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## Legislation

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## I

*(Acts whose publication is obligatory)*

**COUNCIL REGULATION (EEC) No 4064/89****of 21 December 1989****on the control of concentrations between undertakings**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 87 and 235 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas, for the achievement of the aims of the Treaty establishing the European Economic Community, Article 3 (f) gives the Community the objective of instituting 'a system ensuring that competition in the common market is not distorted';

Whereas this system is essential for the achievement of the internal market by 1992 and its further development;

Whereas the dismantling of internal frontiers is resulting and will continue to result in major corporate re-organizations in the Community, particularly in the form of concentrations;

Whereas such a development must be welcomed as being in line with the requirements of dynamic competition and capable of increasing the competitiveness of European industry, improving the conditions of growth and raising the standard of living in the Community;

Whereas, however, it must be ensured that the process of re-organization does not result in lasting damage to

competition; whereas Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it;

Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

Whereas a new legal instrument should therefore be created in the form of a Regulation to permit effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations;

Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also with regard to concentrations on the markets for agricultural products listed in Annex II to the Treaty;

Whereas the provisions to be adopted in this Regulation should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State;

Whereas the scope of application of this Regulation should therefore be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension; whereas, at the end of an initial phase of the implementation of this Regulation, these thresholds should be reviewed in the light of the experience gained;

Whereas a concentration with a Community dimension exists where the aggregate turnover of the undertakings concerned exceeds given levels worldwide and throughout

<sup>(1)</sup> OJ No C 130, 19. 5. 1988, p. 4.

<sup>(2)</sup> OJ No C 309, 5. 12. 1988, p. 55.

<sup>(3)</sup> OJ No C 208, 8. 8. 1988, p. 11.

the Community and where at least two of the undertakings concerned have their sole or main fields of activities in different Member States or where, although the undertakings in question act mainly in one and the same Member State, at least one of them has substantial operations in at least one other Member State; whereas that is also the case where the concentrations are effected by undertakings which do not have their principal fields of activities in the Community but which have substantial operations there;

Whereas the arrangements to be introduced for the control of concentrations should, without prejudice to Article 90 (2) of the Treaty, respect the principle of non-discrimination between the public and the private sectors; whereas, in the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them;

Whereas it is necessary to establish whether concentrations with a Community dimension are compatible or not with the common market from the point of view of the need to preserve and develop effective competition in the common market; whereas, in so doing, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a;

Whereas this Regulation should establish the principle that a concentration with a Community dimension which creates or strengthens a position as result of which effective competition in the common market or in a substantial part of it is significantly impeded is to be declared incompatible with the common market;

Whereas concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market; whereas, without prejudice to Articles 85 and 86 of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25 % either in the common market or in a substantial part of it;

Whereas the Commission should have the task of taking all the decisions necessary to establish whether or not concentrations of a Community dimension are compatible with the common market, as well as decisions designed to restore effective competition;

Whereas to ensure effective control undertakings should be obliged to give prior notification of concentrations with a Community dimension and provision should be made for the suspension of concentrations for a limited period, and for the possibility of extending or waiving a suspension where necessary; whereas in the interests of legal certainty the validity of transactions must nevertheless be protected as much as necessary;

Whereas a period within which the Commission must initiate a proceeding in respect of a notified concentration and a period within which it must give a final decision on the compatibility or incompatibility with the common market of a notified concentration should be laid down;

Whereas the undertakings concerned must be accorded the right to be heard by the Commission as soon as a proceeding has been initiated; whereas the members of management and supervisory organs and recognized workers' representatives in the undertakings concerned, together with third parties showing a legitimate interest, must also be given the opportunity to be heard;

Whereas the Commission should act in close and constant liaison with the competent authorities of the Member States from which it obtains comments and information;

Whereas, for the purposes of this Regulation, and in accordance with the case-law of the Court of Justice, the Commission must be afforded the assistance of the Member States and must also be empowered to require information to be given and to carry out the necessary investigations in order to appraise concentrations;

Whereas compliance with this Regulation must be enforceable by means of fines and periodic penalty payments; whereas the Court of Justice should be given unlimited jurisdiction in that regard pursuant to Article 172 of the Treaty;

Whereas it is appropriate to define the concept of concentration in such a manner as to cover only operations bringing about a durable change in the structure of the undertakings concerned; whereas it is therefore necessary to exclude from the scope of this Regulation those operations which have as their object or effect the coordination of the competitive behaviour of independent undertakings, since such operations fall to be examined under the appropriate provisions of Regulations implementing Article 85 or Article 86 of the Treaty; whereas it is appropriate to make this distinction specifically in the case of the creation of joint ventures;

Whereas there is no coordination of competitive behaviour within the meaning of this Regulation where two or more undertakings agree to acquire jointly control of one or more

other undertakings with the object and effect of sharing amongst themselves such undertakings or their assets;

Whereas the application of this Regulation is not excluded where the undertakings concerned accept restrictions directly related and necessary to the implementation of the concentration;

Whereas the Commission should be given exclusive competence to apply this Regulation, subject to review by the Court of Justice;

Whereas the Member States may not apply their national legislation on competition to concentrations with a Community dimension, unless the Regulation makes provision therefor; whereas the relevant powers of national authorities should be limited to cases where, failing intervention by the Commission, effective competition is likely to be significantly impeded within the territory of a Member State and where the competition interests of that Member State cannot be sufficiently protected otherwise than by this Regulation; whereas the Member States concerned must act promptly in such cases; whereas this Regulation cannot, because of the diversity of national law, fix a single deadline for the adoption of remedies;

Whereas, furthermore, the exclusive application of this Regulation to concentrations with a Community dimension is without prejudice to Article 223 of the Treaty, and does not prevent the Member States' taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law;

Whereas concentrations not referred to in this Regulation come, in principle, within the jurisdiction of the Member States; whereas, however, the Commission should have the power to act, at the request of a Member State concerned, in cases where effective competition would be significantly impeded within that Member State's territory;

Whereas the conditions in which concentrations involving Community undertakings are carried out in non-member countries should be observed, and provision should be made for the possibility of the Council's giving the Commission an appropriate mandate for negotiation with a view to obtaining non-discriminatory treatment for Community undertakings;

Whereas this Regulation in no way detracts from the collective rights of workers as recognized in the undertakings concerned,

HAS ADOPTED THIS REGULATION:

#### *Article 1*

##### *Scope*

1. Without prejudice to Article 22 this Regulation shall apply to all concentrations with a Community dimension as defined in paragraph 2.

2. For the purposes of this Regulation, a concentration has a Community dimension where;

- (a) the aggregate worldwide turnover of all the undertakings concerned is more than ECU 5 000 million, and
- (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than ECU 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. The thresholds laid down in paragraph 2 will be reviewed before the end of the fourth year following that of the adoption of this Regulation by the Council acting by a qualified majority on a proposal from the Commission.

#### *Article 2*

##### *Appraisal of concentrations*

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.

In making this appraisal, the Commission shall take into account:

- (a) the need to preserve and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
- (b) the market position of the undertakings concerned and their economic and financial power, the opportunities available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market.

3. A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.

### Article 3

#### Definition of concentration

1. A concentration shall be deemed to arise where:

- (a) two or more previously independent undertakings merge, or
- (b) one or more persons already controlling at least one undertaking, or  
— one or more undertakings

acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

2. An operation, including the creation of a joint venture, which has as its object or effect the coordination of the competitive behaviour of undertakings which remain independent shall not constitute a concentration within the meaning of paragraph 1 (b).

The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity, which does not give rise to coordination of the competitive behaviour of the parties amongst themselves or between them and the joint venture, shall constitute a concentration within the meaning of paragraph 1 (b).

3. For the purposes of this Regulation, control shall be constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- (a) ownership or the right to use all or part of the assets of an undertaking;
- (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

4. Control is acquired by persons or undertakings which:

- (a) are holders of the rights or entitled to rights under the contracts concerned, or
- (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

5. A concentration shall not be deemed to arise where:

- (a) credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the sale of all or part of that undertaking or of its assets or the sale of those securities and that any such sale takes place within one year of the date of acquisition; that period may be extended by the Commission on request where such institutions or companies justify the fact that the sale was not reasonably possible within the period set;
- (b) control is acquired by an office holder according to the law of a Member State relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;
- (c) the operations referred to in paragraph 1 (b) are carried out by the financial holding companies referred to in Article 5 (3) of the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies<sup>(1)</sup>, as last amended by Directive 84/569/EEC<sup>(2)</sup>, provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

### Article 4

#### Prior notification of concentrations

1. Concentrations with a Community dimension as referred to by this Regulation shall be notified to the Commission not more than one week after the conclusion of the agreement, or the announcement of the public bid, or the acquisition of a controlling interest. That week shall begin when the first of those events occurs.

2. A concentration which consists of a merger within the meaning of Article 3 (1) (a) or in the acquisition of joint control within the meaning of Article 3 (1) (b) shall be notified jointly by the parties to the merger or by those acquiring joint control as the case may be. In all other cases,

<sup>(1)</sup> OJ No L 222, 14. 8. 1978, p. 11.

<sup>(2)</sup> OJ No L 314, 4. 12. 1984, p. 28.

the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings.

3. Where the Commission finds that a notified concentration falls within the scope of this Regulation, it shall publish the fact of the notification, at the same time indicating the names of the parties, the nature of the concentration and the economic sectors involved. The Commission shall take account of the legitimate interest of undertakings in the protection of their business secrets.

#### Article 5

##### Calculation of turnover

1. Aggregate turnover within the meaning of Article 1 (2) shall comprise the amounts derived by the undertakings concerned in the preceding financial year from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover. The aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings referred to in paragraph 4.

Turnover, in the Community or in a Member State, shall comprise products sold and services provided to undertakings or consumers, in the Community or in that Member State as the case may be.

2. By way of derogation from paragraph 1, where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers.

However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.

3. In place of turnover the following shall be used:

- (a) for credit institutions and other financial institutions, as regards Article 1 (2) (a), one-tenth of their total assets.

As regards Article 1 (2) (b) and the final part of Article 1 (2), total Community-wide turnover shall be replaced by one-tenth of total assets multiplied by the ratio between loans and advances to credit institutions and customers in transactions with Community residents and the total sum of those loans and advances.

As regards the final part of Article 1 (2), total turnover within one Member State shall be replaced by one-tenth of total assets multiplied by the ratio between loans and

advances to credit institutions and customers in transactions with residents of that Member State and the total sum of those loans and advances;

- (b) for insurance undertakings, the value of gross premiums written which shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the insurance undertakings, including also outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums; as regards Article 1 (2) (b) and the final part of Article 1 (2), gross premiums received from Community residents and from residents of one Member State respectively shall be taken into account.

4. Without prejudice to paragraph 2, the turnover of an undertaking concerned within the meaning of Article 1 (2) shall be calculated by adding together the respective turnover of the following:

- (a) the undertaking concerned;
- (b) those undertakings in which the undertaking concerned, directly or indirectly;
  - owns more than half the capital or business assets, or
  - has the power to exercise more than half the voting rights, or
  - has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
  - has the right to manage the undertakings' affairs;
- (c) those undertakings which have in an undertaking concerned the rights or powers listed in (b);
- (d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
- (e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

5. Where undertakings concerned by the concentration jointly have the rights or powers listed in paragraph 4 (b), in calculating the turnover of the undertakings concerned for the purposes of Article 1 (2);

- (a) no account shall be taken of the turnover resulting from the sale of products or the provision of services between the joint undertaking and each of the undertakings concerned or any other undertaking connected with any one of them, as set out in paragraph 4 (b) to (e);
- (b) account shall be taken of the turnover resulting from the sale of products and the provision of services between

the joint undertaking and any third undertakings. This turnover shall be apportioned equally amongst the undertakings concerned.

#### Article 6

##### Examination of the notification and initiation of proceedings

1. The Commission shall examine the notification as soon as it is received.

(a) Where it concludes that the concentration notified does not fall within the scope of this Regulation, it shall record that finding by means of a decision.

(b) Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.

(c) If, on the other hand, it finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings.

2. The Commission shall notify its decision to the undertakings concerned and the competent authorities of the Member States without delay.

#### Article 7

##### Suspension of concentrations

1. For the purposes of paragraph 2 a concentration as defined in Article 1 shall not be put into effect either before its notification or within the first three weeks following its notification.

2. Where the Commission, following a preliminary examination of the notification within the period provided for in paragraph 1, finds it necessary in order to ensure the full effectiveness of any decision taken later pursuant to Article 8 (3) and (4), it may decide on its own initiative to continue the suspension of a concentration in whole or in part until it takes a final decision, or to take other interim measures to that effect.

3. Paragraphs 1 and 2 shall not impede the implementation of a public bid which has been notified to the Commission in accordance with Article 4 (1) by the date of its announcement, provided that the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission pursuant to paragraph 4.

4. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1, 2 or 3 in order

to prevent serious damage to one or more undertakings concerned by a concentration or to a third party. That derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, even before notification or after the transaction.

