in respect of one or more varieties of the same holder, the liability to compensate the holder for any further damage pursuant to Article 94(2) of the basic Regulation shall cover at least a lump sum calculated on the basis of the quadruple average amount charged for the licensed production of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage.

CHAPTER 8
FINAL PROVISIONS

Article 19

Entry into force

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

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