Commission Implementing Regulation (EU) 2016/1448 of 1 September 2016 amending Regulation (EC) No 874/2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office

COMMISSION IMPLEMENTING REGULATION (EU) 2016/1448

of 1 September 2016

amending Regulation (EC) No 874/2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights[(1)] ('the basic Regulation'), and in particular Article 114 thereof,

Whereas:

(1) For the purposes of the basic Regulation, Commission Regulation (EC) No 874/2009[(2)] lays down rules on the proceedings before the Community Plant Variety Office ('the Office').

(2) The efficient administration of the proceedings before the Office requires that parties to such proceedings should be designated by their email address, apart from their name and address, where an email address is used by the party concerned.

(3) It should be specified that the official designations of legal persons, companies, and firms as referred to in Article 2(2) of Regulation (EC) No 874/2009 should be the designations as recorded in the respective Member State or third country.

(4) The successor in title of a Community plant variety right should be given the possibility to use another official language of the European Union than the one that has been chosen by the initial party to the proceedings before the Office or the Board of Appeal.

(5) In order to reduce translation costs and to speed up the proceedings, the Office or the Board of Appeal, with the agreement of all parties to the proceedings, should be able to use only one of the official languages of the European Union during those proceedings. The same should apply to the hearing of witnesses and experts and to the translation of documents of parties to the proceedings. For the same reason, it should be possible to limit the translation of lengthy documents to their extracts or summaries.

(6) The increasing complexity of the law governing Community plant variety rights requires that the legally qualified members, referred to in Article 6 of Regulation (EC) No 874/2009, are graduates in law with recognised experience in the field of intellectual property, plant variety rights or plant variety registration.

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(7) It is appropriate that the members of the Board of Appeal receive remuneration for the performance of their assignments, the level of which should be determined by the Administrative Council, based on a proposal by the President of the Office.

(8) For the purpose of clarity, it should be made explicit that the Examination Office is entrusted with responsibility for a specific scope of the technical examination. It should further be made explicit that the Administrative Council may amend or cancel such designation at the request of the Examination Office.

(9) For the purpose of transparency, the Administrative Council should be able to make such designation subject to certain requirements and to establish the procedures to be followed by the Office for such designation.

(10) Experience has shown that it is important to develop guiding principles concerning plant material to be submitted for testing the distinctiveness, uniformity and stability in the framework of applications for Community plant variety rights and the transfer of such plant material between Examination Offices. It is therefore appropriate that the Administrative Council adopts such principles.

(11) It should be set out in a clearer manner in Article 14 of Regulation (EC) No 874/2009 that that provision deals with agencies and sub-offices acting as Examination Offices. Furthermore, that provision should clearly set out that the designation of such agency or the establishment of such sub-offices should follow the same rules as the designation of an Examination Office.

(12) Article 15 of Regulation (EC) No 874/2009 should be aligned with the wording of the other provisions of that Regulation. It should further be specified that only acts performed after the signature of the written agreement are to be considered, as far as third parties are concerned, to be acts of the Office.

(13) The comparability of the auditing reports referred to in Article 15(5) of Regulation (EC) No 874/2009 requires that those reports are submitted in a harmonised form, which should be determined by the Office. Furthermore, the Office should be able to reduce the fee to be paid to the Examination Office where the auditing report is not delivered in time.

(14) Article 15(6) of Regulation (EC) No 874/2009 should be reworded to allow for an amendment of the designation of an Examination Office.

(15) An effective, efficient, and expeditious examination of applications for a Community plant variety right requires that those applications are filed at the Office only, and not at designated agencies or sub-offices established pursuant to Article 30(4) of the basic Regulation.

(16) Article 17 of Regulation (EC) No 874/2009 contains the rules on the receipt of applications. The confirmation of receipt should also refer to the nature of the documents received. It should further be specified that the confirmation of receipt is to be transmitted to the Office by electronic means.

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(17) Article 18(3) of Regulation (EC) No 874/2009 specifies the information to be provided by the applicant for an application for a property right in respect of the variety and for an application for official acceptance of the variety for certification and marketing where official acceptance includes an official description of the variety. Since the latter application can be submitted in a country or to a regional organisation that is not a member of the International Union for the Protection of new Varieties of Plants ('UPOV'), it is appropriate to delete the reference to a Member State and the UPOV in that Article with respect to the application for official acceptance of the variety for certification.

(18) It should be specified in Article 19 of Regulation (EC) No 874/2009 that no application can be submitted by a person other than the breeder, unless the breeder has duly mandated that person to do so, and that the application should contain the name and the address of the procedural representative. The wording of that provision should further be aligned with the wording of the technical questionnaire established in line with the international standards of the UPOV.

(19) For the purpose of clarity and to avoid any gaps or overlaps, it is appropriate to specify in Article 22 of Regulation (EC) No 874/2009 that, as to test guidelines, the UPOV guidelines per genera and species apply where there is no decision of the Administrative Council or no provisional decision of the President of the Office. Where the former guidelines are not available, the national guidelines that have been developed by the competent authority that is in charge of the technical examination of the plant variety should apply, provided that the President of the Office agrees.

(20) Decisions on test guidelines should have a permanent nature due to their significance for their users. Article 23(2) of Regulation (EC) No 874/2009 should therefore be deleted to reflect that the decision of the President of the Office, when exercising the power referred to in paragraph 1 of that Article, is not a provisional one.

