

COMMISSION REGULATION (EC) No 1002/2005**of 30 June 2005****amending Regulation (EC) No 1239/95 as regards the grant of compulsory licences and the rules on public inspection and access to documents held by the Community Plant Variety Office**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

HAS ADOPTED THIS REGULATION:

Having regard to the Treaty establishing the European Community,

Article 1

Regulation (EC) No 1239/95 is amended as follows:

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

1. Chapter IV of Title II is replaced by the following:

Whereas:

'CHAPTER IV

COMMUNITY LICENCES TO BE GRANTED BY THE OFFICE

Section 1**Compulsory licences pursuant to Article 29 of the Basic Regulation***Article 37***Applications for a compulsory licence**

1. The application for a compulsory licence pursuant to Article 29(1), (2) and (5) of the basic Regulation shall contain:

- (1) Article 29 of Regulation (EC) No 2100/94 has been amended in order to include a reference to compulsory licences provided for in Article 12 of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions ⁽²⁾ and to replace the term 'compulsory exploitation right' by 'compulsory licence'.
- (2) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ⁽³⁾, which lays down the general principles and limits governing the right of access to documents provided for in Article 255 of the Treaty, has been made applicable to documents held by the Community Plant Variety Office by way of insertion of a new Article 33a in Regulation (EC) No 2100/94.
- (3) It is therefore appropriate to amend Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office ⁽⁴⁾ accordingly.
- (4) The Administrative Council of the Community Plant Variety office has been consulted.
- (5) The measures provided for in this Regulation are in accordance with the opinion of the Standing Committee on Community Plant Variety Rights,

- (a) the designation of the applicant and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a proposal for the type of acts to be covered by the compulsory licence;
- (d) a statement setting out the public interest concerned, including details of facts, items of evidence and arguments presented in support of the public interest claimed;
- (e) in the case of an application referred to in Article 29(2) of the basic Regulation, a proposal for the category of persons to which the compulsory licence shall be granted, including, as the case may be, the specific requirements related to that category of persons.
- (f) a proposal for an equitable remuneration and the basis for calculating the remuneration.

⁽¹⁾ OJ L 227, 1.9.1994, p. 1. Regulation as last amended by Regulation (EC) No 873/2004 (OJ L 162, 30.4.2004, p. 38).

⁽²⁾ OJ L 213, 30.7.1998, p. 13.

⁽³⁾ OJ L 145, 31.5.2001, p. 43.

⁽⁴⁾ OJ L 121, 1.6.1995, p. 37. Regulation as last amended by Regulation (EC) No 2181/2002 (OJ L 331, 7.12.2002, p. 14).

2. The application for a compulsory licence referred to in Article 29(5a) of the basic Regulation shall contain:

- (a) the designation of the applicant holding a patent right and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a certified copy of the patent certificate showing the number and claims of the patent for a biotechnological invention and the granting authority of the patent;
- (d) a proposal for the type of acts to be covered by the compulsory licence;
- (e) a proposal for an equitable remuneration and the basis for calculating the remuneration;
- (f) a statement setting out why the biotechnological invention constitutes significant technical progress of considerable economic interest compared with the protected variety, including details of facts, items of evidence and arguments in support of the claim;
- (g) a proposal for the territorial scope of the licence, which may not exceed the territorial scope of the patent referred to in point (c).

3. The application for a cross-licence referred to in Article 29(5a) of the basic Regulation shall contain:

- (a) the designation of the applicant holding a patent right and the opposing holder of the variety concerned as parties to proceedings;
- (b) the variety denomination and the plant species of the variety or varieties concerned;
- (c) a certified copy of the patent certificate showing the number and claims of the patent for a biotechnological invention and the granting authority of the patent;
- (d) an official document showing that a compulsory licence for a patented biotechnological invention has been granted to the holder of the plant variety right;
- (e) a proposal for the type of acts to be covered by the cross-licence;
- (f) a proposal for an equitable remuneration and the basis for calculating the remuneration;

- (g) a proposal for the territorial scope of the cross-licence, which may not exceed the territorial scope of the patent referred to in point (c).

