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([1]) Text with EEA relevance

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 May 2003

on the aid scheme implemented by France for headquarters and logistics centres

(notified under document number C(2003) 1483)

(Only the French text is authentic)

(Text with EEA relevance)

(2004/76/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above [1], and having regard to those comments,

Whereas:

I. PROCEDURE

(1) In 1997 the Ecofin Council adopted a Code of conduct for business taxation [2], with a view to tackling harmful tax competition. In line with the undertaking it gave in connection with that Code, the Commission published in 1998 a Notice on the application of the State aid rules to measures relating to direct business taxation [3] (hereinafter called the Notice), restating its determination to apply the rules strictly and in accordance with the principle of equality of treatment. The present procedure has to be viewed in this context.

(2) The present procedure is concerned exclusively with the scheme of taxation of headquarters and logistics centres (hereinafter called the scheme) and hence does not cover the scheme of expatriation allowances paid to members of staff of headquarters and logistics centres posted temporarily to France from abroad by other units of the group concerned.

(3) By letter dated 12 February 1999 (D/50716), the Commission sent a request for information on the scheme to the French authorities. The latter furnished the requested information by letter dated 7 May 1999 (A/33525).

(4) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* [4], inviting interested parties to submit their comments.

(5) By letter dated 9 October 2001 (A/37896), the Commission received comments from France in reply to the letter initiating the formal investigation procedure.

(6) The Commission received comments from the American Chamber of Commerce in France (A/39294). By letter dated 14 January 2002, it forwarded them to France (D/50110) to give it the opportunity to react. The Commission has not received any other comments on the subject, whether from France or from any other interested party.

[1] OJ C 302, 27.10.2001, p. 2.
[2] OJ C 2, 6.1.1998, p. 1.
[3] OJ C 384, 10.12.1998, p. 3.
[4] See footnote 1.

II. **DESCRIPTION OF THE MEASURE**

Introduction ([5])

(7) The scheme entered into force in 1974 and was not notified under Article 88(3) of the Treaty. A circular of the Directorate-General of Taxes dated 21 January 1997 set out all the administrative arrangements relating to the scheme and stated that headquarters already approved by the tax authorities could avail themselves of the circular. The circular forms the legal basis for all rules relating to the scheme. A second circular of the Directorate-General of Taxes dated 11 October 2002 ([6]), taking effect as from the financial year beginning on 1 January 2003, amended the 1997 circular in such a way as to enable the tax authorities' approvals of headquarters and logistics centres to be systematically reviewed every three to five years at the latest. According to the circular dated 21 January 1997, the scheme is intended to resolve the difficulties inherent in determining transfer prices in the context of commercial relations between headquarters and logistics centres in France and other group companies abroad. Such pricing is often difficult in practice because it depends on the practical application by taxpayers and the tax authorities of the arm's length principle laid down by the OECD. The arm's length principle is the international standard agreed by OECD member countries to determine transfer prices for tax purposes with a view to avoiding, firstly, double taxation of taxable income and, secondly, tax evasion involving the same income.

(8) The scheme makes it possible to determine profits subject to corporation tax in an alternative manner, using the 'cost-plus' method. This method consists in determining taxable profits by applying a mark-up to the operating expenditure of the headquarters or logistics centre. This mark-up is determined by the tax authorities at the taxpayer's request. The method used forms part of the traditional methods, based on a comparison with similar transactions with non-associated enterprises, as recommended by the OECD in its report on transfer pricing (hereinafter called the OECD report) ([7]). Compared with other transaction methods, which involve a direct comparison between the price charged in a transaction between associated enterprises and that charged in a transaction between non-associated enterprises, the cost-plus method is based on an indirect determination of the arm's length price. The method involves setting a mark-up on a case-by-case basis by analogy with the mark-ups actually charged in comparable situations between non-associated enterprises in the light of the functions performed, the assets used, the risks assumed and the market conditions. These factors may result in adjustments being made to the mark-up actually charged in comparable uncontrolled situations to make it better suited to the peculiarities of the intra-group transactions concerned. This mark-up is then applied to the costs actually incurred by the same supplier of goods or services whose taxable profits are to be calculated. The result obtained after applying the mark-up to the above costs is considered equivalent to the arm's length price of these transactions between associated enterprises.

(9) The OECD report also mentions the possibility for associated enterprises to draw up prior transfer pricing agreements with the tax authorities concerned. This type of agreement makes it possible to determine, in advance of transactions between associated enterprises, a series of appropriate criteria (including the method to be used, the factors of comparison and the adjustments to be made thereto) with a view to determining the transfer price applicable to those transactions during a given period. According to the OECD nomenclature, a prior transfer pricing agreement may be unilateral, involving one tax authority and one taxpayer, or multilateral, involving two or more tax authorities. The agreement provides beneficiaries with an assurance that the amount of taxable profits determined using the procedure will not be called into question by the authority or authorities concerned during the lifetime of the agreement, subject, however, to the situation of the enterprise and the circumstances recognised by the agreement remaining unchanged.

Scope

(10) According to the circular of 21 January 1997 (hereinafter called the circular), headquarters and logistics centres may take the legal form either of companies having their registered office in France or of permanent establishments of foreign companies. In addition, headquarters may take the form of a department attached to an industrial or commercial branch of activity of an existing enterprise or to a holding company (holding foreign or French investments). On the other hand, logistics centres may not be attached to an industrial or commercial branch

([5]) Official Tax Bulletin 13 G-1-97 No 21 of 30 January 1997.
([6]) Official Tax Bulletin 4 C-5-02 No 175 of 11 October 2002.
([7]) 'Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations', OECD, 1995.

of activity of an existing enterprise lest there be any risk of confusion between their own activities and those of the principal enterprise. Lastly, logistics centres constituting a branch of activity may not be attached to a holding company, but they may be attached to a headquarters.

(11) The circular stipulates that headquarters and logistics centres must be entities liable to corporation tax in France. Under ordinary tax law, economic entities are liable to corporation tax where they take the form of companies established in France or of permanent establishments in France of foreign companies, but they are not separately liable to tax where they are simply branches of activity of domestic companies.

(12) The activities of headquarters and logistics centres must depend on an international group controlled from France or from abroad. The circular points out that the scheme is reserved exclusively for functions performed on behalf of enterprises within the group. If headquarters or logistics centres supply services to enterprises outside the group, the corresponding profits must be determined in accordance with ordinary law. The circular states that French or foreign companies placed under the same French or foreign control are to be considered as belonging to one and the same group in accordance with the conditions of ordinary tax law.

(13) Apart from this restriction concerning the international character of the group, the scheme is not limited to certain specific sectors of the economy or to certain areas of France. The circular indicates that headquarters and logistics centres must supply services predominantly to companies whose registered office is outside France or to establishments of companies within the group situated outside France. It states that this condition is met where the total amount of current operating expenditure corresponding to services supplied by the headquarters or logistics centre to companies or permanent establishments within the group situated abroad accounts for more than half of the total amount of current operating expenditure.

(14) As regards eligible activities, both headquarters and logistics centres may carry on a wide range of activities, which are listed non-exhaustively in the circular. In general, although it is only activities on which it is difficult to place a commercial value owing to their group-specific nature that are eligible, these activities consist in the supply of services being in the nature of economic activities for the associated beneficiaries, and correspond to:

— administrative functions such as management or control functions, and

— the supply of services being essentially of a preparatory or ancillary nature and not constituting directly productive functions.

(15) As regards headquarters, the circular refers, *inter alia*, to administrative services and data processing services relating to the internal administration of the group; human resource services such as personnel management, training and the development of pay or pay management systems; and communication or public relations services.

(16) As regards logistics centres, the circular refers, *inter alia*, to the functions of storage, packaging, labelling or distribution of raw materials, supplies, finished products or goods; the administrative activities linked to these functions; warehousing and management of the packaging of raw materials, supplies, finished products or goods; and the transport and delivery of these goods to companies within the group.

(17) The circular states that, in view of the nature of the services supplied and the status of the recipients of those services, being entities not taxable in France but belonging to the same group, headquarters and logistics centres may obtain from the tax authorities an assurance that the amount of their profits liable to corporation tax will not be called into question if they determine it on the basis of one profit margin for all the activities that are covered by the functions of a headquarters and logistics centre.

Method of calculating taxable profit

(18) The amount of taxable profit is calculated by applying the mark-up to the amount of current operating expenditure in accordance with the cost-plus method. Inasmuch as the calculation method used is based on the relevant OECD recommendations, France considers that it makes it possible to ensure compliance with the arm's length principle which normally prevails between independent economic entities and that it is justified by the nature of the rules governing the international taxation of cross-border profits.

(19) In fact, according to the circular, the tax base determined by the cost-plus method is considered to

reflect the profit likely to be earned under arm's length conditions, and consequently the authorities' approval is subject to the condition that headquarters and logistics centres invoice their services on the basis of cost plus the profit margin set. The circular goes on to state that any over-invoicing will result in a finding of an additional result subject to corporation tax in accordance with ordinary tax law. Any under-invoicing will constitute a hidden advantage for headquarters and logistics centres and a presumed distribution of income to the beneficiaries which would lead to the application of distribution tax. Otherwise, the method of fixing the taxable profit applied by the scheme has no impact on the taxation of financial products not involving pursuit of the activities of headquarters and logistics centres, such as the income from securities and the capital gains or losses resulting from the sale of fixed assets.

(20) According to the circular, the mark-up will be set on a case-by-case basis separately for headquarters and for logistics centres and in the light of the characteristics of the particular activity and of the context in which it is pursued, at the level which best corresponds to the profit which would have been achieved by an independent enterprise under arm's length conditions. In particular, the mark-up will be low if the activities carried on are purely administrative and higher if the activities are strategic in nature. The tax authorities can take account, in setting the mark-up, of the nature of the jobs needed to perform the tasks of headquarters and logistics centres. The employment of highly skilled staff will give rise to the application of a higher mark-up than the employment of low-skilled staff.

(21) The mark-up set is not cast in stone for the lifetime of headquarters and logistics centres but may be modified in the light of changes in the nature or context of the activities which the beneficiary is required to declare to the tax authorities as from the financial year in which the changes occur. According to the circular of 11 October 2002, and as from 1 January 2003, the mark-up must be determined afresh as part of a systematic review of the approval every three to five years.