(21) It is appropriate to update Article 24 of Regulation (EC) No 874/2009 to reflect that the exchanges between the Office and the Examination Offices are now done by electronic means.

(22) Regarding the acceptance of an examination report of an examination that has been carried out or is in the process of being carried out by a competent authority outside the territory of the European Union, it is necessary to request that a written agreement is concluded on the basis of the consent of the Administrative Council of the Office. In addition, it may be possible for the Office to consider a report produced by a competent authority of a third country or of a regional organisation that is a member of the UPOV as well as of a party to the Agreement on Trade Related Aspects of Intellectual Protection ('TRIPS'). Finally, it is appropriate to add a requirement to have information on the experience of the third country concerning the testing of the genera or species concerned.

(23) Taking into account that the Office is to grant a plant variety protection right for all genera and species, it is appropriate to allow the Office to request a competent authority of a third country or of a regional organisation that is a member of UPOV, as well as

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of a third country that is a party to TRIPS, to perform a technical examination, where there is no possibility to perform the technical examination for the specific genera and species in an Examination Office in the European Union, and where an examination report on the results of a technical examination is not available or is not expected to become available. A written agreement should be concluded on the basis of the consent of the Administrative Council of the Office, based on certain conditions.

(24) Taking into account that the applications for Community plant variety rights are no longer dealt with by national agencies, it is appropriate to adapt the wording of Article 28 of Regulation (EC) No 874/2009 accordingly.

(25) In order to limit the administrative burden, it should not be necessary to request a certified copy of the patent certificate(s).

(26) The appellants sometimes need to use procedural representatives. It is therefore appropriate to specify in Article 45 of Regulation (EC) No 874/2009 that the notice is to contain elements regarding a possible procedural representative appointed by the appellant.

(27) For reasons of efficiency, the Board of Appeal should have the possibility to deal with several appeals in the same proceedings or joint proceedings.

(28) Article 53(4) of Regulation (EC) No 874/2009 should be supplemented with several specifications, in order to adapt that provision to the needs identified and the experience gained in the application of that Regulation and other Union legislation.

(29) For reasons of legal certainty, it is appropriate to add rules with regard to a decision of the Office in proceedings for nullity and cancellation as referred to in Article 20 and Article 21, respectively, of the basic Regulation.

(30) Taking into account that the Office has developed electronic tools, the certificate for a Community plant variety right should be delivered by electronic means.

(31) Taking into account that there is no procedure for the use of an electronic signature, it is appropriate to change the reference in Article 57 of Regulation (EC) No 874/2009 and to refer to electronic authentication only.

(32) In the interest of clarity, it is appropriate to specify in Article 62 of Regulation (EC) No 874/2009 that the Office may grant an advance to witnesses and experts. In addition, it is necessary to clarify the rules on the final liability for the payment with regard to the Office or the party concerned.

(33) There is a need for more precise rules with regard to the content of the minutes referred to in Article 63 of Regulation (EC) No 874/2009. In addition, taking into account that in appeal proceedings the person conducting the oral procedure is not an employee of the Office, it is appropriate to amend that provision to ensure that an external person to the Office can conduct that procedure.

(34) It is appropriate to introduce further detailed rules concerning the service of documents by electronic or other technical means. It is also necessary to clarify to whom the

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Office shall address the notification in case of one or several procedural representatives appointed by one or several parties.

(35) In Article 67 of Regulation (EC) No 874/2009 it should be specified that the President of the Office also has to determine the period within which a document will be deemed to have been notified in case of public notice.

(36) For reasons of transparency, it is appropriate to publish in the Official Gazette the extension of time limits adopted by the President of the Office at the commencement of each calendar year. Furthermore, it is reasonable to allow for the extension of the time limit if one party to the proceedings has faced an interruption of the electronic connection and is able to demonstrate the interruption from the service provider.

(37) For the purpose of simplifying the procedures and optimising resources, it is appropriate to request the parties to proceedings acting in common to notify the name of one procedural representative and to determine the rules for situations where they failed to do so. It is also appropriate to add rules on the transfer of a Community plant variety right by a party to the proceedings to more than one person, where more than one procedural representative has been appointed.

(38) Taking into account that the Office intends to reduce the use of paper documents, it is no longer necessary to provide several copies in case the credentials cover more than one proceeding.

(39) In order to ensure that the other parties to the proceedings are accurately informed, the conditions under which the entry of a procedural representative in the register of the Office will be deleted should be specified.

(40) Article 81 of Regulation (EC) No 874/2009 specifies the conditions for specific entries in the Registers of the Office. For the purpose of clarity about the nature of the final decision, it should be specified that a final decision may not be entered in the Registers as long as it is subject to any appeal.

(41) Given the increased complexity of the proceedings provided for in Regulation (EC) No 874/2009, the remuneration of experts involved in those proceedings should be adjusted. In addition, because the technical examination may take place in an Examination Office or in a technical qualified body, a reference to a technical qualified body should be added.

(42) At the occasion of the amendment of Regulation (EC) No 874/2009, the wording of that Regulation should be aligned with the wording of the basic Regulation.

(43) Regulation (EC) No 874/2009 should therefore be amended accordingly.

(44) The Administrative Council of the Community Plant Variety Office has been consulted.

(45) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Plant Variety Rights,

HAS ADOPTED THIS REGULATION: