Commission Regulation (EC) No 1276/2008 of 17 December 2008 on the monitoring by physical checks of exports of agricultural products receiving refunds or other amounts

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation)[(1)], and in particular Articles 170(c) and 194(a), in conjunction with Article 4 thereof,

Whereas:

(1) Pursuant to Article 9(1)(a) of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy[(2)], Member States, within the framework of the common agricultural policy, are to adopt all legislative, regulatory and administrative provisions and take any other 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 and the European Agricultural Fund for Rural Development, to prevent and pursue irregularities, and to recover sums lost as a result of irregularities or negligence.

(2) Article 201(1)(f) of Regulation (EC) No 1234/2007 repeals Council Regulation (EEC) No 386/90 of 12 February 1990 on the monitoring carried out at the time of export of agricultural products receiving refunds or other amounts[(3)] while Article 194(a) of that Regulation requires the Commission to determine the rules concerning administrative and physical controls to be conducted by the Member States with regard to the respect of obligations resulting from the application of that Regulation. Commission Regulation (EC) No 2090/2002 of 26 November 2002 laying down detailed rules for applying Council Regulation (EEC) No 386/90 of 12 February 1990 as regards physical checks carried out when agricultural products qualifying for refunds are exported[(4)] has been substantially amended. In the interests of clarity and administrative efficiency, therefore, Regulation (EC) No 2090/2002 and Commission Regulation (EC) No 3122/94 of 20 December 1994 laying down criteria for risk analysis as regards agricultural products receiving refunds[(5)] should be repealed and replaced by a new coherent set of rules.

(3) Commission Regulations (EC) No 793/2006 of 12 April 2006 laying down certain detailed rules for applying Council Regulation (EC) No 247/2006 laying down specific measures for agriculture in the outermost regions of the Union[6], (EC) No 967/2006 of 29 June 2006 laying down detailed rules for the application of Council Regulation (EC) No 318/2006 as regards sugar production in excess of the quota[7], and (EC) No 1914/2006 of 20 December 2006 laying down detailed rules for applying Council Regulation (EC) No 1405/2006 laying down specific measures for agriculture in favour of the smaller Aegean islands[8] refer to the application of physical checks in accordance with Council Regulation (EEC) No 386/90 whilst export refunds are not involved. It is therefore appropriate to specify that physical checks on operations involving other amounts and related to financial measures under the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development may be carried out in accordance with this new coherent set of rules.

(4) Account should be taken of existing inspection measures, in particular those introduced by Commission Regulations (EC) No 800/1999 of 15 April 1999 laying down common detailed rules for the application of the system of export refunds on agricultural products[9] and (EC) No 2298/2001 of 26 November 2001 laying down detailed rules for the export of products supplied as food aid[10].

(5) In order to improve and harmonise the measures taken by the Member States, a Community monitoring system should stay in place, based in particular on physical spot checks of products at the time of export, including products exported under a simplified procedure, and on the scrutiny of the payment application files by the paying agencies.

(6) To tackle the risk of substitution in the case of export declarations accepted by an internal customs office within a Member State, a minimum number of 'substitution checks' should be carried out by the customs office of exit from the Community. Having regard to the place where such substitution checks are carried out, they should take the form of simplified checks.

(7) In order to decide whether substitution checks or specific substitution checks are required the customs office of exit should actively check that the seals are in place and not broken.

(8) To ensure that customs offices of exit or the customs offices to which the T5 control copy is sent follow a uniform practice, and to avoid doubts as to the identity of the products, which is a precondition for the granting of refunds, there should be provision for a specific substitution check in cases where these customs offices have found that the seals affixed on departure have been removed other than under customs supervision or have been broken or that no dispensation from sealing has been granted. Since in those cases there is clear suspicion of substitution, the specific substitution checks require increased attention which may include, where appropriate, a physical check on the products.

(9) The number of physical checks should be proportionate to the number of customs export declarations per year. Experience has shown that physical checks on a minimum of 5 % of export declarations is an effective, proportionate and dissuasive level, whilst

allowing Member States to choose on the basis of risk management whether to attribute the minimum norm of 5 % per product sector or to all sectors with a minimum of 2 % per product sector. In order to ensure full coverage of the regime, customs offices of export with very low numbers of export declarations per product sector should nevertheless ensure that each product sector is subject to at least one check. The share of export refunds allocated to goods not covered by Annex I to the Treaty does not represent a high level of risk, while the number of export declarations in this sector is high. In order to make better use of the means of control the minimum control rate for goods not covered by Annex I to the Treaty should therefore be reduced. For the same reason, Member States should also have the possibility to disregard export declarations relating to small quantities or an amount of refund limited to EUR 1 000.

(10) Experience suggests that a minimum level of 10 % of checks on seals is effective, proportionate and dissuasive.

(11) The number of substitution checks and specific substitution checks by customs offices of exit should be proportionate to the number of customs guidance documents per year. Experience suggests that a minimum of 8 % of all customs guidance documents is effective, proportionate and dissuasive.

(12) According to Article 4f of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code[(11)], customs authorities are to undertake risk management to differentiate between the levels of risk associated with products subject to customs control or supervision and to determine whether or not, and if so where, the products will be subject to specific customs controls. Risk management includes analysis of risks as defined in Article 4(26) of Council Regulation (EEC) No 2913/92. According to Article 592e of Regulation (EEC) No 2454/93 the competent customs office is, upon receipt of the customs declaration, to carry out appropriate risk analysis and customs controls, prior to release of the products for export. Risk management is to obligatorily apply from 1 July 2009, by electronic means, according to Article 3(3) of Commission Regulation (EC) No 1875/2006 of 18 December 2006 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code[(12)]. Consequently customs control on export declarations as referred to in Article 5 of Regulation (EC) No 800/1999 should from that date be subject to risk analysis.

(13) Risk analysis as an optional control instrument for physical checks on export declarations was introduced in 1994 by Article 3(2) of Regulation (EEC) No 386/90, and for substitution checks in 1995 by Article 9 of Commission Regulation (EC) No 2221/95 of 20 September 1995 laying down detailed rules for the application of Council Regulation (EEC) No 386/90 as regards physical checks carried out at the time of export of agricultural products qualifying for refunds[(13)]. A choice of criteria to be taken into account was laid down in Regulation (EC) No 3122/94. The application of risk analysis is subject to data protection referred to in Article 6 of Regulation (EEC) No 2913/92.

(14) The specific experience built up by applying risk analysis in the framework of checks on export refunds should be maintained following the generalised introduction of risk management.

(15) The organisation which, in principle, would afford the best safeguards without giving rise to economic constraints and administrative costs outweighing the prospective gains for Community finances would be one which combined physical checks on export and the auditing of accounts. For this reason Member States should coordinate the physical checks with the audit to be conducted *ex post facto* in the undertakings concerned by the competent bodies governed by 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[(14)].

(16) Commission Regulation (EC) No 159/2008 of 21 February 2008 amending Regulations (EC) No 800/1999 and (EC) No 2090/2002 as regards physical checks carried out when agricultural products qualifying for refunds are exported[(15)] replaced certain checking and reporting thresholds of EUR 200 by EUR 1 000. It is appropriate to make EUR 1 000 the threshold for relevant existing checking and reporting requirements.

(17) For the purpose of evaluating the effectiveness of risk analysis and the application of this Regulation, the Member States are required to draft reports of the checks and to submit annual evaluations on the implementation and effectiveness of the checks carried out pursuant to this Regulation and of the procedures applied to selecting the products subject to physical checks. Given the progress in information technology, the requirement to submit the annual report on an ISO 9660 compatible CD-ROM or equivalent data medium should be reformulated as an electronic medium which precludes rewriting of the data.

(18) The application of risk management will be obligatory under the Customs Code from 1 July 2009 but some Member States may apply it earlier. Where appropriate risk management is in place, it is justified to permit the application of flexible control norms. Member States should, therefore, be permitted to apply flexible control norms as soon as they apply appropriate risk management and notify the Commission accordingly.

(19) The measures provided for in this Regulation are in accordance with the opinion of the Management Committee for the Common Organisation of Agricultural markets,

HAS ADOPTED THIS REGULATION:

***Changes to legislation:** There are currently no known outstanding effects for the Commission Regulation (EC) No 1276/2008. (See end of Document for details)*

CHAPTER I

INTRODUCTORY PROVISIONS

Article 1

Subject matter and scope

This Regulation lays down certain procedures for monitoring whether operations conferring entitlement to the payment of export refunds and all other amounts as defined in Article 2(a) have been carried out correctly.

It shall apply without prejudice to the provisions of Regulation (EC) No 800/1999.

This Regulation shall not apply to exports involving Community or national food aid covered by Regulation (EC) No 2298/2001.

Article 2

Definitions

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

(a) ‘other amounts’ means operations related to financial measures under the European Agricultural Guarantee Fund and the European Agricultural Fund for Rural Development pursuant to Regulations (EC) No 793/2006, (EC) No 967/2006 and (EC) No 1914/2006;

(b) ‘products’ means products as defined in first indent of Article 2(1)(a) of Regulation (EC) No 800/1999;

(c) ‘customs office of export’ means the customs office referred to in Article 5(7)(a) of Regulation (EC) No 800/1999;

(d) ‘customs office of exit’ means the customs office referred to in Article 793(2) of Regulation (EEC) No 2454/93;

(e) ‘customs office to which the T5 control copy is sent’ means the customs office of destination referred to in Article 912c of Regulation (EEC) No 2454/93 including a customs office to which an equivalent document is sent;

(f) ‘physical check’ means verification that the export declaration, or for other amounts documents as set out in Regulations (EC) No 793/2006, (EC) No 967/2006 and (EC) No 1914/2006, including documents submitted in support thereof, corresponds with the products as regards quantity, nature and characteristics under the conditions set out in Article 5;

(g) ‘substitution check’ means a check carried out by means of a visual check, that the products correspond to the document which accompanied them from the customs office of export to the customs office of exit or the office to which the T5 control copy is sent under the conditions set out in Article 8;

(h) ‘specific substitution check’ means a substitution check which may vary from a visual check to a physical check, to be carried out if there are doubts as to the integrity of the sealing of the export products under the conditions set out in Article 9;