4. The application for a compulsory licence shall be accompanied by documents evidencing that the applicant has applied unsuccessfully to obtain a contractual licence from the holder of the plant variety right. Should the Commission or a Member State be the applicant for a compulsory licence pursuant to Article 29(2) of the basic Regulation, the Office may waive this condition in the case of *force majeure*.

5. A request for a contractual licence shall be considered unsuccessful within the meaning of paragraph 4 if:

- (a) the opposing holder has not given a final reply to the person seeking such right within a reasonable period, or
- (b) the opposing holder has refused to grant a contractual licence to the person seeking it, or
- (c) the opposing holder has offered a licence to the person seeking it, on obviously unreasonable fundamental terms including those relating to the royalty to be paid, or on terms which, seen as a whole, are obviously unreasonable.

Article 38

Examination of the application for a compulsory licence

1. Oral proceedings and the taking of evidence shall in principle be held together in one hearing.

2. Requests for further hearings shall be inadmissible except for those requests based on circumstances which have undergone change during or after the hearing.

3. Before taking a decision, the Office shall invite the parties concerned to come to an amicable settlement on a contractual licence. If appropriate, the Office shall make a proposal for such an amicable settlement.

Article 39

Tenure of a Community plant variety right during the proceedings

1. If the commencement of an action in respect of a claim referred to in Article 98(1) of the basic Regulation against the holder has been entered in the Register of Community Plant Variety Rights, the Office may suspend the proceedings on the grant of a compulsory licence. It shall not resume them prior to the entry in the same Register of the final judgment upon, or any other termination of, such action.

2. If a transfer of the Community plant variety right is binding on the Office, the new holder shall enter the proceedings as party thereto, upon request of the applicant, if that applicant has unsuccessfully requested the new holder to grant him a licence within two months of receipt of communication from the Office that the name of the new holder has been entered in the Register of Community Plant Variety Rights. A request from the applicant shall be accompanied by sufficient documentary evidence of his vain attempt and, if appropriate, of the conduct of the new holder.

3. In the case of an application referred to in Article 29(2) of the basic Regulation, the new holder shall enter the proceedings as party thereto. Paragraph 1 of this Article shall not apply.

Article 40

Contents of the decision on the application

The written decision shall be signed by the President of the Office. The decision shall contain:

- (a) a statement that the decision is delivered by the Office;
- (b) the date when the decision was taken;
- (c) the names of the members of the committee having taken part in the proceedings;
- (d) the names of the parties to proceedings and of their procedural representatives;
- (e) the reference to the opinion of the Administrative Council;
- (f) a statement of the issues to be decided;
- (g) a summary of the facts;
- (h) the grounds on which the decision is based;
- (i) the order of the Office; if need be, the order shall include the stipulated acts covered by the compulsory licence, the specific conditions pertaining thereto and the category of persons, including where appropriate the specific requirements relating to that category.

Article 41

Grant of a compulsory licence

The decision to grant a compulsory licence pursuant to Article 29(1), (2) and (5) of the basic Regulation shall

contain a statement setting out the public interest involved.

1. The following grounds may in particular constitute a public interest:

- (a) the protection of life or health of humans, animals or plants,
- (b) the need to supply the market with material offering specific features,
- (c) the need to maintain the incentive for continued breeding of improved varieties.

2. The decision to grant a compulsory licence pursuant to Article 29(5a) of the basic Regulation shall contain a statement setting out the reasons why the invention constitutes significant technical progress of considerable economic interest. The following grounds may in particular constitute reasons why the invention constitutes significant technical progress of considerable economic interest compared with the protected plant variety:

- (a) improvement of cultural techniques;
- (b) improvement of the environment;
- (c) improvement of techniques to facilitate the use of genetic biodiversity;
- (d) improvement of quality;
- (e) improvement of yield;
- (f) improvement of resistance;
- (g) improvement of adaptation to specific climatological and/or environmental conditions.

3. The compulsory licence shall be non-exclusive.

4. The compulsory licence may not be transferred, otherwise than together with that part of an enterprise which makes use of the compulsory licence, or, in the circumstances set out in Article 29(5) of the basic Regulation, together with the assignment of the rights of an essentially derived variety.