5. The validity of any transaction carried out in contravention of paragraph 1 or 2 shall be dependent on a decision pursuant to Article 6 (1) (b) or 8 (2) or (3) or by virtue of the presumption established by Article 10 (6).

This Article shall, however, have no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market which is regulated and supervised by authorities recognized by public bodies, operates regularly and is accessible directly or indirectly to the public, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of paragraph 1 or 2.

#### Article 8

##### Powers of decision of the Commission

1. Without prejudice to Article 9, each proceeding initiated pursuant to Article 6 (1) (c) shall be closed by means of a decision as provided for in paragraphs 2 to 5.

2. Where the Commission finds that, following modification by the undertakings concerned if necessary, a notified concentration fulfils the criterion laid down in Article 2 (2), it shall issue a decision declaring the concentration compatible with the common market.

It may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into *vis-à-vis* the Commission with a view to modifying the original concentration plan. The decision declaring the concentration compatible shall also cover restrictions directly related and necessary to the implementation of the concentration.

3. Where the Commission finds that a concentration fulfils the criterion laid down in Article 2 (3), it shall issue a decision declaring that the concentration is incompatible with the common market.

4. Where a concentration has already been implemented, the Commission may, in a decision pursuant to paragraph 3 or by a separate decision, require the undertakings or assets brought together to be separated or the cessation of joint



control or any other action that may be appropriate in order to restore conditions of effective competition.

5. The Commission may revoke the decision it has taken pursuant to paragraph 2 where:

- (a) the declaration of compatibility is based on incorrect information for which one of the undertakings concerned is responsible or where it has been obtained by deceit, or
- (b) the undertakings concerned commit a breach of an obligation attached to the decision.

6. In the case referred to in paragraph 5, the Commission may take a decision pursuant to paragraph 3, without being bound by the deadline referred to in Article 10 (3).

#### Article 9

##### Referral to the competent authorities of the Member States

1. The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other Member States, refer a notified concentration to the competent authorities of the Member State concerned in the following circumstances.

2. Within three weeks of the date of receipt of the copy of the notification a Member State may inform the Commission which shall inform the undertakings concerned that a concentration threatens to create or to strengthen a dominant position as a result of which effective competition would be significantly impeded on a market, within that Member State, which presents all the characteristics of a distinct market, be it a substantial part of the common market or not.

3. If the Commission considers that, having regard to the market for the products or services in question and the geographical reference market within the meaning of paragraph 7, there is such a distinct market and that such a threat exists either:

- (a) it shall itself deal with the case in order to maintain or restore effective competition on the market concerned, or
- (b) it shall refer the case to the competent authorities of the Member State concerned with a view to the application of that State's national competition law.

If, however, the Commission considers that such a distinct market or threat does not exist it shall adopt a decision to that effect which it shall address to the Member State concerned.

4. A decision to refer or not to refer pursuant to paragraph 3 shall be taken where:

- (a) as a general rule within the six-week period provided for in Article 10 (1), second subparagraph, where the

Commission has not initiated proceedings pursuant to Article 6 (1) (b), or

- (b) within three months at most of the notification of the concentration concerned where the Commission has initiated proceedings under Article 6 (1) (c), without taking the preparatory steps in order to adopt the necessary measures pursuant to Article 8 (2), second subparagraph, (3) or (4) to maintain or restore effective competition on the market concerned.

5. If within the three months referred to in paragraph 4 (b) the Commission, despite a reminder from the Member State concerned, has taken no decision on referral in accordance with paragraph 3 or taken the preparatory steps referred to in paragraph 4 (b), it shall be deemed to have taken a decision to refer the case to the Member State concerned in accordance with paragraph 3 (b).

6. The publication of any report or the announcement of the findings of the examination of the concentration by the competent authority of the Member State concerned shall be effected not more than four months after the Commission's referral.

7. The geographical reference market shall consist of the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas. This assessment should take account in particular of the nature and characteristics of the products or services concerned, of the existence of entry barriers or of consumer preferences, of appreciable differences of the undertakings' market shares between neighbouring areas or of substantial price differences.

8. In applying the provisions of this Article, the Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

9. In accordance with the relevant provisions of the Treaty, any Member State may appeal to the Court of Justice, and in particular request the application of Article 186, for the purpose of applying its national competition law.

10. This Article will be reviewed before the end of the fourth year following that of the adoption of this Regulation.

### Article 10

#### Time limits for initiating proceedings and for decisions

1. The decisions referred to in Article 6 (1) must be taken within one month at most. That period shall begin on the day following the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information.

That period shall be increased to six weeks if the Commission receives a request from a Member State in accordance with Article 9 (2).

2. Decisions taken pursuant to Article 8 (2) concerning notified concentrations must be taken as soon as it appears that the serious doubts referred to in Article 6 (1) (c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the deadline laid down in paragraph 3.

3. Without prejudice to Article 8 (6), decisions taken pursuant to Article 8 (3) concerning notified concentrations must be taken within not more than four months of the date on which the proceeding is initiated.

4. The period set by paragraph 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an investigation by decision pursuant to Article 13.

5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision taken under this Regulation, the periods laid down in this Regulation shall start again from the date of the judgment.

6. Where the Commission has not taken a decision in accordance with Article 6 (1) (b) or (c) or Article 8 (2) or (3) within the deadlines set in paragraphs 1 and 3 respectively, the concentration shall be deemed declared compatible with the common market, without prejudice to Article 9.

### Article 11

#### Requests for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States, from the persons referred to in Article 3 (1) (b), and from undertakings and associations of undertakings.

2. When sending a request for information to a person, an undertaking or an association of undertakings, the Commission shall at the same time send a copy of the request

to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 14 (1) (b) for supplying incorrect information.

4. The information requested shall be provided, in the case of undertakings, by their owners or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, by the persons authorized to represent them by law or by their statutes.

5. Where a person, an undertaking or an association of undertakings does not provide the information requested within the period fixed by the Commission or provides incomplete information, the Commission shall by decision require the information to be provided. The decision shall specify what information is required, fix an appropriate period within which it is to be supplied and state the penalties provided for in Articles 14 (1) (b) and 15 (1) (a) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time send a copy of its decision to the competent authority of the Member State within the territory of which the residence of the person or the seat of the undertaking or association of undertakings is situated.

### Article 12

#### Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary pursuant to Article 13 (1), or which it has ordered by decision pursuant to Article 13 (3). The officials of the competent authorities of the Member States responsible for conducting those investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State within the territory of which the investigation is to be carried out. Such authorization shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State within the territory of which the investigation is to be carried out, officials of the Commission may assist the officials of that authority in carrying out their duties.

### Article 13

#### Investigative powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings.

To that end the officials authorized by the Commission shall be empowered:

- (a) to examine the books and other business records;
- (b) to take or demand copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorized to carry out the investigations shall exercise their powers on production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform, in writing, the competent authority of the Member State within the territory of which the investigation is to be carried out of the investigation and of the identities of the authorized officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it shall begin and state the penalties provided for in Articles 14 (1) (c) and 15 (1) (b) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall in good time and in writing inform the competent authority of the Member State within the territory of which the investigation is to be carried out of its intention of taking a decision pursuant to paragraph 3. It shall hear the competent authority before taking its decision.

5. Officials of the competent authority of the Member State within the territory of which the investigation is to be carried out may, at the request of that authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking or association of undertakings opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to carry out their investigation. To this end the Member States shall, after consulting the Commission, take the necessary measures within one year of the entry into force of this Regulation.

#### Article 14

##### Fines

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or

associations of undertakings fines of from ECU 1 000 to 50 000 where intentionally or negligently:

- (a) they omit to notify a concentration in accordance with Article 4;
- (b) they supply incorrect or misleading information in a notification pursuant to Article 4;
- (c) they supply incorrect information in response to a request made pursuant to Article 11 or fail to supply information within the period fixed by a decision taken pursuant to Article 11;
- (d) they produce the required books or other business records in incomplete form during investigations pursuant to Article 12 or 13, or refuse to submit to an investigation ordered by decision taken pursuant to Article 13.

2. The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned within the meaning of Article 5 on the persons or undertakings concerned where, either intentionally or negligently, they;

- (a) fail to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph;
- (b) put into effect a concentration in breach of Article 7 (1) or disregard a decision taken pursuant to Article 7 (2);
- (c) put into effect a concentration declared incompatible with the common market by decision pursuant to Article 8 (3) or do not take the measures ordered by decision pursuant to Article 8 (4).

3. In setting the amount of a fine, regard shall be had to the nature and gravity of the infringement.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

#### Article 15

##### Periodic penalty payments

1. The Commission may by decision impose on the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings concerned periodic penalty payments of up to ECU 25 000 for each day of the delay calculated from the date set in the decision, in order to compel them:

- (a) to supply complete and correct information which it has requested by decision pursuant to Article 11;
- (b) to submit to an investigation which it has ordered by decision pursuant to Article 13.

2. The Commission may by decision impose on the persons referred to in Article 3 (1) (b) or on undertakings

periodic penalty payments of up to ECU 100 000 for each day of the delay calculated from the date set in the decision, in order to compel them:

- (a) to comply with an obligation imposed by decision pursuant to Article 7 (4) or 8 (2), second subparagraph, or
- (b) to apply the measures ordered by decision pursuant to Article 8 (4).

3. Where the persons referred to in Article 3 (1) (b), undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may set the total amount of the periodic penalty payments at a lower figure than that which would arise under the original decision.

#### Article 16

##### Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

#### Article 17

##### Professional secrecy

1. Information acquired as a result of the application of Articles 11, 12, 13 and 18 shall be used only for the purposes of the relevant request, investigation or hearing.

2. Without prejudice to Articles 4 (3), 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information they have acquired through the application of this Regulation of the kind covered by the obligation of professional secrecy.

3. Paragraphs 1 and 2 shall not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings.

#### Article 18

##### Hearing of the parties and of third persons

1. Before taking any decision provided for in Article 7 (2) and (4), 8 (2), second subparagraph, and (3) to (5), 14 and 15, the Commission shall give the persons, undertakings and associations of undertakings concerned the opportunity, at

every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them.

2. By way of derogation from paragraph 1, a decision to continue the suspension of a concentration or to grant a derogation from suspension as referred to in Article 7 (2) or (4) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision.

3. The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of the defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets.

4. Insofar as the Commission and the competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. Natural or legal persons showing a legitimate interest and especially members of the administrative or management organs of the undertakings concerned or recognized workers' representatives of those undertakings shall be entitled, upon application, to be heard.

#### Article 19

##### Liaison with the authorities of the Member States

1. The Commission shall transmit to the competent authorities of the Member States copies of notifications within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission pursuant to this Regulation.

2. The Commission shall carry out the procedures set out in this Regulation in close and constant liaison with the competent authorities of the Member States, which may express their views upon those procedures. For the purposes of Article 9 it shall obtain information from the competent authority of the Member State as referred to in paragraph 2 of that Article and give it the opportunity to make known its views at every stage of the procedure up to the adoption of a decision pursuant to paragraph 3 of that Article; to that end it shall give it access to the file.

3. An Advisory Committee on concentrations shall be consulted before any decision is taken pursuant to Articles 8 (2) to (5), 14 or 15, or any provisions are adopted pursuant to Article 23.

4. The Advisory Committee shall consist of representatives of the authorities of the Member States. Each Member State shall appoint one or two representatives; if

unable to attend, they may be replaced by other representatives. At least one of the representatives of a Member State shall be competent in matters of restrictive practices and dominant positions.

5. Consultation shall take place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the facts, together with the most important documents and a preliminary draft of the decision to be taken for each case considered, shall be sent with the invitation. The meeting shall take place not less than 14 days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration.

6. The Advisory Committee shall deliver an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion shall be delivered in writing and appended to the draft decision. The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

7. The Advisory Committee may recommend publication of the opinion. The Commission may carry out such publication. The decision to publish shall take due account of the legitimate interest of undertakings in the protection of their business secrets and of the interest of the undertakings concerned in such publication taking place.

#### Article 20

##### Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Article 8 (2), where conditions and obligations are attached to them, and to Article 8 (2) to (5) in the Official Journal of the European Communities.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

#### Article 21

##### Jurisdiction

1. Subject to review by the Court of Justice, the Commission shall have sole competence to take the decisions provided for in this Regulation.

2. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

The first subparagraph shall be without prejudice to any Member State's power to carry out any enquiries necessary for the application of Article 9 (2) or after referral, pursuant

to Article 9 (3), first subparagraph, indent (b), or (5), to take the measures strictly necessary for the application of Article 9 (8).

3. Notwithstanding paragraphs 1 and 2, Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.

Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within one month of that communication.

#### Article 22

##### Application of the Regulation

1. This Regulation alone shall apply to concentrations as defined in Article 3.

2. Regulations No 17 <sup>(1)</sup>, (EEC) No 1017/68 <sup>(2)</sup>, (EEC) No 4056/86 <sup>(3)</sup> and (EEC) No 3975/87 <sup>(4)</sup> shall not apply to concentrations as defined in Article 3.

3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, insofar as the concentration affects trade between Member States, adopt the decisions provided for in Article 8 (2), second subparagraph, (3) and (4).

4. Articles 2 (1) (a) and (b), 5, 6, 8 and 10 to 20 shall apply. The period within which the proceedings defined in Article 10 (1) may be initiated shall begin on the date of the receipt of the request from the Member State. The request must be made within one month at most of the date on which the concentration was made known to the Member State or effected. This period shall begin on the date of the first of those events.

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or restore

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No L 175, 23. 7. 1968, p. 1.

<sup>(3)</sup> OJ No L 378, 31. 12. 1986, p. 4.

<sup>(4)</sup> OJ No L 374, 31. 12. 1987, p. 1.

effective competition within the territory of the Member State at the request of which it intervenes.

6. Paragraphs 3 to 5 shall continue to apply until the thresholds referred to in Article 1 (2) have been reviewed.

#### *Article 23*

##### **Implementing provisions**

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of notifications pursuant to Article 4, time limits pursuant to Article 10, and hearings pursuant to Article 18.

#### *Article 24*

##### **Relations with non-member countries**

1. The Member States shall inform the Commission of any general difficulties encountered by their undertakings with concentrations as defined in Article 3 in a non-member country.

2. Initially not more than one year after the entry into force of this Regulation and thereafter periodically the Commission shall draw up a report examining the treatment accorded to Community undertakings, in the terms referred to in paragraphs 3 and 4, as regards concentrations in non-member countries. The Commission shall submit those reports to the Council, together with any recommendations.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a non-member country does not grant Community undertakings treatment comparable to that granted by the Community to undertakings from that non-member country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable treatment for Community undertakings.

4. Measures taken pursuant to this Article shall comply with the obligations of the Community or of the Member States, without prejudice to Article 234 of the Treaty, under international agreements, whether bilateral or multilateral.

#### *Article 25*

##### **Entry into force**

1. This Regulation shall enter into force on 21 September 1990.

2. This Regulation shall not apply to any concentration which was the subject of an agreement or announcement or where control was acquired within the meaning of Article 4 (1) before the date of this Regulation's entry into force and it shall not in any circumstances apply to any concentration in respect of which proceedings were initiated before that date by a Member State's authority with responsibility for competition.

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

Done at Brussels, 21 December 1989.

*For the Council*

*The President*

E. CRESSON

## II

*(Acts whose publication is not obligatory)*

## COUNCIL

## COUNCIL DIRECTIVE

of 11 December 1989

concerning veterinary checks in intra-Community trade with a view to the completion of the internal market

(89/662/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas the Community is to adopt measures designed to establish the internal market progressively over a period expiring on 31 December 1992;

Whereas the harmonious operation of the common organization of the market in livestock products and products of animal origin implies the dismantling of veterinary barriers to the development of intra-Community trade in the products concerned; whereas in this respect the free movement of agricultural products is a fundamental feature of the common organization of markets and should facilitate the rational development of agricultural production and the optimum use of the factors of production.

Whereas in the veterinary field frontiers are currently being used for carrying out checks aimed at safeguarding public health and animal health;

Whereas the ultimate aim is to ensure that veterinary checks are carried out at the place of dispatch only; whereas the attainment of this objective implies the harmonization of the basic requirements relating to the safeguarding of public health and animal health;

Whereas with a view to the completion of the internal market, pending the attainment of this objective, the emphasis should be placed on the checks to be carried out at the place of dispatch and in organizing those that could be carried out at the place of destination; whereas such a solution would entail the suspension of veterinary checks at the Community's internal frontiers;

Whereas this solution implies increased confidence in the veterinary checks carried out by the State of dispatch; whereas the latter must ensure that such veterinary checks are carried out in an appropriate manner;

Whereas in the State of destination spot veterinary checks could be carried out at the place of destination; whereas, however, in the event of a serious presumption of irregularity, the veterinary check could be carried out while the goods are in transit;

Whereas it is for the Member States to specify in a plan to be submitted the manner in which they intend to carry out the checks and whereas these plans should be the subject of Community approval;

Whereas provision must be made for the action to be taken where a veterinary check discloses that the consignment is irregular; whereas in such a situation three possible solutions may be singled out: the aim of the first would be to provide for the regularization of incorrect documents, that of the second to avert any danger where it is found that there has been an outbreak of an epizootic disease, any new serious and contagious disease or other cause likely to constitute a serious

<sup>(1)</sup> OJ No C 225, 31. 8. 1988, p. 4.

<sup>(2)</sup> OJ No C 326, 19. 12. 1988, p. 28.

<sup>(3)</sup> OJ No L 56, 6. 3. 1989, p. 7.

hazard to animals or to human health, while the third would arise where the goods do not satisfy the requirements laid down for reasons other than those referred to above;

Whereas provision should be made for a procedure for resolving conflicts which could arise concerning consignments from an establishment, production centre or undertaking;

Whereas provision must be made for protective measures; whereas in this area, especially for reasons of effectiveness, responsibility must rest firstly with the Member State of dispatch; whereas the Commission must be able to act speedily, in particular by way of on-the-spot visits and adopting measures appropriate to the situation.

Whereas in order to be effective, the rules laid down by this Directive must cover all goods that are subject in the case of intra-Community trade to veterinary requirements;

Whereas, however, with regard to certain epizootic diseases, different health situations still prevail in the Member States and whereas, pending a Community approach on the methods to combat these diseases, the question of checking intra-Community trade in livestock should for the time being be left to one side and a documentary check should be permitted during transport; whereas, in view of the current state of harmonization and pending Community rules, goods that are not the subject of harmonized rules should comply with the requirements of the State of destination provided that the latter are in conformity with Article 36 of the Treaty;

Whereas the provisions of existing Directives should be adapted to the new rules laid down in this Directive;

Whereas these rules should be re-examined before the end of 1993;

Whereas the Commission should be entrusted with the task of adopting measures for applying this Directive; whereas, to that end, provision should be made for procedures establishing close and effective cooperation between the Commission and the Member States within the Standing Veterinary Committee,

HAS ADOPTED THIS DIRECTIVE:

#### *Article 1*

Member States shall ensure that the veterinary checks to be carried out on products of animal origin which are covered by the Directives listed in Annex A or by Article 14 and which are intended for trade are no longer carried out, without prejudice to Article 6, at frontiers but are carried out in accordance with this Directive.

#### *Article 2*

For the purposes of this Directive:

1. 'Veterinary check' means any physical check and/or administrative formality which applies to the products referred to in Article 1 and which is intended for the protection, direct or otherwise, of public or animal health;
2. 'trade' means trade between Member States in goods within the meaning of Article 9 (2) of the Treaty;
3. 'establishment' means any undertaking which produces, stores or processes the products referred to in Article 1;
4. 'competent authority' means the central authority of a Member State competent to carry out veterinary checks or any authority to which it has delegated that competence;
5. 'official veterinarian' means the veterinarian appointed by the competent central authority of the Member State.

### CHAPTER I

#### Checks at origin

#### *Article 3*

1. Member States shall ensure that the only products intended for trade are those referred to in Article 1 which have been obtained, checked, marked and labelled in accordance with Community rules for the destination in question and which are accompanied to the final consignee mentioned therein by a health certificate, animal-health certificate or by any other document provided for by Community veterinary rules.

The establishments of origin shall ensure, by constant self-supervision, that such products satisfy the requirements of the first subparagraph.

Without prejudice to the monitoring duties assigned to the official veterinarian under Community legislation, the competent authority shall carry out regular checks on establishments in order to satisfy itself that products intended for trade comply with Community requirements or, in the cases referred to in paragraph 3 of this Article and Article 14, with the requirements of the Member State of destination.

Where there are grounds for suspecting that requirements are not being met, the competent authority shall carry out the necessary checks and, if the suspicion is confirmed, take the appropriate measures, which may include withdrawing approval.

2. Where the transport operation involves several places of destination, products must be grouped together in as many batches as there are places of destination. Each batch must be accompanied by the aforementioned certificate or document.



Where the products referred to in Article 1 are intended for export to a third country, the transport operation must remain under customs supervision up to the point of exit from Community territory.

3. Member States which make optional imports from certain third countries shall inform the Commission and the other Member States of the existence of such imports.

Where products are brought into Community territory by a Member State other than those referred to above, that Member State shall carry out a documentary check on the origin and destination of the goods in accordance with Article 6 (1).

Member States of destination shall prohibit the products concerned from being sent on from their territory unless they are bound for another Member State using the same option.

#### Article 4

1. Member States of dispatch shall take the necessary measures to ensure that operators comply with veterinary requirements at all stages of the production, storage, marketing and transport of the products referred to in Article 1. In particular, they shall ensure that:

- the products obtained in accordance with the directives referred to in Annex A are checked in the same way, from a veterinary viewpoint, whether they are intended for intra-Community trade or for the national market,
- the products covered by Annex B are not dispatched to the territory of another Member State, if they cannot be marketed on their own territory for reasons justified by Article 36 of the Treaty.

2. Member States of dispatch shall take the appropriate administrative, legal or penal measures to penalize any infringement of veterinary legislation by natural or legal persons where it is found that Community rules have been infringed, in particular where it is found that the certificates or documents drawn up do not correspond to the actual state of the products or that public health stamps have been affixed to products which do not comply with those rules.

## CHAPTER II

### Checks on arrival at the destination

#### Article 5

1. Member States of destination shall implement the following measures:

- (a) The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport;

- (b) where the products referred to in Article 1 originating in another Member State are intended:

- for an establishment placed under the responsibility of an official veterinarian, the latter must ensure that only products that meet the requirements of Article 3 (1) with respect to marking and accompanying documents or, in the case of the products referred to in Annex B, are accompanied by the document stipulated by the rules of the country of destination, are admitted to that establishment,
- for an approved intermediary who divides up the batches or for a commercial undertaking with many branches, or any establishment not subject to permanent supervision, the latter must check, before the batch is divided up or marketed, that the said marks, certificate, or documents referred to in the first indent are present and notify the competent authority of any irregularity or anomaly,
- for other consignees, particularly where the batch is partially unloaded during transport, the batch must be accompanied, in accordance with Article 3 (1), by the original of the certificate referred to in the first indent.

The guarantees which must be furnished by the consignees referred to in the second and third indents shall be specified in an agreement with the competent authority to be signed at the time of the prior registration provided for in paragraph 3. The competent authority shall carry out random checks to verify compliance with those guarantees.

2. Without prejudice to Article 4, where the Community standards laid down by Community rules have not been set and in the case provided for in Article 14, the Member State of destination may require, with due regard for the general provisions of the Treaty, that the establishment of origin must apply the standards in force under the national rules of that Member State. The Member State of origin shall ensure that the product in question comply with those requirements.

3. Operators who have products delivered to them from another Member State or who completely divide up a batch of such products:

- (a) shall be subject, if so requested by the competent authority, to prior registration;
- (b) shall keep a register in which such deliveries are recorded;
- (c) must, if so requested by the competent authority, report the arrival of products from another Member State, to the extent necessary to carry out the checks referred to in paragraph 1;
- (d) keep for a period of not less than six months to be specified by the competent authority, the health certificates or documents referred to in Article 3 for presentation to the competent authority should the latter so request.

4. The detailed rules for implementing this Article shall be adopted in accordance with the procedure laid down in Article 18.

5. The Council, acting on the basis of a Commission report accompanied by any proposals for amendments, shall re-examine this Article within a period of three years from the implementation of this Directive.

#### Article 6

1. Member States shall ensure that during the checks carried out at the places where products from a third country may be brought into Community territory, such as ports, airports and frontier posts with third countries, the following measures are taken:

- (a) a documentary check is made on the products' origin;
- (b) where products are imported from third countries, they must be sent, under customs supervision, to inspection posts in order that veterinary checks may be carried out.

The products referred to in Annex A may not be given customs clearance unless those checks have shown that they comply with Community rules.

The products referred to in Annex B and those which are the subject of optional imports in accordance with Article 3 (3) which, after having been brought into Community territory, are to be sent to the territory of another Member State, must:

- either undergo veterinary checks to show that they comply with the rules of the Member State of destination,
- or, after a solely visual check to establish that the documents and the products tally, be sent under customs supervision to the place of destination where veterinary checks must be carried out;

- (c) products of Community origin shall be subject to the rules of inspection laid down in Article 5.

2. However, as from 1 January 1993 and by way of derogation from paragraph 1, all products transported by regular, direct means of transport linking two geographical points of the Community shall be subject to the rules of inspection laid down in Article 5.

#### Article 7

1. If, during a check carried out at the place of destination of a consignment or during transport, the competent authorities of a Member State establish:

- (a) the presence of agents responsible for a disease named in Directive 82/894/EEC<sup>(1)</sup>, as last amended by Commission Decision 89/162/EEC<sup>(2)</sup>, a zoonosis or disease, or any cause likely to constitute a serious hazard to animals or humans, or that the products come from an area infected by an epizootic disease, they shall, except as regards animal-health aspects, in the case of products subject to one of the treatments referred to in Article 4 of Directive 80/215/EEC<sup>(3)</sup>, as last amended by Directive 88/660/EEC<sup>(4)</sup>, order the batch to be destroyed or used in any other way laid down by Community rules.

Costs relating to the destruction of the batch shall be borne by the consignor or his representative.

The competent authorities of the Member State of destination shall immediately notify the competent authorities of the other Member States and the Commission by telex of the findings arrived at, the decisions taken and the reasons for such decisions.

The protective measures provided for in Article 9 may be applied.

In addition, at the request of a Member State and in accordance with the procedure laid down in Article 17, the Commission may, in order to deal with situations not provided for by Community legislation, adopt any measure necessary to arrive at a concerted approach by the Member States;

- (b) that the goods do not meet the conditions laid down by Community directives, or, in the absence of decisions on the Community standards provided for by the directives, by national standards, they may, provided that health and animal-health considerations so permit, give the consignor or his representative the choice of:
  - destroying the goods, or
  - using the goods for other purposes, including returning them with the authorization of the competent authority of the country of the establishment of origin.

<sup>(1)</sup> OJ No L 378, 31. 12. 1987, p. 58.

<sup>(2)</sup> OJ No L 61, 4. 3. 1989, p. 48.

<sup>(3)</sup> OJ No L 47, 21. 2. 1980, p. 4.

<sup>(4)</sup> OJ No L 382, 31. 12. 1988, p. 35.

However, if the certificate or the documents are found to contain irregularities, the consignor must be granted a period of grace before recourse is had to this last possibility.

2. In accordance with the procedure laid down in Article 18, the Commission shall draw up a list of the agents and diseases referred to in paragraph 1, and detailed rules for the application of this Article.

#### *Article 8*

1. In the cases provided for in Article 7, the competent authority of the Member State of destination shall contact the competent authorities of the Member State of dispatch without delay. The latter authorities shall take all necessary measures and notify the competent authority of the first Member State of the nature of the checks carried out, the decisions taken and the reasons for such decisions.

If the authority of the first Member State fears that such measures are inadequate, the competent authorities of the two Member States shall together seek ways and means of remedying the situation; if appropriate this may involve an on-the-spot inspection.

Where the checks provided for in Article 7 show repeated irregularities, the competent authority of the Member State of destination shall inform the Commission and the veterinary departments of the other Member States.

The Commission, at the request of the competent authority of the Member State of destination or on its own initiative, and taking into account the nature of the infringements established, may:

- send a mission of inspection to the establishment concerned, or
- instruct an official veterinarian, whose name shall be on a list to be prepared by the Commission at the suggestion of the Member States, and who is acceptable to the various parties concerned, to check the facts in the establishment concerned,
- request the competent authority to intensify its sampling of the products of the establishment concerned.

It shall inform the Member States of its findings.

Where these measures are taken to deal with repeated irregularities on the part of an establishment, the Commission shall charge any expenses occasioned by the application of the indents of the foregoing subparagraph to the establishment involved.

Pending the Commission's findings, the Member State of dispatch must, at the request of the Member State of destination, intensify checks on products coming from the establishment in question, and if there are serious animal health or public health grounds, suspend approval.

The Member State of destination may, for its part, intensify checks on products coming from the same establishment.

At the request of one of the two Member States concerned — where the irregularities are confirmed by the expert's opinion — the Commission must, in accordance with the procedure laid down in Article 17, take the appropriate measures, which may go as far as authorizing the Member States to prohibit provisionally the bringing into their territory of products coming from that establishment. These measures must be confirmed or reviewed as soon as possible in accordance with the procedure laid down in Article 17.

The general rules for the application of this Article shall be adopted in accordance with the procedure set out in Article 18.

2. Rights of appeal existing under the laws in force in the Member States against decisions by the competent authorities shall not be affected by this Directive.

Decisions taken by the competent authority of the State of destination and the reasons for such decisions shall be notified to the consignor or his representative and to the competent authority of the Member State of dispatch.

If the consignor or his representative so requests, the said decisions and reasons shall be forwarded to him in writing with details of the rights of appeal which are available to him under the law in force in the Member State of destination and of the procedure and time limits applicable.

However, in the event of a dispute, and without prejudice to the aforementioned rights of appeal, the two parties concerned may, if they so agree, within a maximum period of one month, submit the dispute for the assessment of an expert whose name appears on a list of Community experts to be drawn up by the Commission; the cost of consulting the expert shall be borne by the Community.

Such experts shall issue their opinions within not more than 72 hours. The parties shall abide by the expert's opinion, with due regard for Community veterinary legislation.

3. The costs of returning the consignment, storing the goods, putting them to other uses or destroying them shall be borne by the consignee.

### CHAPTER III

#### Common provisions

#### *Article 9*

1. Each Member State shall immediately notify the other Member States and the Commission of any outbreak in its

territory, other than an outbreak of diseases referred to in Directive 82/894/EEC, of any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.

The Member State of origin shall immediately implement the control or precautionary measures provided for in Community rules, in particular the determination of the buffer zones provided for in those rules, or adopt any other measure which it deems appropriate.

The Member State of destination or transit which, in the course of a check referred to in Article 5, has established the existence of one of the diseases or causes referred to in the first subparagraph may, if necessary, take the precautionary measures provided for in Community rules.

Pending the measures to be taken in accordance with paragraph 4, the Member State of destination may, on serious public or animal-health grounds, take interim protective measures with regard to the establishments concerned or, in the case of an epizootic disease, with regard to the area of protection provided for in Community rules.

The measures taken by Member States shall be notified to the Commission and to the other Member States without delay.

2. At the request of the Member State referred to in the first subparagraph of paragraph 1 or on the initiative of the Commission, one or more Commission representatives may go at once to the place concerned to examine, in collaboration with the competent authorities, what measures have been taken, and shall issue an opinion on those measures.

3. If the Commission has not been informed of the measures taken, or if it considers the measures taken to be inadequate, it may, in collaboration with the Member State concerned and pending the meeting of the Standing Veterinary Committee, take interim protective measures with regard to products from the region affected by the epizootic disease or from a given establishment. These measures shall be submitted to the Standing Veterinary Committee as soon as possible to be confirmed, amended or cancelled in accordance with the procedure laid down in Article 17.

4. The Commission shall in all cases review the situation in the Standing Veterinary Committee at the earliest opportunity. It shall adopt the necessary measures for the products referred to in Article 1 and, if the situation so requires, for the originating products or products derived from those products in accordance with the procedure laid down in Article 17. The Commission shall monitor the situation and, by the same procedure, shall amend or repeal the decisions taken, depending on how the situation develops.

5. Detailed rules for the application of this Article, and in particular the list of zoonoses or causes likely to constitute a serious hazard to human health, shall be adopted in accordance with the procedure laid down in Article 18.

#### Article 10

Each Member State and the Commission shall appoint the veterinary department or departments responsible for carrying out the veterinary checks and collaborating with the other Member States' inspection departments.

#### Article 11

The Member States shall also ensure that the officials of their veterinary departments, if appropriate in collaboration with the officials of other departments empowered to that end, are able in particular to:

- carry out inspections of premises, offices, laboratories, installations, means of transport, plant and equipment, cleaning and maintenance products, procedures used for the production and processing of products and the marking and labelling and presentation of those products,
- carry out checks on whether staff comply with the requirements laid down in the texts referred to in Annex A,
- take samples from products held with a view to being stored or sold, put on the market or transported;
- examine documentary or computer material relevant to the checks carried out further to the measures taken pursuant to Article 3 (1).

For this purpose, they must receive from the establishments being checked the cooperation necessary for the performance of their duties.

#### Article 12

1. Article 8 (3) and Articles 10 and 11 of Directive 64/433/EEC <sup>(1)</sup>, as last amended by Directive 88/657/EEC <sup>(2)</sup> are deleted.

2. Article 5 (3) and (4), and Articles 9, 10 and 11 of Directive 71/118/EEC <sup>(3)</sup> as last amended by Directive 88/657/EEC are deleted.

3. In Directive 74/461/EEC <sup>(4)</sup> as last amended by Directive 87/489/EEC <sup>(5)</sup>:

- (i) Articles 5 (2), (3), (4) and (5) and Articles 6 and 8 are deleted;
- (ii) in Article 8a, the references to Article 8 are replaced by a reference to Article 9 of Directive 89/662/EEC.

<sup>(1)</sup> OJ No 121, 29. 7. 1964, p. 2012/64.

<sup>(2)</sup> OJ No L 382, 21. 12. 1988, p. 3.

<sup>(3)</sup> OJ No L 55, 8. 3. 1971, p. 23.

<sup>(4)</sup> OJ No L 302, 31. 12. 1972, p. 24.

<sup>(5)</sup> OJ No L 280, 3. 10. 1987, p. 28.

4. Article 7 (3) and Articles 12 and 16 of Directive 77/99/EEC <sup>(1)</sup>, as last amended by Directive 89/227/EEC <sup>(2)</sup>, is deleted.

5. In Directive 80/215/EEC:

(i) Article 5 (2), (3), (4) and (5) and Articles 6 and 7 are deleted;

(ii) in Article 7a, the references to Article 7 is replaced by a reference to Article 9 of Directive 89/662/EEC.

6. Article 5 (3) and (4), and Article 7, 8 and 12 of Directive 85/397/EEC <sup>(3)</sup>, as amended by Regulation (EEC) No 3768/85 <sup>(4)</sup>, are deleted.

7. Article 10 (1) and (3) of Directive 88/657/EEC is deleted.

8. Articles 8 and 9 of Directive 89/437/EEC <sup>(5)</sup> are deleted.

9. In Annex B to Directive 72/462/EEC <sup>(6)</sup>, the following shall be added to the certificate: 'Name and address of first consignee'.

#### Article 13

1. The following Article is added to Directives 64/433/EEC and 71/118/EEC:

##### 'Article 19

The Rules laid down in Directive 89/662/EEC (\*) concerning veterinary checks applicable in intra-Community trade, with a view to the completion of the internal market, shall apply in particular to checks at origin, to the organization of and follow-up to the checks to be carried out by the Member State of destination, and to the protective measures to be implemented.

(\*) OJ No L 395, 30. 12. 1989, p. 13'.

2. The following Article is added to Directives 72/461/EEC and 80/215/EEC:

##### 'Article 15

The rules laid down in Directive 89/662/EEC (\*) concerning veterinary checks applicable in intra-Community trade, with a view to the completion of the internal market, shall apply in particular to checks at

origin, to the organization of and follow-up to the checks to be carried out by the Member State of destination, and to the protective measures to be implemented.

(\*) OJ No L 395, 30. 12. 1989, p. 13'.

3. The following Article is added to Directive 77/99/EEC:

##### 'Article 24

The Rules laid down in Directive 89/662/EEC (\*) concerning veterinary checks applicable in intra-Community trade, with a view to the completion of the internal market, shall apply in particular to checks at origin, to the organization of and follow-up to the checks to be carried out by the Member State of destination, and to the protective measures to be implemented.

(\*) OJ No L 395, 30. 12. 1989, p. 13'.

4. The following Article shall be added to Directives 85/397/EEC and 88/657/EEC:

##### 'Article 18

The Rules laid down in Directive 89/662/EEC (\*) concerning veterinary checks applicable in intra-Community trade, with a view to the completion of the internal market, shall apply in particular to checks at origin, to the organization of and follow-up to the checks to be carried out by the Member State of destination, and to the protective measures to be implemented.

(\*) OJ No L 395, 30. 12. 1989, p. 13'.

5. The following Article is added to Directive 88/437/EEC:

##### 'Article 17

The Rules laid down in Directive 89/662/EEC (\*) concerning veterinary checks applicable in intra-Community trade, with a view to the completion of the internal market, shall apply in particular to checks at origin, to the organization of and follow-up to the checks to be carried out by the Member State of destination, and to the protective measures to be implemented.

(\*) OJ No L 395, 30. 12. 1989, p. 13'.

#### Article 14

Until 31 December 1992, trade in the products listed in Annex B shall, pending the adoption of Community rules, be subject to the rules on control laid down by this Directive, in particular those laid down in Article 5 (2).

<sup>(1)</sup> OJ No L 26, 31. 1. 1977, p. 85.

<sup>(2)</sup> OJ No L 93, 6. 4. 1989, p. 25.

<sup>(3)</sup> OJ No L 226, 24. 8. 1985, p. 13.

<sup>(4)</sup> OJ No L 362, 31. 12. 1985, p. 8.

<sup>(5)</sup> OJ No L 212, 22. 7. 1989, p. 87.

<sup>(6)</sup> OJ No L 302, 31. 12. 1972, p. 28.

Member States shall communicate before the date laid down in Article 19 the conditions and procedures currently applicable to trade in the products referred to in the first subparagraph.

The Council, acting on a proposal from the Commission, shall determine the final arrangements applicable to trade in the products listed in Annex B before 31 December 1991.

#### Article 15

In Article 9 of Directive 64/432/EEC <sup>(1)</sup>, the following point is inserted:

- '2a. One or more Commission representatives may, at the request of a Member State or at the initiative of the Commission itself, go at once to the place concerned to examine, in cooperation with the competent authorities, the measures taken and issue an opinion on those measures.'

#### Article 16

1. Member States shall submit to the Commission no later than three months before the date laid down in Article 19 (1) a programme setting out the national measures to be taken to achieve the stated objective of this Directive, in particular the frequency of checks.

2. The Commission shall examine the programmes communicated by the Member States in accordance with paragraph 1.

3. Each year and for the first time in 1991, the Commission shall address to the Member States a recommendation on a programme of checks for the following year; the Standing Veterinary Committee will have expressed its opinion on the recommendation in advance. This recommendation may be subject to later adaptations.

#### Article 17

1. Where the procedure laid down in this Article is to be used, matters shall without delay be referred by the Chairman, either on his own initiative or at the request of a Member State, to the Standing Veterinary Committee (hereinafter called the 'Committee') set up by Decision 68/361/EEC <sup>(2)</sup>.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a

proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The Chairman shall not vote.

3. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

4. If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken.

The Council shall act by a qualified majority.

If, on the expiry of a period of 15 days from the date of referral to the Council, the Council has not acted, the Commission shall adopt the proposed measures, save where the Council has decided against the said measures by a simple majority.

#### Article 18

1. Where the procedure laid down in this Article is to be used, matters shall without delay be referred by the Chairman, either on his own initiative or at the request of a Member State, to the Standing Veterinary Committee (hereinafter called 'the Committee') set up by Decision 68/361/EEC.

2. The representative of the Commission shall submit to the Committee a draft of the measures to be taken. The Committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The Chairman shall not vote.

3. The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

4. If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken.

The Council shall act by a qualified majority.

If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the Commission shall adopt the proposed measures and implement them immediately, save where the Council has decided against the said measures by a simple majority.

<sup>(1)</sup> OJ No 121, 29. 7. 1964, p. 1977/64.

<sup>(2)</sup> OJ No L 255, 18. 10. 1968, p. 23.

## CHAPTER IV

## Transitional and Final Provisions

*Article 19*

1. Before 31 December 1990 the Council shall act by a qualified majority on the Commission proposal concerning veterinary checks in intra-Community trade in live animals.

Before the date referred to in the first subparagraph, the Council, acting by a qualified majority on a proposal from the Commission, shall decide on the rules and general principles applicable to checks on imports from third countries of products covered by this Directive. In the same way, the check posts on the external frontiers, together with the requirements that these posts will have to satisfy, shall be fixed before that date.

2. Before 31 December 1992 the Council shall review the provisions of this Directive on the basis of a report from the Commission on the experience gained, accompanied by any relevant proposals, on which it will decide by a qualified majority.

*Article 20*

Until 31 December 1992 and in order to permit the gradual implementation of the checking arrangements laid down by this Directive, Member States may, by way of derogation from Article 5 (1):

- maintain documentary checks during transport on meat and on products deriving therefrom, in order to ensure compliance with the specific requirements laid down by Community rules concerning foot and mouth disease and swine fever,

- operate documentary checks during transport on products imported from third countries intended for them.

*Article 21*

The Council, acting by a qualified majority on a proposal from the Commission, shall, before 1 October 1992, determine the arrangements applicable on the expiry of the transitional provisions laid down in Article 20.

*Article 22*

The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive on a date to be fixed in the decision to be taken before 31 December 1990, in accordance with the second subparagraph of Article 19 (1), but not later than 31 December 1991.

However, the Hellenic Republic shall have a further period of one year within which to comply therewith.

*Article 23*

This Directive is addressed to the Member States.

Done at Brussels, 11 December 1989.

*For the Council*  
*The President*  
H. NALLET

## ANNEX A

## Veterinary legislation

- Council Directive 64/433/EEC of 26 June 1964 on health problems affecting intra-Community trade in fresh meat (OJ No L 121, 29. 7. 1964, p. 2012/64), as last amended by Directive 88/657/EEC (OJ No L 382, 31. 12. 1988, p. 3),
- Council Directive 71/118/EEC of 15 February 1971 on health problems affecting trade in fresh poultrymeat (OJ No L 55, 8. 3. 1971, p. 23), as last amended by Directive 88/657/EEC (OJ No L 382, 31. 12. 1988, p. 3),
- Council Directive 72/461/EEC of 12 December 1972 on health problems affecting intra-Community trade in fresh meat (OJ No L 302, 31. 12. 1972, p. 24), as last amended by Directive 87/489/EEC (OJ No L 280, 3. 10. 1987, p. 28),
- Council Directive 77/99/EEC of 21 December 1976 on health problems affecting intra-Community trade in meat products (OJ No L 26, 31. 1. 1977, p. 85), as last amended by Directive 89/277/EEC (OJ No L 93, 6. 4. 1989, p. 25),
- Council Directive 80/215/EEC of 22 January 1980 on animal health problems affecting intra-Community trade in meat products (OJ No L 47, 21. 2. 1980, p. 4), as last amended by Directive 88/660/EEC (OJ No L 382, 31. 12. 1988, p. 35),
- Council Directive 85/397/EEC of 5 August 1985 on health and animal health problems affecting intra-Community trade in heat-treated milk (OJ No L 226, 24. 8. 1985, p. 13), as last amended by Regulation (EEC) No 3768/85 of 20. 12. 1985 (OJ No L 362, 31. 12. 1985, p. 8),
- Council Directive 88/657/EEC of 14 December 1988 laying down the requirements for the production of, and trade in, minced meat, meat in pieces of less than 100 grams and meat preparations (OJ No L 382, 31. 12. 1988, p. 3) <sup>(1)</sup>,
- Council Directive 89/437/89 of 20 June 1989 on hygiene and health problems affecting the production and the placing on the market of egg products (OJ No L 212, 22. 7. 1989, p. 87) <sup>(1)</sup>.

## ANNEX B

Products not subject to Community harmonization, but trade in which would be subject to the checks provided for by this Directive

Products of animal origin covered by Annex II to the Treaty:

- rabbit and game meat,
- raw milk and milk products,
- aquaculture products intended for human consumption,
- fishery products intended for human consumption,
- live bivalve molluscs intended for human consumption,
- game and rabbit meat products,
- blood,
- offal of animal fats, greaves and by-products of rendering,
- honey,
- snails intended for human consumption,
- frogs' legs intended for human consumption.

<sup>(1)</sup> As from 1 January 1992.



## COUNCIL DECISION

of 14 December 1989

amending Decision 87/327/EEC adopting the European Community action scheme for the mobility of university students (Erasmus)

(89/663/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 128 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament <sup>(1)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(2)</sup>,

Whereas the fundamental objectives of the common vocational training policy set down in the second principle of Decision 63/266/EEC <sup>(3)</sup> aim in particular at enabling every person to reach the highest possible level of vocational training which is necessary for his professional activity, and refer also to broadening vocational training to meet requirements arising from technical progress, linking the different forms of vocational training to social and economic developments;

Whereas on the basis of the sixth principle of that Decision it is the Commission's responsibility to encourage direct exchanges of vocational training specialists in order to enable them to acquaint themselves with and study the achievements and new developments in the other countries of the Community;

Whereas by its Decision 87/327/EEC <sup>(4)</sup> the Council established the European Community Action Scheme for the Mobility of University Students (Erasmus) and whereas Article 7 thereof provides for the possibility of adapting the Erasmus programme;

Whereas the Council has adopted measures with a view to strengthening technological cooperation at Community level and providing the necessary human resources for this purpose, notably through its Decision 89/27/EEC adopting the second phase of the programme on cooperation between universities and industry regarding training in the field of technology (Comett II) (1990 to 1994) <sup>(5)</sup>;

Whereas the Council has adopted measures to stimulate cooperation and interchange between European research scientists, notably through Decision 88/419/EEC <sup>(6)</sup>

establishing the Science programme and Decision 89/118/EEC <sup>(7)</sup> establishing the SPES programme; whereas it is therefore not appropriate that such activities should also be covered by the Erasmus programme;

Whereas, in the light of the Judgment of the Court of Justice of the European Communities of 30 May 1989, the situation should be clarified by laying down that the Erasmus programme, henceforth, falls exclusively within the scope of the common vocational training policy as provided for in Article 128 of the Treaty;

Whereas as a follow-up to the 'People's Europe' report approved by the European Council (28 to 29 June 1985), which called for exchanges by a significant section of the student population, the Commission's aim, in line with the European Parliament's wish <sup>(8)</sup>, is that by 1992 around 10 % of all students in the Community will be following a university course organized by universities in more than one Member State;

Whereas the Council on 28 July 1989 adopted Decision 89/489/EEC <sup>(9)</sup> establishing the Lingua programme to promote training in foreign languages as well as the teaching and learning of foreign languages in the European Community;

Whereas the Council on 21 December 1988 adopted Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration <sup>(10)</sup>;

Whereas the annual reports on the application of the Erasmus programme in 1987 and 1988, as well as the report on the experience acquired in the implementation of the programme in the years 1987 to 1989, have shown that the programme is an appropriate means of increasing student mobility via effective inter-university cooperation within the Community;

Whereas the commitment entered into at Community level as regards the stimulation of student mobility also involves the participation of the Member States, which are called upon to make their contribution to the effort which is necessary for the objectives of Erasmus to be attained,

HAS DECIDED AS FOLLOWS:

## Article 1

Council Decision 87/327/EEC is hereby amended as follows:

<sup>(1)</sup> OJ No C 323, 27. 12. 1989.

<sup>(2)</sup> OJ No C 329, 30. 12. 1989.

<sup>(3)</sup> OJ No 63, 20. 4. 1963, p. 1338/63.

<sup>(4)</sup> OJ No L 166, 25. 6. 1987, p. 20.

<sup>(5)</sup> OJ No L 13, 17. 1. 1989, p. 28.

<sup>(6)</sup> OJ No L 206, 30. 7. 1988, p. 34.

<sup>(7)</sup> OJ No L 44, 16. 2. 1989, p. 43.

<sup>(8)</sup> OJ No C 148, 16. 6. 1986, p. 125.

<sup>(9)</sup> OJ No L 239, 16. 8. 1989, p. 24.

<sup>(10)</sup> OJ No L 19, 24. 1. 1989, p. 16.

1. In Article 1, the following is added to paragraph 2:

*'Students registered in those establishments, regardless of the field of study, are eligible for support within the Erasmus programme, up to and including doctorate level, provided that the period of study carried out at the host university, which is compatible with the curriculum at the student's home university, forms part of his or her vocational training.'*

The Erasmus programme does not cover research and technological development activities.'

2. In Article 2:

- (a) Paragraph (ii) is replaced by the following text:

*'(ii) to promote broad and intensive cooperation in vocational training between universities in all Member States;'*

- (b) in paragraph (iii), the words 'education and' are deleted.

3. Article 4 shall be replaced by the following:

*'Article 4*

The funds estimated as necessary to execute the Erasmus programme in the first three years of a five-year period amount to ECU 192 million.

As from the 1990 budgetary year the appropriations necessary to finance the Community contribution to the actions provided for in the annex, including measures to ensure the technical assistance at Community level, continuing monitoring and evaluation of the programme, will be authorized in the annual budgetary procedure, taking into account the results of the programme as well as any new needs which may emerge during its operation.

The appropriations necessary for the first three years of the programme will form part of future budgets within

the framework of the present financial forecasts 1988 to 1992 agreed jointly in the Interinstitutional Agreement <sup>(1)</sup> by the European Parliament, the Council and the Commission on 29 June 1988 and their development.

The objective shall be to ensure that, in the framework of Actions 1 and 2, the highest possible proportion of the funds is allocated to student mobility.

<sup>(1)</sup> OJ No L 185, 15. 7. 1988, p. 33.'

4. In Article 5, the phrase 'the other actions already scheduled at Community level' shall be replaced by 'other actions at Community level'.
5. In Article 7, the date of 31 December 1989 shall be replaced by 31 December 1993 and the date of 30 June 1990 shall be replaced by 30 June 1994.
6. The Annex shall be replaced by the Annex appearing in this Decision.

*Article 2*

This Decision shall take effect on 1 January 1991, except in the case of Action 2 (2) which will take effect on 1 July 1990.

Done at Brussels, 14 December 1989.

*For the Council*  
*The President*  
L. JOSPIN

## ANNEX

## 'ANNEX

## ACTION 1

**Establishment and operation of a European University Network**

1. The Community will further develop the European University Network established within the Erasmus programme and designed to stimulate Community-wide exchange of students.

The European University Network will be composed of those universities which, in the framework of the Erasmus programme, have concluded agreements and organize programmes providing for exchanges of students and teachers with universities of other Member States and ensuring full recognition of study periods thus accomplished outside the home university.

The main aim of inter-university agreements is to give the students of one university the opportunity to undertake a fully recognized period of study in at least one other Member State, as an integral part of their diploma or academic qualification. These joint programmes could include as necessary an integrated period of foreign language preparation as well as cooperation among teachers and administrative staff in order to prepare the conditions necessary for the exchange of students and for the mutual recognition of periods of study accomplished abroad. Wherever possible, the preparation in the foreign language should be commenced in the country of origin before departure.

Priority will be given to programmes involving an integrated and fully recognized period of study in another Member State. For each joint programme, each participating university will receive support of up to an annual ceiling of ECU 25 000 for a maximum period of three years in the first instance subject to periodic review.

2. Support will also be provided for exchanges of teaching staff for the purpose of carrying out integrated teaching assignments in other Member States.
3. Support will also be provided for joint curriculum development projects between universities in different Member States as a means of facilitating academic recognition and of contributing by means of an exchange of experience to the process of innovation and improvement of courses on a Community-wide basis.
4. In addition, grants of up to ECU 20 000 will be provided to universities organizing intensive teaching programmes of short duration involving students from several different Member States. This action will be of a complementary nature.
5. The Community will also provide support for teaching staff and university administrators to carry out visits to other Member States, to enable them to prepare programmes of integrated study with universities of these Member States and to increase their mutual understanding of the training aspects of the higher education systems of other Member States. Grants will also be provided to allow teaching staff to conduct a series of specialized lectures in several Member States.

## ACTION 2

**Erasmus student grants scheme**

1. The Community will further develop a scheme for the direct financial support of students at universities as defined in Article 1 (2) carrying out a period of study in another Member State. In determining the total expenditure for Actions 1 and 2 respectively, the Community will have regard to the number of students to be exchanged within the European University Network as it develops.
2. The Erasmus student grants are administered through the competent authorities of the Member States. In view of the development of the European university network, the Member States shall each be paid a minimum of ECU 200 000 (the equivalent of approximately 100 grants); the remainder shall be allocated to each Member State on the basis of the total number of students at universities as defined in Article 1 (2), as well as on the total

number of 18 to 25-year-olds in each Member State, the average cost of the journey between the country of the university of the student's country of origin and that of the host university as well as on the difference between the cost of living in the country of the home university and that of the host university.

Moreover, the Commission will take the necessary steps to ensure balanced participation across the various subjects, to take account of the demand for programmes and of student flow and to deal with certain specific problems, in particular the financing of certain grants which, because of the structure of the exceptional programmes concerned, cannot be administered by national agencies. The proportion available for such measures shall not exceed 5 % of the total annual student grants budget.

3. The grant-awarding authorities of the Member States will issue grants up to a maximum of ECU 5 000 per student for a stay of one year, subject to the following conditions:
  - (a) the grants are intended to offset the additional costs of mobility, that is travel costs, foreign language preparation as necessary and higher cost of living in the host country (including, where appropriate, the extra cost of living away from the student's home country). They do not aim to cover the full cost of study abroad;
  - (b) priority will be given to students on courses which are part of the European University Network under Action 1 as well as to those students participating in the European Community Course Credit Transfer System (ECTS) pursuant to Action 3. Grants may also be provided for other students on courses for whom special arrangements are made outside the network in another Member State provided they fulfil the eligibility criteria;
  - (c) grants will be awarded only in cases where the period of study spent in another Member State will be granted full recognition by the student's home university. However, grants may be awarded exceptionally in cases where the period of study to be spent in another Member State will be granted full recognition by the degree-awarding university in that Member State, provided that this arrangement forms part of an inter-university agreement supported pursuant to Action 1;
  - (d) no tuition fees will be charged by the host university to incoming students; where appropriate, grantholders will continue to pay tuition fees at their home university;
  - (e) grants will be awarded for a significant period of academic study in another Member State of three months to a full academic year, or to more than 12 months in the case of highly integrated programmes. Grants will not normally be awarded for the first year of university study;
  - (f) any grants or loans available to students in their own country will continue to be paid in full during their period of study at the host university for which they are receiving an Erasmus grant.

### ACTION 3

#### Measures to promote mobility through the academic recognition of diplomas and periods of study

The Community will undertake, through cooperation with the competent authorities in the Member States, the following actions in order to promote mobility through the academic recognition of diplomas and periods of study acquired in another Member State:

1. measures to promote the European Community Course Credit Transfer System (ECTS) on an experimental and voluntary basis in order to provide a means by which students undergoing or having completed higher education and training may receive credit for such training carried out at universities in other Member States. A limited number of grants of up to ECU 20 000 per year will be awarded to the universities participating in the pilot system;
2. measures to promote the Community-wide exchange of information on the academic recognition of diplomas acquired and periods of study spent in another Member State, notably by means of the further development of the European Community Network of national academic recognition information centres; annual grants of up to ECU 20 000 will be awarded to the centres to facilitate exchange of information, in particular by means of a computerized system for data exchange.

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ACTION 4

## Complementary measures to promote student mobility in the Community

1. The complementary measures are intended to finance:
    - support to association and consortia of universities, teaching staff, administrators or students acting on a European basis, in particular with a view to making initiatives in specific fields of training better known throughout the Community;
    - publications designed to enhance awareness of study and teaching opportunities in the other Member States or to draw attention to important developments and innovative models for university cooperation throughout the Community;
    - other initiatives designed to promote inter-university cooperation in the field of vocational training within the Community;
    - measures facilitating the dissemination of information on the Erasmus programme;
    - Erasmus prizes of the European Community to be awarded to students, staff members, universities or Erasmus projects which have made an outstanding contribution to the development of inter-university cooperation within the Community.
  2. The cost of measures under Action 4 will not exceed 5 % of the annual appropriations for the Erasmus programme.
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## COUNCIL DECISION

of 15 December 1989

adopting a specific research and technical development programme for the European Atomic Energy Community in the field of management and storage of radioactive waste

(1990 to 1994)

(89/664/Euratom)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 7 thereof,

Having regard to the proposal from the Commission, submitted after consultation of the Scientific and Technical Committee <sup>(1)</sup>,

Having regard to the opinion of the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas the Council, in adopting the framework programme of Community research and technological development (1987 to 1991) <sup>(4)</sup>, acknowledged the value of an activity 'Fission: Nuclear Safety' which includes, in particular, a research and development area 'radioactive waste management';

Whereas radioactive waste is produced by the use of nuclear energy and by the use of radionuclides in medicine and in other industrial activities;

Whereas it is therefore essential to implement effective solutions to guarantee the safety and protection of man and the environment against the potential risks associated with the management of such waste;

Whereas the fourth European Communities' action programme on the environment, which was the subject of the resolution of 19 October 1987 of the Council and the representatives of the Governments of the Member States meeting in the Council <sup>(5)</sup>, underlines the need for Community action on the management and storage of radioactive waste;

Whereas, by its resolution of 18 February 1980 on the implementation of a Community plan of action (1980 to 1992) in the field of radioactive waste <sup>(6)</sup>, the Council resolved to ensure the continuity of the research and development programmes in this sphere during the plan;

Whereas the programme on the management and storage of radioactive waste adopted by Decision 85/199/Euratom <sup>(7)</sup> has yielded positive results and opened up encouraging prospects which should be exploited through the implementation of research, development and demonstration projects representing the real waste management and storage conditions which can be expected in the future; whereas effective management of radioactive waste requires that very reliable techniques and very secure underground sites be used,

HAS ADOPTED THIS DECISION:

*Article 1*

A specific research and technological development programme for the European Atomic Energy Community in the field of management and storage of radioactive waste, as defined in the Annex, is hereby adopted for a period of five years from 1 January 1990.

*Article 2*

The funds estimated necessary for the execution of the programme amount to ECU 79,6 million including expenditure on a staff of 14.

An indicative breakdown of this amount appears in the Annex.

*Article 3*

Detailed rules for the implementation of the programme and the level of the Community's financial contribution are set out in the Annex.

*Article 4*

1. During the third year of its implementation the Commission shall review the programme. A report on the results of this review shall be sent to the European Parliament, the Council and the Economic and Social Committee. This report shall be accompanied where

<sup>(1)</sup> OJ No C 144, 10. 6. 1989, p. 11.

<sup>(2)</sup> OJ No C 323, 27. 12. 1989.

<sup>(3)</sup> OJ No C 329, 30. 12. 1989.

<sup>(4)</sup> OJ No L 302, 24. 10. 1987, p. 1.

<sup>(5)</sup> OJ No C 328, 7. 12. 1987, p. 1.

<sup>(6)</sup> OJ No C 51, 29. 2. 1980, p. 1.

<sup>(7)</sup> OJ No L 83, 25. 3. 1985, p. 20.

necessary by proposals for the amendment of the programme.

2. On the expiry of the programme, the Commission shall report on the results achieved to the European Parliament, the Council and the Economic and Social Committee.

3. The reports referred to in paragraphs 1 and 2 shall be established having regard to the objectives set out in the Annex to this Decision and in accordance with Article 2 (2) of Decision 87/516/Euratom, EEC <sup>(1)</sup>.

#### *Article 5*

For the implementation of the programme, the Commission shall be assisted by Management and Coordination Advisory

Committee CGC 6 (Nuclear fission energy — Fuel cycle/processing and storage of waste) set up by Council Decision 84/338/Euratom, ECSC, EEC <sup>(2)</sup>.

#### *Article 6*

This Decision is addressed to the Member States.

Done at Brussels, 15 December 1989.

*For the Council*  
*The President*  
H. CURIEN

<sup>(1)</sup> OJ No L 302, 24. 10. 1987, p. 1.

<sup>(2)</sup> OJ No L 177, 4. 7. 1984, p. 25.

## ANNEX

OBJECTIVES, TECHNICAL CONTENT, IMPLEMENTATION OF THE PROGRAMME, INDICATIVE  
BREAKDOWN OF THE AMOUNT AND EVALUATION CRITERIA

## 1. Objectives

The programme is aimed at perfecting and demonstrating a system for managing radioactive waste, including unprocessed irradiated fuel where this is considered as waste, which will ensure, at the various stages, the best possible protection of man and the environment. In particular, research will be continued on the characterization and description of the various barriers considered, both engineered and natural (geological), and the findings will be used to evaluate the long-term safety of this waste disposal concept.

## 2. Technical content

*Indicative breakdown of  
the amount  
(millions of ecus)*

## PART A

## Waste management and associated R &amp; D projects

A1 *Studies of management systems*

5,4

Task 1: Study of systems including analytical models for minimizing the transport of waste. Harmonization of policies and practices concerning the management of waste, including waste from dismantling operations and irradiated fuels. Information for the general public. The system studies will concern the evaluation of various scenarios for the management of different types of waste. Harmonization work will mainly involve the development of common waste-management criteria and schemes.

A2 *Treatment of waste*

7,5

Task 2: Treatment and packaging of waste, including unprocessed irradiated fuel, where this is considered as waste. Treatment of radioactive waste. The work will concern the development of advanced processes for minimizing the production of waste, minimizing the discharge of radioactive effluent into the environment and reducing the volume of waste for disposal and study of the potentialities of transmutation.

A3 *Safety of the multi-barrier system of geological disposal*

39,2

Task 3: Characterization and description of waste forms, packages and their environment. The various waste packages will be studied in an environment representative of final storage so that the safety of their long-term behaviour can be ascertained. The quality control of waste forms will also be developed.

Task 4: Disposal of radioactive waste: research to back up the development of underground repositories. The work will concern the radionuclide isolation properties of the various types of rock envisaged for the disposal of waste, and also some design aspects of the construction and operation of underground repositories in such environments, the aim being to evaluate their feasibility and safety.

Task 5: Methods of evaluating the safety of disposal systems. The methods developed hitherto will be perfected and extended to new types of waste, in order to carry out a comprehensive safety assessment of radioactive waste storage facilities, taking into account their radiological and environmental impact and nuclear safety.



## PART B

Construction and/or operation of underground facilities open to Community joint activities	27,5
Project 1 Pilot underground facility in the Asse salt mine in the Federal Republic of Germany	
Project 2 Pilot underground facility in the argillaceous layer under the Mol nuclear site in Belgium	
Project 3 Underground validation facility in France	
Project 4 Underground validation facility in the United Kingdom	
Other projects could be added in the course of the execution of the programme	
Total	79,6 <sup>(1)</sup>

### 3. Implementation

The programme will be implemented mainly through shared-cost research contracts with appropriate organizations, undertakings and companies — public or private — established in the Member States. Small and medium-sized undertakings will be encouraged to take part in the programme.

Together with the invitation to participate in the programme, the Commission will send out information brochures in all the Community languages so as to give an equal opportunity to undertakings, universities and research centres in the Member States.

In addition to shared-cost research contracts, the programme may also be carried out by means of study contracts, co-ordination projects and awards of training and mobility grants. Such contracts and grants will, where appropriate, be awarded following a selection procedure based on calls for proposals published in the *Official Journal of the European Communities*.

The Community's contribution will not normally exceed 50 % of the total costs of the project. Alternatively, in respect of universities and similar organizations, the Community may bear up to 100 % of the marginal costs which are additional to the normal recurrent costs without the execution of the project.

Specific coordinated research projects already launched in the previous programme will be continued in order to promote and intensify cooperation between teams in the various Member States. International cooperation within the projects in Part B (underground facilities) will be promoted in particular.

Where appropriate, shared-cost projects should be carried out by participants from more than one State.

The information resulting from the implementation of the shared-cost activities will be made accessible on an equal basis to all Member States. Licences and/or other rights developed in the framework of the programme will be subject to Community rules, taking account of contractual arrangements. This information will also have to be used for the publication of clear, factual and accurate documents to inform the Community institutions and the public about the main aspects of the technology of radioactive waste management, which it will then be possible to assess in the more general context of toxic waste management.

### 4. Evaluation criteria

The programme is to be evaluated by independent experts in accordance with the Community plan of action relating to the evaluation of Community research and development activities. The evaluation criteria will include the following:

- the extent to which research proposals were selected against relevant criteria (scientific, technical or Community interest and cost),

<sup>(1)</sup> Of which about ECU 8,4 million is to cover staff and administration costs.

- 
- the extent to which substantial development of knowledge, techniques and equipment has resulted from the work supported, taking into account the objectives mentioned above,
  - the potential relevance of the results with regard to safety and protection aspects and in particular with regard to radioactive waste disposal,
  - the potential relevance of the results with regard to radioactive waste management and disposal on an industrial scale,
  - the extent to which information exchange and co-operation across the borders of Member States have been promoted,
  - the programme's contribution to the development of Community policies in the field,
  - the extent to which the programme has avoided duplication of research work,
  - the extent to which the programme has facilitated the supply of information to the general public and the participation of the communities concerned.
-

## COUNCIL DIRECTIVE

of 21 December 1989

on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts

(89/665/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

In cooperation with the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas Community Directives on public procurement, in particular Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts <sup>(4)</sup>, as last amended by Directive 89/440/EEC <sup>(5)</sup>, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts <sup>(6)</sup>, as last amended by Directive 88/295/EEC <sup>(7)</sup>, do not contain any specific provisions ensuring their effective application;

Whereas the existing arrangements at both national and Community levels for ensuring their application are not always adequate to ensure compliance with the relevant Community provisions particularly at a stage when infringements can be corrected;

Whereas the opening-up of public procurement to Community competition necessitates a substantial increase in the guarantees of transparency and non-discrimination; whereas, for it to have tangible effects, effective and rapid remedies must be available in the case of infringements of Community law in the field of public procurement or national rules implementing that law;

Whereas in certain Member States the absence of effective remedies or inadequacy of existing remedies deter

Community undertakings from submitting tenders in the Member State in which the contracting authority is established; whereas, therefore, the Member States concerned must remedy this situation;

Whereas, since procedures for the award of public contracts are of such short duration, competent review bodies must, among other things, be authorized to take interim measures aimed at suspending such a procedure or the implementation of any decisions which may be taken by the contracting authority; whereas the short duration of the procedures means that the aforementioned infringements need to be dealt with urgently;

Whereas it is necessary to ensure that adequate procedures exist in all the Member States to permit the setting aside of decisions taken unlawfully and compensation of persons harmed by an infringement;

Whereas, when undertakings do not seek review, certain infringements may not be corrected unless a specific mechanism is put in place;

Whereas, accordingly, the Commission, when it considers that a clear and manifest infringement has been committed during a contract award procedure, should be able to bring it to the attention of the competent authorities of the Member State and of the contracting authority concerned so that appropriate steps are taken for the rapid correction of any alleged infringement;

Whereas the application in practice of the provisions of this Directive should be re-examined within a period of four years of its implementation on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures,

HAD ADOPTED THIS DIRECTIVE:

*Article 1*

1. The Member States shall take the measures necessary to ensure that, as regards contract award procedures falling within the scope of Directives 71/305/EEC and 77/62/EEC, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles, and, in particular, Article 2 (7) on the grounds that such decisions have infringed Community law in the field of public procurement or national rules implementing that law.

<sup>(1)</sup> OJ No C 230, 28. 8. 1987, p. 6 and OJ No C 15, 19. 1. 1989, p. 8.

<sup>(2)</sup> OJ No C 167, 27. 6. 1988, p. 77 and OJ No C 323, 27. 12. 1989.

<sup>(3)</sup> OJ No C 347, 22. 12. 1987, p. 23.

<sup>(4)</sup> OJ No L 185, 16. 8. 1971, p. 5.

<sup>(5)</sup> OJ No L 210, 21. 7. 1989, p. 1.

<sup>(6)</sup> OJ No L 13, 15. 1. 1977, p. 1.

<sup>(7)</sup> OJ No L 127, 20. 5. 1988, p. 1.

2. Member States shall ensure that there is no discrimination between undertakings claiming injury in the context of a procedure for the award of a contract as a result of the distinction made by this Directive between national rules implementing Community law and other national rules.

3. The Member States shall ensure that the review procedures are available, under detailed rules which the Member States may establish, at least to any person having or having had an interest in obtaining a particular public supply or public works contract and who has been or risks being harmed by an alleged infringement. In particular, the Member States may require that the person seeking the review must have previously notified the contracting authority of the alleged infringement and of his intention to seek review.

#### Article 2

1. The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers to:

- (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;
- (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
- (c) award damages to persons harmed by an infringement.

2. The powers specified in paragraph 1 may be conferred on separate bodies responsible for different aspects of the review procedure.

3. Review procedures need not in themselves have an automatic suspensive effect on the contract award procedures to which they relate.

4. The Member States may provide that when considering whether to order interim measures the body responsible may take into account the probable consequences of the measures for all interests likely to be harmed, as well as the public interest, and may decide not to

grant such measures where their negative consequences could exceed their benefits. A decision not to grant interim measures shall not prejudice any other claim of the person seeking these measures.

5. The Member States may provide that where damages are claimed on the grounds that a decision was taken unlawfully, the contested decision must first be set aside by a body having the necessary powers.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law.

Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. The Member States shall ensure that decisions taken by bodies responsible for review procedures can be effectively enforced.

8. Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made to guarantee procedures whereby any allegedly illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it can be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 177 of the EEC Treaty and independent of both the contracting authority and the review body.

The members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary. The independent body shall take its decisions following a procedure in which both sides are heard, and these decisions shall, by means determined by each Member State, be legally binding.

#### Article 3

1. The Commission may invoke the procedure for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of public procurement has been committed during a contract award procedure falling within the scope of Directives 71/305/EEC and 77/62/EEC.

2. The Commission shall notify the Member State and the contracting authority concerned of the reasons which have led it to conclude that a clear and manifest infringement has been committed and request its correction.

3. Within 21 days of receipt of the notification referred to in paragraph 2, the Member State concerned shall communicate to the Commission:

- (a) its confirmation that the infringement has been corrected; or
- (b) a reasoned submission as to why no correction has been made; or
- (c) a notice to the effect that the contract award procedure has been suspended either by the contracting authority on its own initiative or on the basis of the powers specified in Article 2 (1) (a).

4. A reasoned submission in accordance with paragraph 3 (b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial or other review proceedings or of a review as referred to in Article 2 (8). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

5. Where notice has been given that a contract award procedure has been suspended in accordance with paragraph 3 (c), the Member State shall notify the Commission when the suspension is lifted or another contract procedure relating in whole or in part to the same subject matter is begun. That notification shall confirm that the alleged infringement has been corrected or include a reasoned submission as to why no correction has been made.

#### Article 4

1. Not later than four years after the implementation of this Directive, the Commission, in consultation with the

Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, if necessary, make proposals for amendments.

2. By 1 March each year the Member States shall communicate to the Commission information on the operation of their national review procedures during the preceding calendar year. The nature of the information shall be determined by the Commission in consultation with the Advisory Committee for Public Contracts.

#### Article 5

Member States shall bring into force, before 1 December 1991, the measures necessary to comply with this Directive. They shall communicate to the Commission the texts of the main national laws, regulations and administrative provisions which they adopt in the field governed by this Directive.

#### Article 6

This Directive is addressed to the Member States.

Done at Brussels, 21 December 1989.

*For the Council*

*The President*

É. CRESSON

## ELEVENTH COUNCIL DIRECTIVE

of 21 December 1989

concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State

(89/666/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

In cooperation with the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas in order to facilitate the exercise of the freedom of establishment in respect of companies covered by Article 58 of the Treaty, Article 54 (3) (g) and the general programme on the elimination of restrictions on the freedom of establishment require coordination of the safeguards required of companies and firms in the Member States for the protection of the interests of members and others;

Whereas hitherto this coordination has been effected in respect of disclosure by the adoption of the First Directive 68/151/EEC <sup>(4)</sup> covering companies with share capital, as last amended by the 1985 Act of Accession; whereas it was continued in the field of accounting by the Fourth Directive 78/660/EEC <sup>(5)</sup> on the annual accounts of certain types of companies, as last amended by the 1985 Act of Accession, the Seventh Directive 83/349/EEC <sup>(6)</sup> on consolidated accounts, as amended by the 1985 Act of Accession, and the Eighth Directive 84/253/EEC <sup>(7)</sup> on the persons responsible for carrying out the statutory audits of accounting documents;

Whereas these Directives apply to companies as such but do not cover their branches; whereas the opening of a branch, like the creation of a subsidiary, is one of the possibilities currently open to companies in the exercise of their right of establishment in another Member State;

Whereas in respect of branches the lack of coordination, in particular concerning disclosure, gives rise to some

disparities, in the protection of shareholders and third parties, between companies which operate in other Member States by opening branches and those which operate there by creating subsidiaries;

Whereas in this field the differences in the laws of the Member States may interfere with the exercise of the right of establishment; whereas it is therefore necessary to eliminate such differences in order to safeguard, *inter alia*, the exercise of that right;

Whereas to ensure the protection of persons who deal with companies through the intermediary of branches, measures in respect of disclosure are required in the Member State in which a branch is situated; whereas, in certain respects, the economic and social influence of a branch may be comparable to that of a subsidiary company, so that there is public interest in disclosure of the company at the branch; whereas to effect such disclosure it is necessary to make use of the procedure already instituted for companies with share capital within the Community;

Whereas such disclosure relates to a range of important documents and particulars and amendments thereto;

Whereas such disclosure, with the exception of the powers of representation, the name and legal form and the winding-up of the company and the insolvency proceedings to which it is subject, may be confined to information concerning a branch itself together with a reference to the register of the company of which that branch is part, since under existing Community rules all information covering the company as such is available in that register;

Whereas national provisions in respect of the disclosure of accounting documents relating to a branch can no longer be justified following the coordination of national law in respect of the drawing up, audit and disclosure of companies' accounting documents; whereas it is accordingly sufficient to disclose, in the register of the branch, the accounting documents as audited and disclosed by the company;

Whereas letters and order forms used by a branch must give at least the same information as letters and order forms used by the company, and state the register in which the branch is entered;

Whereas to ensure that the purposes of this Directive are fully realized and to avoid any discrimination on the basis of a

<sup>(1)</sup> OJ No C 105, 21. 4. 1988, p. 6.

<sup>(2)</sup> OJ No C 345, 21. 12. 1987, p. 76 and OJ No C 256, 9. 10. 1989, p. 27.

<sup>(3)</sup> OJ No C 319, 30. 11. 1987, p. 61.

<sup>(4)</sup> OJ No L 65, 14. 3. 1968, p. 8.

<sup>(5)</sup> OJ No L 222, 14. 8. 1978, p. 11.

<sup>(6)</sup> OJ No L 193, 18. 7. 1983, p. 1.

<sup>(7)</sup> OJ No L 126, 12. 5. 1984, p. 20.

company's country of origin, this Directive must also cover branches opened by companies governed by the law of non-member countries and set up in legal forms comparable to companies to which Directive 68/151/EEC applies; whereas for these branches it is necessary to apply certain provisions different from those that apply to the branches of companies governed by the law of other Member States since the Directives referred to above do not apply to companies from non-member countries;

Whereas this Directive in no way affects the disclosure requirements for branches under other provisions of, for example, employment law on workers' rights to information and tax law, or for statistical purposes;

HAS ADOPTED THIS DIRECTIVE:

## SECTION I

### Branches of companies from other Member States.

#### Article 1

1. Documents and particulars relating to a branch opened in a Member State by a company which is governed by the law of another Member State and to which Directive 68/151/EEC applies shall be disclosed pursuant to the law of the Member State of the branch, in accordance with Article 3 of that Directive.

2. Where disclosure requirements in respect of the branch differ from those in respect of the company, the branch's disclosure requirements shall take precedence with regard to transactions carried out with the branch.

#### Article 2

1. The compulsory disclosure provided for in Article 1 shall cover the following documents and particulars only:

- (a) the address of the branch;
- (b) the activities of the branch;
- (c) the register in which the company file mentioned in Article 3 of Council Directive 68/151/EEC is kept, together with the registration number in that register;
- (d) the name and legal form of the company and the name of the branch if that is different from the name of the company;
- (e) the appointment, termination of office and particulars of the persons who are authorized to represent the company in dealings with third parties and in legal proceedings;
  - as a company organ constituted pursuant to law or as members of any such organ, in accordance with

the disclosure by the company as provided for in Article 2 (1) (d) of Directive 68/151/EEC,

- as permanent representatives of the company for the activities of the branch, with an indication of the extent of their powers;
- (f) the winding-up of the company, the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation in accordance with disclosure by the company as provided for in Article 2 (1) (h), (j) and (k) of Directive 68/151/EEC,
  - insolvency proceedings, arrangements, compositions, or any analogous proceedings to which the company is subject;
- (g) the accounting documents in accordance with Article 3;
- (h) the closure of the branch.

2. The Member State in which the branch has been opened may provide for the disclosure, as referred to in Article 1, of

- (a) the signature of the persons referred to in paragraph 1 (e) and (f) of this Article;
- (b) the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument in accordance with Article 2 (1) (a), (b) and (c) of Directive 68/151/EEC, together with amendments to those documents;
- (c) an attestation from the register referred to in paragraph 1 (c) of this Article relating to the existence of the company;
- (d) an indication of the securities on the company's property situated in that Member State, provided such disclosure relates to the validity of those securities.

#### Article 3

The compulsory disclosure provided for by Article 2 (1) (g) shall be limited to the accounting documents of the company as drawn up, audited and disclosed pursuant to the law of the Member State by which the company is governed in accordance with Directives 78/660/EEC, 83/349/EEC and 84/253/EEC.

#### Article 4

The Member State in which the branch has been opened may stipulate that the documents referred to in Article 2 (2) (b) and Article 3 must be published in another official language of the Community and that the translation of such documents must be certified.

#### Article 5

Where a company has opened more than one branch in a Member State, the disclosure referred to in Article 2 (2) (b)

and Article 3 may be made in the register of the branch of the company's choice.

In this case, compulsory disclosure by the other branches shall cover the particulars of the branch register of which disclosure was made, together with the number of that branch in that register.

#### Article 6

The Member States shall prescribe that letters and order forms used by a branch shall state, in addition to the information prescribed by Article 4 of Directive 68/151/EEC, the register in which the file in respect of the branch is kept together with the number of the branch in that register.

### SECTION II

#### Branches of companies from third countries

#### Article 7

1. Documents and particulars concerning a branch opened in a Member State by a company which is not governed by the law of a Member State but which is of a legal form comparable with the types of company to which Directive 68/151/EEC applies shall be disclosed in accordance with the law of the Member State of the branch as laid down in Article 3 of that Directive.

2. Article 1 (2) shall apply.

#### Article 8

The compulsory disclosure provided for in Article 7 shall cover at least the following documents and particulars:

- (a) the address of the branch;
- (b) the activities of the branch;
- (c) the law of the State by which the company is governed;
- (d) where that law so provides, the register in which the company is entered and the registration number of the company in that register;
- (e) the instruments of constitution, and memorandum and articles of association if they are contained in a separate instrument, with all amendments to these documents;
- (f) the legal form of the company, its principal place of business and its object and, at least annually, the amount of subscribed capital if these particulars are not given in the documents referred to in subparagraph (e);
- (g) the name of the company and the name of the branch if that is different from the name of the company;

(h) the appointment, termination of office and particulars of the persons who are authorized to represent the company in dealings with third parties and in legal proceedings:

- as a company organ constituted pursuant to law or as members of any such organ,
- as permanent representatives of the company for the activities of the branch.

The extent of the powers of the persons authorized to represent the company must be stated, together with whether they may do so alone or must act jointly;

- (i) — the winding-up of the company and the appointment of liquidators, particulars concerning them and their powers and the termination of the liquidation;
- insolvency proceedings, arrangements, compositions or any analogous proceedings to which the company is subject;
- (j) the accounting documents in accordance with Article 7;
- (k) the closure of the branch.

#### Article 9

1. The compulsory disclosure provided for by Article 8 (1) (j) shall apply to the accounting documents of the company as drawn up, audited and disclosed pursuant to the law of the State which governs the company. Where they are not drawn up in accordance with or in a manner equivalent to Directives 78/660/EEC and 83/349/EEC, Member States may require that accounting documents relating to the activities of the branch be drawn up and disclosed.

2. Articles 4 and 5 shall apply.

#### Article 10

The Member States shall prescribe that letters and order forms used by a branch state the register in which the file in respect of the branch is kept together with the number of the branch in that register. Where the law of the State by which the company is governed requires entry in a register, the register in which the company is entered, and the registration number of the company in that register must also be stated.

### SECTION III

#### Indication of branches in the company's annual report

#### Article 11

The following subparagraph is added to Article 46 (2) of Directive 78/660/EEC:

'(e) the existence of branches of the company'.



## SECTION IV

## Transitional and final provisions

## Article 12

The Member States shall provide for appropriate penalties in the event of failure to disclose the matters set out in Articles 1, 2, 3, 7, 8 and 9 and of omission from letters and order forms of the compulsory particulars provided for in Articles 6 and 10.

## Article 13

Each Member State shall determine who shall carry out the disclosure formalities provided for in this Directive.

## Article 14

1. Articles 3 and 9 shall not apply to branches opened by credit institutions and financial institutions covered by Directive 89/117/EEC <sup>(1)</sup>.

2. Pending subsequent coordination, the Member States need not apply Articles 3 and 9 to branches opened by insurance companies.

## Article 15

Article 54 of Directive 78/660/EEC and Article 48 of Directive 83/349/EEC shall be deleted.

## Article 16

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this

Directive not later than 1 January 1992. They shall forthwith inform the Commission thereof.

2. Member States shall stipulate that the provisions referred to in paragraph 1 shall apply from 1 January 1993 and, with regard to accounting documents, shall apply for the first time to annual accounts for the financial year beginning on 1 January 1993 or during 1993.

3. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

## Article 17

The Contact Committee set up pursuant to Article 52 of Directive 78/660/EEC shall also:

- (a) facilitate, without prejudice to Articles 169 and 170 of the Treaty, the harmonized application of this Directive, through regular meetings dealing, in particular, with practical problems arising in connection with its application;
- (b) advise the Commission, if necessary, on any additions or amendments to this Directive.

## Article 18

This Directive is addressed to the Member States.

Done at Brussels, 21 December 1989.

For the Council  
The President  
E. CRESSON

<sup>(1)</sup> OJ No L 44, 16. 2. 1989, p. 40.

## TWELFTH COUNCIL COMPANY LAW DIRECTIVE

of 21 December 1989

on single-member private limited-liability companies

(89/667/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

In cooperation with the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas certain safeguards which, for the protection of the interests of members and others, are required by Member States of companies and firms within the meaning of the second paragraph of Article 58 of the Treaty should be coordinated with a view to making such safeguards equivalent throughout the Community;

Whereas, in this field, Directives 68/151/EEC <sup>(4)</sup> and 78/660/EEC <sup>(5)</sup>, as last amended by the Act of Accession of Spain and Portugal, and Directive 83/349/EEC <sup>(6)</sup>, as amended by the Act of Accession of Spain and Portugal, on disclosure, the validity of commitments, nullity, annual accounts and consolidated accounts, apply to all share capital companies; whereas Directives 77/91/EEC <sup>(7)</sup> and 78/855/EEC <sup>(8)</sup>, as last amended by the Act of Accession of Spain and Portugal, and Directive 82/891/EEC <sup>(9)</sup> on formation and capital, mergers and divisions apply only to public limited-liability companies;

Whereas the small and medium-sized enterprises (SME) action programme <sup>(10)</sup> was approved by the Council in its Resolution of 3 November 1986;

Whereas reforms in the legislation of certain Member States in the last few years, permitting single-member private limited-liability companies, have created divergences between the laws of the Member States;

Whereas it is important to provide a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Community, without prejudice to the laws of the Member States which, in exceptional circumstances, require that entrepreneur to be liable for the obligations of his undertaking;

Whereas a private limited-liability company may be a single-member company from the time of its formation, or may become one because its shares have come to be held by a single shareholder; whereas, pending the coordination of national provisions on the laws relating to groups, Member States may lay down certain special provisions and penalties for cases where a natural person is the sole member of several companies or where a single-member company or any other legal person is the sole member of a company; whereas the sole aim of this provision is to take account of the differences which currently exist in certain national laws; whereas, for that purpose, Member States may in specific cases lay down restrictions on the use of single-member companies or remove the limits on the liabilities of sole members; whereas Member States are free to lay down rules to cover the risks that single-member companies may present as a consequence of having single members, particularly to ensure that the subscribed capital is paid;

Whereas the fact that all the shares have come to be held by a single shareholder and the identity of the single member must be disclosed by an entry in a register accessible to the public;

Whereas decisions taken by the sole member in his capacity as general meeting must be recorded in writing;

Whereas contracts between a sole member and his company as represented by him must likewise be recorded in writing, insofar as such contracts do not relate to current operations concluded under normal conditions,

HAS ADOPTED THIS DIRECTIVE:

Article 1

The coordination measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States relating to the following types of company:

<sup>(1)</sup> OJ No C 173, 2. 7. 1988, p. 10.

<sup>(2)</sup> OJ No C 96, 17. 4. 1989, p. 92 and  
OJ No C 291, 20. 11. 1989, p. 53.

<sup>(3)</sup> OJ No C 318, 12. 12. 1988, p. 9.

<sup>(4)</sup> OJ No L 65, 14. 3. 1968, p. 8.

<sup>(5)</sup> OJ No L 222, 14. 8. 1978, p. 11.

<sup>(6)</sup> OJ No L 193, 18. 7. 1983, p. 1.

<sup>(7)</sup> OJ No L 26, 30. 1. 1977, p. 1.

<sup>(8)</sup> OJ No L 295, 20. 10. 1978, p. 36.

<sup>(9)</sup> OJ No L 378, 31. 12. 1982, p. 47.

<sup>(10)</sup> OJ No C 287, 14. 11. 1986, p. 1.

— *in Germany:*  
Gesellschaft mit beschränkter Haftung,

(b) a single-member company or any other legal person is the sole member of a company.

— *in Belgium:*  
Société privée à responsabilité limitée/de besloten vennootschap met beperkte aansprakelijkheid,

#### Article 3

— *in Denmark:*  
Anpartsselskaber,

Where a company becomes a single-member company because all its shares come to be held by a single person, that fact, together with the identity of the sole member, must either be recorded in the file or entered in the register within the meaning of Article 3 (1) and (2) of Directive 68/151/EEC or be entered in a register kept by the company and accessible to the public.

— *in Spain:*  
Sociedad de responsabilidad limitada,

— *in France:*  
Société à responsabilité limitée,

#### Article 4

— *in Greece:*  
Εταιρεία περιορισμένης ευθύνης,

1. The sole member shall exercise the powers of the general meeting of the company.

— *in Ireland:*  
Private company limited by shares or by guarantee,

2. Decisions taken by the sole member in the field referred to in paragraph 1 shall be recorded in minutes or drawn up in writing.

— *in Italy:*  
Società a responsabilità limitata,

#### Article 5

— *in Luxembourg:*  
Société à responsabilité limitée,

1. Contracts between the sole member and his company as represented by him shall be recorded in minutes or drawn up in writing.

— *in the Netherlands:*  
Besloten vennootschap met beperkte aansprakelijkheid,

2. Member States need not apply paragraph 1 to current operations concluded under normal conditions.

— *in Portugal:*  
Sociedade por quotas,

#### Article 6

— *in the United Kingdom:*  
Private company limited by shares or by guarantee.

Where a Member State allows single-member companies as defined by Article 2 (1) in the case of public limited companies as well, this Directive shall apply.

#### Article 2

1. A company may have a sole member when it is formed and also when all its shares come to be held by a single person (single-member company).

#### Article 7

2. Member States may, pending coordination of national laws relating to groups, lay down special provisions or sanctions for cases where:

(a) a natural person is the sole member of several companies;

A Member State need not allow the formation of single-member companies where its legislation provides that an individual entrepreneur may set up an undertaking the liability of which is limited to a sum devoted to a stated activity, on condition that safeguards are laid down for such undertakings which are equivalent to those imposed by this Directive or by any other Community provisions applicable to the companies referred to in Article 1.

*Article 8*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 January 1992. They shall inform the Commission thereof.

2. Member States may provide that, in the case of companies already in existence on 1 January 1992, this Directive shall not apply until 1 January 1993.

3. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 9*

This Directive is addressed to the Member States.

Done at Brussels, 21 December 1989.

*For the Council*  
*The President*  
E. CRESSON