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

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

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to 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[(1)], and in particular Article 6 thereof,

Having regard to Council Regulation (EC) No 1784/2003 of 29 September 2003 on the common organisation of the market in cereals[(2)], and in particular Article 18 thereof, and the corresponding provisions of the other regulations on the common organisation of the markets in agricultural products,

Whereas:

(1) Commission Regulation (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[(3)] and Commission Regulation (EC) No 2090/2002 of 26 November 2002 laying down detailed rules for applying Council Regulation (EEC) No 386/90 as regards physical checks carried out when agricultural products qualifying for refunds are exported[(4)] provide for the rules concerning physical controls and substitution checks by customs on export products for which an export refund is claimed. In the light of experience gained, problems mentioned by Member States in their annual reports on physical checks and recommendations of the European Court of Auditors, appropriate amendments are required.

(2) Before affixing seals the customs office of export should visually check the conformity between the refund products and the documents. Visual conformity checks aim at improving the general control measures in the framework of the customs procedure and they are of a different nature than substitution checks as described in Article 10(4) of Regulation (EC) No 2090/2002 or physical checks as described in Article 5 of the same Regulation. The visual conformity check shall confirm to customs that the products loaded are of the kind as mentioned in the documents. In principle products or goods are not unloaded and packaging is not opened or removed. In case a visual conformity check reveals that the conformity could be a problem, customs can decide to execute a physical check in accordance with Regulation (EEC) No 386/90. A minimum level of 10 % of visual conformity checks is deemed to be effective, proportionate and dissuasive. For

Changes to legislation: *Commission Regulation (EC) No 159/2008 is up to date with all changes known to be in force on or before 21 February 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

information reasons, the customs office of export should note its conformity check on the control copy T5 or its equivalent.

(3) Customs should be informed on the rate of export refunds at stake when selecting export declarations for physical or substitution checks. This information should therefore be mentioned in the export declaration and in the control copy T5 or equivalent document. However, in some Member States the authorities concerned already dispose of the same information. Consequently exporters may be exempted from the obligation to mention this information either in the export declaration, or in the T5 control copy or equivalent document, or in both.

(4) In order to ensure effective application of the obligation to mention the export refund rate, provisions need to be laid down to deter inaccurate information. A suitable penalty system should therefore be established. In case of substantial differences between the refund calculated according to the export refund rate mentioned and the export refund actually applicable customs would be particularly misled not to execute the necessary controls. In particular if the exporter indicates a rate representing an export refund less than EUR 1 000 and the refund applicable is more than EUR 10 000, the penalty should be effective, proportionate and dissuasive.

(5) In order to concentrate controls more on export products covering a relatively high amount of refunds, the selection thresholds, under which controls are generally disregarded for calculating the minimum control rates, expressed in quantities or in amounts of refunds are raised.

(6) Predictability of customs controls due to a steady control pattern by customs authorities should be minimised. Therefore, customs authorities' timing of arriving at the exporter's premises and of executing controls should vary. In parallel, exporters should be more tightly bound to non-substitution of products after the export declaration was lodged and before customs arrive, by identifying the export products before their being loaded. The registration of customs authorities' physical controls should be adapted accordingly.

(7) When a Member State applies the third subparagraph of Article 3(2) of Regulation (EEC) No 386/90 it should be possible to apply the specific provisions set up by Article 6 of Regulation (EC) No 2090/2002.

(8) Substitution checks should be targeted to all exports which were not physically checked at the start of the procedure. The number of substitution checks and specific substitution checks together must cover a representative part of the exports leaving the Community's customs territory. The number of these checks should therefore be based on a percentage of the number of T5 control copies or equivalent documents, rather than in the number of days that refund products leave the Community's customs territory.

(9) In order to decide whether substitution checks or specific substitution checks are required the customs office of exit should actively check the presence and soundness of seals. A minimum level of 10 % of checks on seals is deemed to be effective, proportionate and dissuasive.

(10) The provisions on annual reports in Annex III to Regulation (EC) No 2090/2002 should be adapted accordingly.

***Changes to legislation:** Commission Regulation (EC) No 159/2008 is up to date with all changes known to be in force on or before 21 February 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(11) Regulations (EC) No 800/1999 and (EC) No 2090/2002 should therefore be amended accordingly.

(12) The Management Committees concerned have not delivered an opinion within the time limit set by their chairman,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 800/1999 is amended as follows:

1. Article 5 is amended as follows:

   (a) The fourth subparagraph of paragraph 7 is replaced by the following:

   > The products shall be identified by appropriate means before the indicated time for starting loading. The competent customs office must be able to make physical checks and identify the goods for transport to the office of exit from the customs territory of the Community.

   (b) In paragraph 8, the following subparagraph is added:

   > Before affixing seals, the customs office shall visually check the conformity of the products with the export declarations. The number of visual checks shall not be less than 10 % of the number of export declarations, other than those in respect of which the products covered by them have been physically checked or selected for a physical check under Article 2 of Regulation (EEC) No 386/90. The customs office shall note this check in box D of the control copy T5 or equivalent document by one of the entries listed in Annex XIII. For the year 2008, the rate of controls shall be calculated on the basis of the export declarations accepted from 1 April 2008.;

2. After Article 8, the following Article 8a is inserted:

Article 8a

The exporter shall mention the rate of export refunds in EUR per unit of products or goods on the date of advanced fixing, as mentioned in the export license or certificate of Regulation (EC) No 1291/2000 or the refund certificate of Chapter III of Regulation (EC) No 1043/2005[(5)], in box 44 of the export declaration or its electronic equivalent and in box 106 of the control copy T5 or its equivalent. If the export refunds have not been fixed in advance, information on previous refund payments for the same products or goods not older than 12 months may be used. If the product or good to be exported does not cross the border of another Member State and if the national currency is not EUR, the rates of refunds may be mentioned in national currency.

The competent authorities may exempt the exporter of the requirements provided for in the first paragraph if the administration operates a system by which the services concerned are informed with the same information.

The exporter may choose to mention one of the entries listed in Annex XIV for export declarations and T5 control copies and equivalent documents covering an amount of export refunds less than EUR 1 000.;

3. In Article 51, the following paragraph 1a is inserted:

Changes to legislation: *Commission Regulation (EC) No 159/2008 is up to date with all changes known to be in force on or before 21 February 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

1a. Without prejudice to the second paragraph of Article 8a, where it is found that the rate of export refund pursuant to Article 8a was not mentioned, the rate mentioned will be deemed to be zero. If the amount of export refund calculated according to the information pursuant to Article 8a is lower than the amount applicable, the refund due for the relevant exportation shall be that applicable to the products actually exported, reduced by:

a 10 % of the difference between the calculated refund and that applicable to the actual export if the difference is more than EUR 1 000;

b 100 % of the difference between the calculated refund and that applicable to the actual export if the exporter indicated that the refunds would be less than EUR 1 000 and the refund applicable is more than EUR 10 000;

c 200 % of the difference between the calculated refund and that applicable where the exporter intentionally provides false information.

The first subparagraph shall not apply if the exporter proves to the satisfaction of the competent authorities that the situation referred to in that subparagraph is due to *force majeure*, to obvious error, or, where applicable, that it was based on correct previous payment information.

The first subparagraph shall not apply when Article 51(1) applies for penalties based on the same elements fixing the right to export refunds.;

4. Annexes XIII and XIV, the text of which are set out in Annex I to this Regulation, are added.

Article 2

Regulation (EC) No 2090/2002 is amended as follows:

1. Article 2 is amended as follows:

(a) paragraph 2 is replaced by the following:

2. When calculating the minimum rates of checks to be carried out in accordance with Article 3(2) and Article 3a of Regulation (EEC) No 386/90, Member States shall disregard export declarations for physical controls and T5 control copies or equivalent documents for substitution checks involving:

a either quantities not exceeding:

(i) 25 000 kg in the case of cereals and rice,

(ii) 5 000 kg in the case of products not listed in Annex I to the Treaty,

(iii) 2 500 kg in the case of other products;

b or refund amounts of less than EUR 1 000.;

(b) paragraph 3 is replaced by the following:

3. When implementing paragraphs 1 and 2, Member States shall adopt appropriate provisions to prevent fraud and abuses. Any checks made to that end may be counted for the purposes of calculating compliance with the minimum rates of checks referred to in paragraph 2 if the Member State applies risk analysis in accordance with Commission Regulation (EC) No 3122/94[(6)].;

***Changes to legislation:** Commission Regulation (EC) No 159/2008 is up to date with all changes known to be in force on or before 21 February 2022. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

2. in Article 5(2), the following subparagraph is added:

Member States shall ensure that there are variations in the start of the physical check at the exporter's premises by comparison with the indicated time for starting loading as referred to in Article 5(7) of Regulation (EC) No 800/1999.;

3. in Article 6, the following subparagraph is added:

When applying the third subparagraph of Article 3(2) of Regulation (EEC) No 386/90, a Member State may apply the rules provided for in the first subparagraph.;

4. in Article 8, paragraph 2 is replaced by the following:

2. The competent customs officer shall produce a detailed inspection report on each physical check carried out.

Inspection reports shall at least bear:

a the place, date, time of arrival, time of completion, means of transport and the name and signature of the competent officer, and

b date and time of receipt of information as referred to in point (b) of Article 5(7) of Regulation (EC) No 800/1999, the indicated time for starting loading and completion of the loading of the products in the means of transport.

The reports shall be kept accessible for consultation at the customs office which executed the physical control, or at one place in the Member State for three years from the year of export.;

5. Article 10 is amended as follows:

(a) paragraph 2 is replaced by the following:

2. If the customs office of export had not executed a physical control within the meaning of Article 2(a) of Regulation (EEC) No 386/90, substitution checks shall be carried out, wherever possible in the light of a risk analysis, without prejudice to paragraph 2a and to checks carried out under other provisions.

The total of the minimum number of substitution checks and specific substitution checks under this paragraph and paragraph 2a carried out each calendar year shall not be less than 8 % of the number of T5 control copies and equivalent documents covering products for which a refund is claimed and which leave the Community's customs territory at the customs office of exit.

For the year 2008, Member States may decide to calculate the rate of controls as referred in the second subparagraph on the basis of T5 control copies and equivalent documents accepted either from 1 January 2008 or from 1 April 2008.;

(b) paragraph 2a is replaced by the following:

2a. The customs office of exit or the office to which the T5 control copy or equivalent document is sent shall check the seals. The number of checks shall not be less than 10 % of the total number of T5 control copies and equivalent documents other than those selected for a substitution check pursuant to paragraph 2.