*Article 42***Conditions pertaining to the person to whom a compulsory licence is granted**

1. Without prejudice to the other conditions referred to in Article 29(3) of the basic Regulation, the person to whom the compulsory licence is granted shall have the appropriate financial and technical capacity to make use of the compulsory licence.

2. Compliance with the conditions pertaining to the compulsory licence and laid down in the decision thereupon shall be considered a 'circumstance' under Article 29(4) of the basic Regulation.

3. The Office shall provide that the person to whom a compulsory licence is granted may not bring a legal action for infringement of a Community plant variety right unless the holder has refused or neglected to do so within two months after being so requested.

*Article 43***Category of persons satisfying specific requirements pursuant to Article 29(2) of the basic Regulation**

1. Any person intending to make use of a compulsory licence who comes under the category of person satisfying specific requirements referred to in Article 29(2) of the basic Regulation shall declare his intention to the Office and to the holder by registered letter with advice of delivery. The declaration shall include:

- (a) the name and address of that person as laid down for parties to proceedings pursuant to Article 2 of this Regulation;
- (b) a statement on the facts meeting the specific requirements;
- (c) a statement setting out the acts to be effected; and
- (d) an assurance that that person has the appropriate financial resources as well as information about his technical capacity, to make use of the compulsory licence.

2. Upon request, the Office shall enter a person in the Register of Community Plant Variety Rights if such person has fulfilled the conditions relating to the declaration referred to in paragraph 1. Such person shall not be entitled to make use of the compulsory licence prior to the entry. The entry shall be communicated to that person and the holder.

3. Article 42(3) of this Regulation shall apply *mutatis mutandis* to a person entered in the Register of Community Plant Variety Rights pursuant to paragraph 2 of this Article. Any judgment, or other termination, of the legal action in respect of the act of infringement shall apply to the other persons entered or to be entered.

4. The entry referred to in paragraph 2 may be deleted on the sole grounds that the specific requirements laid down in the decision on the grant of a compulsory licence or the financial and technical capacities established pursuant to paragraph 2 have undergone change more than one year after the grant of the compulsory licence and within any time-limit stipulated in that grant. The deletion of the entry shall be communicated to the person entered and the holder.

Section 2**Exploitation rights pursuant to Article 100(2) of the Basic Regulation***Article 44***Exploitation rights pursuant to Article 100(2) of the basic Regulation**

1. A request for a contractual non-exclusive exploitation right from a new holder, as referred to in Article 100(2) of the basic Regulation, shall be made, in the case of the former holder within two months, or in the case of a person having enjoyed an exploitation right within four months, of receipt of notification from the Office that the name of the new holder has been entered in the Register of Community Plant Variety Rights.

2. An application for an exploitation right to be granted pursuant to Article 100(2) of the basic Regulation shall be accompanied by documents supporting the unsuccessful request referred to in paragraph 1. The provisions of Article 37(1)(a), (b), (c) and (5), Article 38, Article 39(3), Article 40 except letter (f), Article 41(3) and (4) and Article 42 of this Regulation shall apply *mutatis mutandis*;

2. Article 82 is replaced by the following:

*'Article 82***Public inspection of the Registers**

1. The Registers shall be open for public inspection on the premises of the Office.

Access to the Registers and the documents held therein shall be granted under the same terms and conditions as apply to the access to documents held by the Office within the meaning of in Article 84.

2. On the spot inspection of the Registers shall be free of charge.

The production and delivery of extracts from the Registers in any form that requires the processing or manipulating of data other than the mere reproduction of a document or parts thereof shall be subject to the payment of a fee.

3. The President of the Office may provide for public inspection of the Registers on the premises of national agencies, or sub-offices designated, pursuant to Article 30(4) of the basic Regulation.’;

3. Article 84 is replaced by the following:

‘Article 84

Access to documents held by the Office

1. The Administrative Council shall adopt the practical arrangements for access to the documents held by the Office, including the Registers.

2. The Administrative Council shall adopt the categories of documents of the Office to be made directly accessible to the public by way of publication, including publication by electronic means.’

Article 2

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

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

Done at Brussels, 30 June 2005.

For the Commission

Markos KYPRIANOU

Member of the Commission
