I

*(Acts whose publication is obligatory)*

# COUNCIL REGULATION (EC) No 1469/95

## of 22 June 1995

## on measures to be taken with regard to certain beneficiaries of operations financed by the Guarantee Section of the EAGGF

THE COUNCIL OF THE EUROPEAN UNION,

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

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

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

Having regard to the opinion of the Economic and Social Committee (3),

Whereas, at its meetings in June 1993 in Copenhagen and December 1994 in Essen, the European Council stressed the importance of pursuing the campaign against fraud and irregularities affecting the Community budget; whereas there should be a reinforcement of those measures designed to ensure that the Community funds intended for the implementation of the common agricultural policy (CAP) are not granted to persons or companies which do not offer all the guarantees of reliability as to the proper execution of the operations concerned;

Whereas Article 8 of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (4), lays down, in particular, that Member States are under an obligation to take all the measures necessary to ensure that transactions financed by the Fund are actually carried out and properly executed, and to prevent and follow up irregularities;

Whereas Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (5), provides, among other things, for the Member States regularly to inform the Commission of cases of irregularities and judicial or administrative procedures sanctioning persons who have committed irregularities, in order to acquire systematic knowledge of the nature of the fraudulent practices and to recover sums wrongly paid;

Whereas these provisions need to be supplemented by a Community system allowing all the national authorities to identify, in connection with tendering procedures, grant of export refunds or sales at reduced prices of intervention products, operators who have deliberately or as a result of serious negligence committed an irregularity prejudicial to Community funds or who are suspected on solid grounds of having done so; whereas, on that basis, there must be determined, in the light of the seriousness of the offence and depending on whether it has been established or suspected, a series of varied measures ranging from reinforced controls to the exclusion of the operators concerned from taking part in operations to be determined when their fraudulent actions are established;

Whereas, in order to provide operators with a maximum of guarantees, it would be advisable to adopt the essential features of the corresponding provisions of Regulation (EEC) No 595/91, in particular with regard to the observance of confidentiality and professional secrecy and the national rules relating to criminal proceedings; whereas, with regard to data protection, the relevant provisions laid down for that purpose in the rules on mutual assistance in customs and agricultural matters may be applied;

Whereas this system must be supplementary to the specific provisions already existing or to be adopted in the future under the CAP with a view to preventing irregularities, in particular those provisions relating to controls and sanctions established by the Commission by virtue of its powers confirmed by the Court of Justice;

(1) OJ No C 151, 2. 6. 1994, p. 13.
(2) OJ No C 56, 6. 3. 1995, p. 175.
(3) OJ No C 393, 31. 12. 1994, p. 81.
(4) OJ No L 94, 28. 4. 1970, p. 13. Regulation as last amended by Regulation (EC) No 1287/95 (OJ No L 125, 8. 6. 1995, p. 1).
(5) OJ No L 67, 14. 3. 1991, p. 11.

Whereas, furthermore, as part of an across-the-board campaign against fraud, on 7 July 1994 the Commission submitted a proposal for a Regulation (EC, Euratom) on protection of the Community's financial interests [1], whereas, on the adoption of that Regulation by the Council, the common set of legal rules enacted by it for all areas of Community policy will apply to the measures introduced by this Regulation ; whereas, until that Regulation is adopted, provision should be made for the detailed rules for the application of this Regulation temporarily to include similar rules, in particular as regards the definition of the irregularities involved,

HAS ADOPTED THIS REGULATION :

*Article 1*

1. A Community system is hereby established for the purpose of identifying and making known as rapidly as possible to all the competent authorities of the Member States and the Commission operators presenting, on the grounds of experience acquired with them as regards the proper execution of their previous obligations, a risk of non-reliability in connection with tendering procedures, export refunds and sales at reduced prices or intervention products, financed by the Guarantee Section of the EAGGF.

2. For the purposes of this Regulation, 'operators presenting a risk of non-reliability' means operators, whether natural or legal persons, who :

(a) according to a final decision of an administrative or judicial authority, have deliberately or through serious negligence committed an irregularity in respect of relevant Community provisions and have unjustly benefited from a financial advantage or attempted to benefit therefrom ;

(b) have been the subject, in this respect, on the basis of established facts, of a preliminary administrative or judicial report by the competent authorities of the Member State.

3. Pending the entry into force of horizontal provisions defining irregularities, the conduct referred to in paragraph 2 (a) shall be defined in accordance with the procedure laid down in Article 5.

*Article 2*

1. The identification procedures and rules relating to notification shall be implemented on the initiative of the Member State in which the risk of the operator's non-reliability is identified.

2. Where a Member State fails to fulfil its obligation under paragraph 1 the Commission shall, within the framework of the existing legal provisions, ensure that the identification and notification system is implemented by the Member State concerned.

*Article 3*

1. Member States shall take the following measures to deal with the operators referred to in Article 1 (2) (a) :

(a) reinforced checking of all operations performed by the operator, and/or

(b) suspension, going as far as an administrative determination of the existence of an irregularity or of the absence of an irregularity, of payment of amounts relating to current operations, to be determined, and, where appropriate, of release of the guarantee relating thereto, and/or

(c) their exclusion for a period of time from operations to be determined.

The measures referred to under points (b) and (c) shall be determined by the competent authorities of the Member State in accordance with criteria laid down in accordance with the procedure provided for in Article 5, having due regard to the risk of further irregularities that may be committed by the operator. They shall be adopted after any formalities relating thereto laid down in the laws of the Member States have been completed.

2. As regards the operators referred to in Article 1 (2) (b), only the measures set out in paragraph 1 points (a) and (b) shall apply.

3. Where, under a tendering procedure, the Commission itself awards a contract, it shall, as appropriate, take or propose to the Member State, one or more of the measures set out in paragraph 1.

*Article 4*

1. The measures referred to in Article 3 shall comply with the following principles, in accordance with the national law of the Member State :

(a) a prior hearing and right of appeal by the operator concerned in respect of the measures referred to in Article 3 (1) (c) and, where appropriate, (b) ;

(b) proportionality between the irregularity committed or suspected and one or other of the measures referred to in Article 3 (1), subject to the provisions to be established in accordance with the procedure laid down in Article 5 ;

(c) non-discrimination between operators.

2. Member States and the Commission shall take all necessary precautions to ensure that the information which they exchange pursuant to this Regulation remains confidential.

Such information may not, in particular, be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it, unless the Member State supplying it has expressly so agreed.

[1] OJ No C 216, 6. 8. 1994, p. 11.

Information communicated or acquired in any form under this Regulation shall be covered by professional confidentiality and protected in the same way as similar information is protected by the national legislation of the Member State that received it and by the corresponding provisions applicable to the Community institutions.

In addition, that information may not be used for purposes other than those provided for in this Regulation unless the authorities providing it have expressly agreed and provided that the provisions in force in the Member State in which the authority that has received it is located do not prohibit such communication or use.

As regards data protection, the relevant provisions laid down in the rules on mutual assistance in customs and agricultural matters shall apply.

3. The provisions of this Regulation shall not affect the application in the Member States of rules governing criminal proceedings and mutual assistance in criminal matters between Member States. They shall not prevent the use, in the context of judicial proceedings or of proceedings brought subsequently for non-compliance with agricultural regulations, of information obtained pursuant to this Regulation ; in the latter case the competent authority of the Member State which provided such information shall be notified of such use.

However, Member States shall take the administrative measures necessary to ensure that the provisions of the first subparagraph are applied in such a way as not to hinder the effective application of this Regulation as regards the operators referred to in Article 1 (2) (b).

If national laws provide for the confidentiality of judicial investigations, communication of information as provided for in this Regulation shall be subject to authorization by the competent judicial authority. The competent administrative authority shall secure such authorization at the earliest opportunity.

*Article 5*

Detailed rules for the application of this Regulation shall be adopted in accordance with the procedure laid down in Article 13 of Regulation (EEC) No 729/70. They shall concern, among other things :

— the notifications to be made by the Member States ;
— the nature of the links between different natural or legal persons which may result in their being regarded as operators within the meaning of this Regulation ;
— the conditions under which operators may avoid the suspension of payments as referred to in Article 3 (1) (b) by lodging a security.

*Article 6*

This Regulation shall be supplementary to the specific provisions under the CAP.

*Article 7*

The Commission shall present to the European Parliament and the Council by 6 July 1997 a report on the implementation of this Regulation and, in the light of experience gained, shall propose amendments that may be needed to the arrangements introduced by this Regulation.

*Article 8*

This Regulation shall enter into force on the seventh day following 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.

Done at Brussels, 22 June 1995.

*For the Council*

*The President*

Ph. VASSEUR