(22) According to the circular, the operating expenditure that is taken into account in calculating the taxable profit is determined in accordance with the ordinary law rules on corporation tax. This expenditure corresponds to the miscellaneous expenses incurred during the financial year as registered on the debit side of the taxpayer's revenue and expenditure accounts, and includes interest payments and amortisation. However, operating expenditure does not include:

— disbursements which are reimbursed to headquarters and logistics centres under the conditions laid down by the ordinary law scheme provided for in Article 267 II-2 of the General Tax Code. Such disbursements must be occasional and incidental in nature and must not come within the traditional area of activity of headquarters and logistics centres. They are regarded as incidental if the amount does not exceed 10 % of current operating expenditure excluding disbursements. Above this percentage, disbursements are included in expenditure,

— subcontracted activities, provided that the expenditure in respect of these activities represents less than half of the operating expenditure excluding subcontracting. From an example given in the circular, the Commission has learnt that, where this exclusion from the tax base is applicable, that part of the subcontracting expenditure which does not exceed half of the operating expenditure excluding subcontracting is deducted from the base subject to application of the mark-up. The inclusion of subcontracting expenditure in the basis for calculating taxable profits is therefore limited to the part exceeding 50 % of current operating expenditure excluding subcontracting.

Annual flat-rate tax

(23) As regards the annual flat-rate tax (imposition forfaitaire annuelle — IFA), headquarters and logistics centres are taxable only on the amount laid down for the first bracket of the IFA scale fixed by Article 223 septies of the General Tax Code. The amount of the IFA depends on the amount of turnover plus financial income. The first tax bracket is EUR 750 and relates to turnover plus financial income between EUR 76 000 and EUR 150 000. The last IFA tax bracket is EUR 30 000 and relates to turnover plus financial income greater than EUR 75 million. The IFA tax brackets between EUR 750 and EUR 30 000 are not applicable to beneficiaries under the scheme.

(24) The IFA must be paid to the State by 15 March of the financial year in question. The payment is therefore only a part payment towards one of the payments subsequently due for the current year or the following two years ([8]). Consequently, an exemption from the IFA which is not set against corporation tax for the three consecutive years is equivalent to total exemption from the tax. Exemption from payment of the IFA for a

([8]) If, for example, a company paid the IFA on 15 March 2003, it may set this sum against one of the part payments or the balance due in either 2003, 2004 or 2005. After that date, the tax becomes definitively due to the Treasury.

shorter period, because the tax due during the three-year period exceeds the IFA part payment, constitutes a mere tax deferral.

III. GROUNDS FOR INITIATING THE PROCEDURE

(25) In opening the formal investigation procedure ([9]), the Commission considered that the measure might constitute State aid as it seemed to meet the four cumulative criteria under Article 87(1) of the Treaty. In particular, the Commission identified the following three potential aid elements:

— firstly, certain costs borne by headquarters and logistics centres are not taken into account in calculating taxable profit according to the cost-plus method,

— secondly, the partial exemption from the IFA from which headquarters and logistics centres benefit seems to result in lower taxation than under the ordinary law,

— thirdly, the authorities' room for manoeuvre in setting the mark-up applicable in the cost-plus method may favour certain enterprises or groups.

(26) Lastly, as part of its preliminary assessment, the Commission considered that none of the derogations in Article 87(2) and (3) of the Treaty applied to the scheme.

IV. COMMENTS FROM INTERESTED PARTIES

(27) The American Chamber of Commerce in France (hereinafter called the American Chamber of Commerce) considers that the scheme does not confer any financial advantage on beneficiaries and that, for the following reasons, it cannot constitute aid:

(28) firstly, the American Chamber of Commerce considers that the only advantage that the scheme confers on beneficiaries is that of enabling them to have prior knowledge of the method for determining the applicable taxable income. Consequently, the scheme is akin to a unilateral prior transfer pricing agreement between the taxpayer and the tax authorities, constituting an administrative practice encouraged by the OECD;

(29) secondly, the fact that the costs relating to disbursements and subcontracting expenditure are partially taken into account in the basis for applying the cost-plus method is in keeping with the strictest application of the OECD rules on transfer pricing, which requires even the total exclusion of such costs, notably where the international intra-group transactions concerned take the form of supplies of services. As far as subcontracting expenditure is concerned, the American Chamber of Commerce considers that the inclusion of such expenditure in the basis for applying the cost-plus margin does not correspond to economic reality for an intermediary in France. Such inclusion would give rise to problems of tax deductibility for the group company benefiting from the service in view of the unjustified application of a margin to the subcontracting expenditure potentially deductible by the latter;

(30) thirdly, the American Chamber of Commerce considers that the IFA is not a definitive tax as it is credited towards the corporation tax due during the two years following application of the IFA. Where this latter tax base, once the 33 1/3 % corporation tax rate is applied, determines a result greater than EUR 750, an entity benefiting from the scheme is obliged to pay the higher definitive tax and hence this IFA ceiling will have no impact. The IFA ceiling provided by the scheme does not therefore have a decisive impact as an advantage;

(31) lastly, the American Chamber of Commerce considers that the French tax authorities are particularly rigorous and strict when it comes to negotiating and determining the mark-up applicable to operations carried out by headquarters and logistics centres and that, consequently, no advantage lies in the methods of setting the mark-up involved in applying the cost-plus method. In particular, the American Chamber of Commerce confirms the application of paragraph 36 of the circular, according to which 'the mark-up shall be set on a case-by-case basis in the light of the characteristics of the headquarter's activity and of the context in which it is pursued, at the level which best corresponds to the profit that would have been achieved by an independent enterprise under arm's length conditions'.

(32) At all events, the American Chamber of Commerce points to the legitimate expectation of its members, who have benefited from the scheme in the certain knowledge that the transfer prices charged corresponded to arm's length prices.

V. COMMENTS FROM FRANCE

(33) In its comments, France challenges the categorisation of the headquarters and logistics centres scheme as aid, arguing that it fulfils none of the four criteria in Article 87(1) of the Treaty.

([9]) See footnote 1.

Absence of an advantage

(34) France considers that the correspondence between the taxation applied to headquarters and logistics centres and that applicable to entities acting entirely independently excludes the presence of any advantage. It must be borne in mind that the arm's length principle has to be applied in situations involving international transactions between associated enterprises, and that it is therefore this principle that is the general rule for determining whether the taxable profits of a firm acting in the intra-group context are calculated more advantageously. France considers that the method applied for determining the taxable profits of headquarters and logistics centres corresponds to that which, according to the OECD, makes it possible to obtain the arm's length price. Moreover, the OECD considers the cost-plus method to be the most appropriate where the controlled transactions taken into account are supplies of services.

(35) As regards the exclusion of disbursements and subcontracting expenditure from the basis for calculating taxable profits, France observes that, in order to be excluded from this basis, such costs must be occasional and incidental in nature, i.e. wholly independent of the exercise of the normal functions of a headquarters or logistics centre. The difference in threshold for subcontracting expenditure (50 % of current operating expenditure excluding subcontracting) compared with disbursements (10 % of operating expenditure excluding disbursements) is justified by the need to make the scheme reflect economic reality as closely as possible and to distinguish between the activities of headquarters or logistics centres and those of agents (disbursements) or intermediaries (subcontracting). With regard more particularly to subcontracting expenditure, France considers that, if the scheme had followed the OECD's recommendations on application of the cost-plus method to the activities of agent or intermediary, it might have been more advantageous. The OECD advocates either the exclusion, without any ceiling, of subcontracting expenditure from the tax base, or the application of a lower rate to such expenditure and to that part of the current operating expenditure which is related thereto. According to France, the solution adopted by the circular is less favourable than that advocated by the OECD in its determination of the arm's length price, and therefore the French measure cannot constitute an advantage.

(36) As regards the setting of the mark-up permitting application of the cost-plus method, according to France it is effectively determined on a case-by-case basis and is adjustable every three to five years at the most. However, the authorities do not enjoy any room for manoeuvre capable of favouring certain enterprises owing to the fact that the setting of the rate is actually carried out in general on a case-by-case basis in the light of changes in the nature or context of the pursuit of the activities and as from the financial year in which those changes occur. Moreover, as a result of the mark-up being set on a case-by-case basis, the taxation of headquarters and logistics centres in fact more closely resembles that deriving from the application of the arm's length principle, which is the standard applicable to all intra-group transactions.

(37) As regards the limitation of the IFA to the first bracket of the scale fixed by Article 223 septies of the General Tax Code, France considers that this limitation confers no advantage as the IFA is no more than an advance on the corporation tax owed by beneficiaries and is ultimately borne by enterprises only if they are in deficit, a situation which would not arise in the case of headquarters and logistics centres. These are in principle always subject to corporation tax through the application of the cost-plus method, which makes it possible to determine their taxable profits as a surplus on top of their gross operating expenditure. Application of the advances system constituted by the IFA represents at the most an advance payment which, for ordinary companies, is larger than for headquarters and logistics centres. In view of the fact that the maximum amount of the IFA is EUR 30 000, any cash flow advantage stemming from exemption from the IFA is negligible.

(38) As regards the fact that application of the cost-plus method enables taxpayers to know in advance how much tax they owe and to avoid any disputes with the tax authorities, this cannot, in France's opinion, be considered an advantage because disputes are avoided only if the conditions of the cost-plus method are met and hence if the tax base of headquarters and logistics centres is determined in accordance with the arm's length principle. Therefore, according to France, if the application of this principle constitutes an advantage compared with the analytical determination of the tax base as provided for under the ordinary law, that advantage is justified by the nature and general scheme of the French tax system, complying as it does with the OECD's recommendations regarding the taxation of supplies of services between controlled enterprises. In fact, the scheme promotes the removal of uncertainty in the application of corporation tax in an international intra-group context in accordance with the OECD's recommendations on the conclusion of prior transfer pricing agreements.

Absence of State resources

(39) According to France, the scheme merely safeguards the resources of the State as the alternative method which is

applied makes it possible to effectively tax activities which would otherwise be completely missed by corporation tax in France. It is thanks to this scheme that France obtains tax revenues from certain activities which, in France's view, are not normally likely to give rise to marketing to third parties and hence are not determinable in any way.

Absence of effect on competition and trade

(40) In France's view, the scheme is not likely to affect competition and intra-Community trade as the services which benefit from the measure are, by definition, 'non-externalisable' and hence extra-market. With regard more particularly to logistics centres, France considers that their activities do not add any value to the products they serve.

Absence of selectivity

(41) Lastly, in France's view, the scheme is not selective as it is a general tax policy measure open to all economic sectors and all international groups controlled from both France and abroad. The fact that the scheme is directed exclusively at international operations is justified because these operations alone are faced with the problem of transfer prices and the risk of double taxation. In fact, the measure is not selective because the special determination of prices between associated enterprises covered by the scheme has no fiscal impact for other enterprises which do not do business at the international level.

(42) Lastly, the measure is open to all economic operators supplying, in whatever legal form, international intra-group services ancillary to production and marketing activities and is therefore not selective.

VI. ASSESSMENT OF THE MEASURE

Introduction

(43) After considering the comments from France and from the interested parties, the Commission adheres to the position it took in its letter of 11 July 2001 ([10]) opening the formal investigation procedure. It considers that the observations submitted by France and the other interested parties have not removed the doubts expressed. It accordingly takes the view that certain aspects of the tax scheme scrutinised constitute unlawful operating aid which is incompatible with the common market.

Advantage

(44) France and the interested parties invoke the absence of any advantage linked to recourse to a flat-rate taxation method based on determination of the taxable profit in accordance with the arm's length principle. Where, in a multinational context characterised by differences in the actual level of taxation between the various countries concerned, associated enterprises carry out transactions with one another, their commercial relations and hence their accruing profits are theoretically liable to manipulation by the taxpayer because they involve the same economic interest. Consequently, the national tax authorities concerned may unilaterally correct the taxable profits of these taxpayers and hence determine a heavier taxation or a double taxation of the relevant transactions. In France's view, inasmuch as the aim of having recourse to the cost-plus method is to eliminate double taxation, the scheme does not confer any advantage.

(45) It should be pointed out first of all that the French tax system does in fact comply with the arm's length principle as regards the determination of taxable profits in international transactions between controlled enterprises, both at the level of domestic law, under Article 57 of the General Tax Code, and at that of the bilateral double taxation treaties concluded by France with its partner countries. In particular, Article 57 of the General Tax Code provides for a tax adjustment procedure 'to establish the income tax payable by enterprises which are dependent on or which control enterprises situated outside France' with regard to 'profits indirectly transferred to the latter, either by increasing or by reducing purchase or selling prices or by any other means'. In this case, profits which do not comply with the arm's length principle 'shall be included in the results as shown in the accounts' of the French enterprises concerned. Article 57 also specifies that, in the absence of specific evidence to support such adjustment, 'taxable profits shall be determined by comparison with those of similar, normally operated enterprises'. The double taxation treaties concluded by France make it possible, for their part, to make comparable adjustments as regards the profits accruing in commercial relations between related enterprises established in the contracting States, in accordance with the arm's length principle set forth in Article 9 of the

([10]) See footnote 1.

OECD Model Convention. The Commission would point out in this connection that the cost-plus method used to determine the taxable profits of headquarters and logistics centres forms part of the traditional methods listed by the OECD in its report on transfer pricing.

(46) The Commission considers that the nature of the services supplied by headquarters and logistics centres makes it difficult to determine directly their taxable profits in France and that the application of an indirect method of determining taxable profits is therefore justified. This method takes the form of an estimate involving the setting of the gross profit margin which one of the parties to a transaction between associated enterprises has sought by way of payment and which the other party has considered acceptable under arm's length conditions for the performance of comparable functions. Moreover, the determination of the mark-up within the framework of the application of the cost-plus method, via a prior agreement valid for a whole series of indeterminate economic transactions, constitutes a method of applying the arm's length principle strongly encouraged by the OECD. In conclusion, the Commission confirms its position according to which it has no objections of principle either to the cost-plus method or to the prior agreements for the setting of the mark-up relating to intra-group transactions used by France in the scheme under scrutiny.

(47) The Commission notes, moreover, that neither France nor the other interested parties contest the fact that the taxable profits accruing to headquarters and logistics centres are not actual but simply estimated. Lastly, the possibility of obtaining prior approval from the authorities covering the rate of return on an indefinite and potentially large number of transactions constitutes special treatment compared with the analytical determination of profits. It is therefore necessary to examine in detail the specific application by France of this method of taxation.

Setting of the mark-up

(48) As regards the setting of the mark-up, it should be pointed out that, according to the circular, the scheme concerns only 'activities on which it is in practice extremely difficult to place a commercial value owing to their group-specific nature' ([11]). In fact, the activities to which the circular refers concern functions which are 'essentially of a preparatory or ancillary character and which do not therefore constitute directly productive functions' ([12]). On the other hand, the Commission considers that the activities to which the circular refers are very varied and may well have a fairly considerable commercial value. By way of example, reference may be made to 'strategic services' or 'research and development services', as mentioned in the circular. In particular, it should be pointed out that these services constitute not only economic activities but also commercial activities which potentially account for a significant fraction of the overall added value produced by a multinational group. Lastly, the fact that certain activities of headquarters and logistics centres may be subcontracted bears witness to the commercial nature of those operations.

(49) The Commission considers that the application of the cost-plus method and the prior setting of the rate of return for all the activities carried on by a headquarters responsible for these strategic or research and development services for a period of three-five years may give rise to a different calculation from that resulting from an analytical determination. It takes the view, that, for want of other methods, this differential treatment is necessary in order to determine the transfer price for transactions between associated enterprises where a direct estimation of the price compared with that charged in similar transactions between independent enterprises would be inappropriate. This method is therefore justified by the nature of the French tax system within the meaning of point 23 of the Notice.

(50) The Commission must also verify whether the methods of determining the margin are such as to leave the tax authorities a degree of discretion. In the light of the comments submitted by France and the interested parties, it would appear that the mark-up is effectively set on a case-by-case basis by reference to the characteristics of the activities actually carried on by the taxpayer and of the context in which they are carried on. The evidence in the Commission's possession does not therefore support a finding that the authorities' room for manoeuvre in setting the mark-up usable in the cost-plus method may have been used to favour certain enterprises or groups. Lastly, the Commission takes note of the amendment to the circular, introduced after the formal investigation procedure was opened, providing for a systematic review, at the latest every three to five years, of agreements in the light of changes in the conditions under which the activities of headquarters and logistics centres are carried on. It must therefore be concluded that the determination of the mark-up under the scheme does not confer any advantage on headquarters and logistics centres or on the groups to which they belong.

([11]) See paragraph 13 of the circular.

([12]) See paragraph 56 of the circular.

Disbursements and subcontracted activities

(51) With regard to the non-inclusion of disbursements in the cost-plus method, the Commission considers that, while these activities may in fact be of an occasional and ancillary nature, they are nevertheless significant owing to the fact that the ceiling of 10 % of current operating expenditure excluding disbursements may correspond to substantial amounts. It takes the view, however, that the decisive factor when it comes to eliminating any supposition of advantage is the fact that, in order to be excluded from the expenditure base for the cost-plus method, and hence from the tax base, disbursements must fulfil the common conditions set out in Article 267 II-2 of the General Tax Code. That article excludes from the tax base for corporation tax purposes 'sums reimbursed to intermediaries … who carry out expenditure in the name and on behalf of their principals in so far as those intermediaries are answerable to their principals, enter the expenditure in suspense accounts and provide the tax authorities with proof of the nature and exact amount of the expenditure'. The fact that the scheme under scrutiny and the ordinary law rule are the same makes it possible to rule out the existence of an advantage over the arrangements for the analytical determination of taxable profits. In the latter case, activities relating to disbursements would not give rise to any taxable profits.

(52) With regard to the exclusion of subcontracted activities from the method for calculating taxable profits under the conditions referred to above, it should be pointed out that the OECD transfer pricing principles advocate, in such cases involving application of the cost-plus method, either applying a margin only to the costs inherent in the exercise of the function of agent or intermediary or reducing the mark-up to be applied to all the costs of the services. Although in this connection the OECD report gives an example whereby it is considered appropriate for an associated enterprise which bears costs on behalf of another associated enterprise to pass on these costs to the latter without applying a margin, this example does not prevent the Commission from remarking that, in such situations, it must be ensured that all the advantages enjoyed by the beneficiary are correctly taken into account so as to make the determination of the taxable profit comply with the arm's length principle.

(53) It must be concluded that France applies systematically the exclusion of expenditure relating to subcontracting activities without evaluating on a case-by-case basis whether it might not be appropriate to apply a specific mark-up to the activity of intermediary or whether an alternative solution involving reducing the mark-up for all the activities might be envisaged. If, on the one hand, reducing the mark-up determines lower taxable profits, on the other hand, extending the basis for applying the mark-up produces a larger taxable profit. The Commission finds that the exclusion of subcontracting expenditure cannot be justified in so far as, beyond the limit of 50 % of the total excluding subcontracting expenditure, subcontracting activities are again taken into consideration in the calculation of the tax base. Lastly, the Commission considers that the ceiling of 50 % of total expenditure excluding subcontracting may represent a considerable amount of revenue which systematically escapes taxation.

(54) As indicated in point 9 of the Notice, the advantage may be provided through a reduction in the tax burden. The Commission would observe that not all costs borne by headquarters and logistics centres are taken into account in calculating taxable profit according to the cost-plus method. This exclusion is liable to constitute a reduction in the tax burden within the meaning of point 9 of the Notice.

IFA

(55) With regard to the exemption from the annual flat-rate tax (IFA) forming part of the scheme, the Commission agrees with France's argument that any advantage would be limited to situations in which headquarters and logistics centres do not generate tax amounting to more than EUR 30 000. Although it is difficult to assess the impact of the limited application of the IFA (exclusively to its first bracket) in a system such as that of the scheme under scrutiny, which fixes tax revenue presumptively, this does not prevent the Commission from observing that beneficiaries' turnover can be determined autonomously and objectively in relation to the eligible expenditure of headquarters and logistics centres. The partial exemption from the IFA granted by the scheme therefore constitutes, as France acknowledges, an advantage which may take the form of a tax deferment. The IFA paid is deductible from corporation tax and headquarters and logistics centres are still liable for that tax as use of the cost-plus method still implies the existence of a taxable profit. However, where the IFA avoided under the scheme is higher than the amount paid by way of corporation tax, this difference during the course of a tax year involves a tax deferment. In addition, and as already indicated in recital 23, the Commission cannot rule out that the partial exemption from the IFA may constitute a definitive tax exemption where such tax deferment is repeated during three consecutive years.

(56) The fact that the amounts in question are modest does not suffice to rule out the existence of an advantage within the meaning of Article 87(1) of the Treaty. France has not furnished any evidence to show that the conditions of application of the *de minimis* rule as laid down by Commission Regulation (EC) No 69/2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid ([13]) are complied with in the present case, notably as regards the sectors excluded from that rule and the limits on cumulation.

Conclusions on the advantage

(57) It must be concluded from the above that both the non-inclusion of subcontracting expenditure and the exemption from the IFA constitute advantages for beneficiary enterprises and the groups to which they belong.

State resources

(58) In the present case, the reduction in the amount of tax, whether it stems from a reduction in the tax base or from a reduction in the amount of the IFA, leads to a reduction in tax revenue, which is a State resource.

(59) France's argument that tax revenue is increased as a result of the scheme is immaterial as, in its assessment, the Commission must refer exclusively to the resources from which the State would benefit if the taxation of headquarters and logistics centres were determined under the conditions of ordinary law.

Effect on competition and trade between Member States

(60) Since the scheme is a scheme of direct taxation which is in principle open to all sectors of activity connected with production and commerce, the Commission cannot rule out that some beneficiary enterprises and the groups to which they belong may be active in sectors where intra-Community trade is intense. The possibility of an effect on trade through the application of this flat-rate tax scheme cannot be excluded.

(61) Secondly, in accordance with the case-law of the Court of Justice of the European Communities ([14]) and as stated in point 11 of the Notice, 'The mere fact that the aid strengthens the firm's position compared with that of other firms which are competitors in intra-Community trade is enough to allow the conclusion to be drawn that intra-Community trade is affected'.

(62) Lastly, the fact that the scheme in question applies in a multinational context is a strong indication that it may influence inter-State economic activities and therefore distort competition at European level.

Selectivity and justification by the nature or general scheme of the system

(63) According to France, the scheme is not selective as it is a general tax policy measure open to all economic sectors, all geographic areas and all legal forms.

(64) The Commission does not dispute that the scheme is open to all sectors of the economy irrespective of their geographic location or legal form, but it considers none the less that this does not suffice to rule out the selective character of the measure.

(65) Firstly, the measure is limited to supplies of services which correspond to the functions of management, administration, coordination or control and to activities preparatory or ancillary to productive or commercial functions performed in the context of an international group. Directly productive or commercial activities and activities not taking place in the context of an international group are therefore excluded. Only the former activities are therefore capable of benefiting from the advantages identified.

(66) Secondly, the benefit of the scheme is limited exclusively to headquarters and logistics centres which provide their services predominantly to associated companies situated outside France. The Commission would observe that entities which do not provide their services predominantly to associated companies located outside France are excluded from the benefit of the measure. This predominance condition must be viewed in the light of the ratio between the total amount of current operating expenditure corresponding to services supplied by the entities in question to group companies whose registered office is situated outside France or to permanent establishments of group companies situated outside France and the total amount of current operating expenditure corresponding to all services

([13]) OJ L 10, 13.1.2001, p. 30.
([14]) Case 730/79 Philip Morris Holland BV v Commission [1980] ECR 2671.

supplied to all beneficiaries whether established or not in France. Thus, entities established in France but not satisfying the predominance condition cannot benefit from the advantages of the scheme despite the fact that in their transactions with associated companies or branches situated abroad they must face the same difficulties as headquarters and logistics centres in determining their taxable profits.

(67) Lastly, the fact that logistics centres constituting a department attached to an industrial or commercial branch of activity of an existing enterprise or to a holding company are excluded from the scheme strengthens the selectivity of the measure. France has not presented any arguments in this connection in the course of the procedure. The circular states that this limitation is motivated by the need to avoid any confusion with other activities of the group. However, it is not stated why this limitation does not apply to headquarters.

(68) As regards the possible justification for the differential nature of the scheme, the French authorities have not furnished, as required by point 23 of the Notice, any information explaining to what extent operations carried out by headquarters and logistics centres deserve more favourable tax treatment than entities carrying out the same operations but not satisfying the abovementioned predominance criterion or than logistics centres not attached to an enterprise in France or to a holding company. In the present case, it does not appear that the economic rationale of the measure makes it necessary to the functioning and effectiveness of the tax system ([15]). The measure must therefore be deemed not to be justified by the nature or general scheme of the system, and the Commission confirms its preliminary position on the selective character of the measure.

(69) The Commission would point out, lastly, that subcontracting activities receive different tax treatment above a certain ceiling, which confers a selective character on this differentiated treatment.

Conclusions on the existence of aid

(70) It must be concluded that the measure in question constitutes aid within the meaning of Article 87(1) of the Treaty as the advantages represented by the exclusion of certain expenditure from the basis for calculating taxable profits and the partial exemption from the IFA scheme are not justified by the nature or general scheme of the French tax system.

Compatibility

(71) As stated in the decision to open the formal investigation procedure, the scheme in question does not seem *prima facie* to qualify for any of the derogations laid down in Article 87(2) and (3) of the Treaty. In the course of the procedure, neither the French authorities nor the interested third parties presented any arguments as to a possible compatibility of the scheme with the common market. The Commission's doubts have therefore been confirmed.

(72) The derogations in Article 87(2) of the Treaty, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.

(73) Nor does the derogation in Article 87(3)(a) of the Treaty, which provides for the authorisation of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, apply, as the scheme in question has unlimited territorial scope.

(74) Similarly, the scheme does not fall into the category of projects of common European interest eligible for the derogation in Article 87(3)(b) of the Treaty, and in so far as it does not seek to promote culture and heritage conservation it cannot qualify for the derogation in Article 87(3)(d) of the Treaty.

(75) The tax advantages granted under the scheme do not qualify for the derogation in Article 87(3)(c) of the Treaty, which authorises aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest. They amount to operating aid which relieves the beneficiary companies or groups to which they belong of charges that should normally be borne by them.

(76) It must be concluded, therefore, that the scheme is incompatible with the common market.

([15]) See Commission Decision 96/369/EC of 13 March 1996 concerning fiscal aid given to German airlines in the form of a depreciation facility (OJ L 146, 20.6.1996, p. 42).

Recovery

(77) The measure in question has been implemented without ever having been notified to the Commission in accordance with Article 88(3) of the Treaty; it is not covered by prescription and it constituted aid as soon as it came into force. It therefore constitutes illegal aid.

(78) Where illegally granted State aid is found to be incompatible with the common market, the natural consequence of such a finding is that the aid should be recovered from the recipients in accordance with Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([16]). Through recovery of the aid, the competitive position that existed before the aid was granted is restored as far as is possible. Neither the lack of any precedent involving the application of the State aid rules in similar cases nor the alleged lack of clarity of Community policy on State aid justifies a departure from this basic principle.

(79) Nevertheless, Article 14(1) of Regulation (EC) No 659/1999 provides that 'the Commission shall not require the recovery of the aid if this would be contrary to a general principle of Community law'. The case-law of the Court of Justice and the Commission's own decision-making practice have established that where, as a result of the Commission's actions, a legitimate expectation exists on the part of the beneficiary of a measure that the aid has been granted in accordance with Community law, then an order to recover the aid would infringe a general principle of Community law.

(80) In its judgment in Van den Bergh en Jurgens ([17]), the Court ruled:

'The Court has consistently held that any trader in regard to whom an Institution has given rise to justified hopes may rely on the principle of protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

France has invoked the existence of a legitimate expectation on the part of the beneficiaries of the scheme without submitting to the Commission any specific argument concerning this approach. However, it follows from the case-law of the Court of Justice ([18]) that the Commission must take into account exceptional circumstances justifying, in accordance with Article 14(1) of Regulation (EC) No 659/1999, non-recovery of aid illegally granted where recovery would be contrary to a general principle of Community law such as respect for the recipients' legitimate expectations.

(81) In the present case, the Commission notes that the French scheme presents certain similarities with the system introduced in Belgium by Royal Decree No 187 of 30 December 1982 concerning the taxation of coordination centres. The two schemes concern intra-group activities and lay down specific rules for determining the tax base. In its Decision SG(84) D/6421 of 16 May 1984, the Commission took the view that the scheme did not give rise to aid within the meaning of Article 92(1) of the Treaty. Even though the decision has not been published, the fact that the Commission did not raise any objection to the Belgian scheme for coordination centres was made public at the time in the Fourteenth Report on Competition Policy and in an answer to a Parliamentary question ([19]).

(82) Under the circumstances, the Commission notes that its decision on the Belgian scheme for coordination centres was adopted before the French scheme was adopted in its present form as set out in the circulars of 21 January 1997 and 11 October 2002. Accordingly, the Commission concludes that the beneficiaries under the scheme had a legitimate expectation that the aid would not be recovered and hence is not requiring recovery.

VII. **CONCLUSIONS**

(83) The Commission finds that certain aspects of the French scheme constitute State aid within the meaning of Article 87(1) of the Treaty and that France has unlawfully implemented the aid in breach of Article 88(3) of the Treaty.

(84) Nevertheless, the position that the Commission has taken in the past with regard to certain tax measures for multinationals may have given rise, on the part of the beneficiaries under the scheme, to the legitimate expectation that the scheme did not constitute State aid. The Commission finds that recovery of the aid would

([16]) OJ L 83, 27.3.1999, p. 1.
([17]) Case C-265/85 Van den Bergh en Jurgens BV v Commission [1987] ECR 1155, paragraph 44.
([18]) Case 223/85 RSV v Commission [1987] ECR 4617.
([19]) See answer to Written Question No 1735/90 (OJ C 63, 11.3.1991, p. 37).

run counter to the general principle of respect for legitimate expectation and, accordingly, has decided not to require recovery of the aid,

HAS ADOPTED THIS DECISION:

Article 1

The exclusion of subcontracting expenditure from the calculation of the tax base and the application limited to the first bracket of the scale of the annual flat-rate tax implemented by France within the framework of the circular of 21 January 1997 of the Directorate-General of Taxes concerning the headquarters and logistics centres scheme constitute State aid which is illegal and incompatible with the common market.

Article 2

France is required to abolish, with effect from the tax period following that under way on the date of notification of this Decision, the following aid elements governed by the circular referred to in Article 1:

(a) the arrangements for applying the cost-plus method as regards the exclusion of certain subcontracting expenditure from the basis for calculating taxable profit;

(b) the arrangements for partial exemption from the IFA.

Article 3

France shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 13 May 2003.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 24 June 2003

on the aid scheme implemented by Belgium — Tax ruling system for United States foreign sales corporations

(notified under document number C(2003) 1868)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

(2004/77/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]),

Whereas:

I. PROCEDURE

(1) In 1997 the Ecofin Council adopted a Code of Conduct for business taxation ([2]) with the objective of tackling harmful tax competition; it subsequently established a Group to assess tax measures that fall within the scope of the Code. In line with the undertaking given in the Code, the Commission published in 1998 a notice on the application of the State aid rules to measures relating to direct business taxation ([3]) (hereinafter the Notice), stressing its determination to apply them rigorously and to respect the principle of equality of treatment. It was within this framework that the Commission undertook to examine or re-examine on a case-by-case basis, and in the light of the guidelines set out in the Notice, the tax arrangements in force in the Member States.

(2) In this connection, the Commission, by letter dated 23 March 2001 (D/51238), asked the Belgian authorities to provide information on the tax ruling system for United States foreign sales corporations (FSCs) in Belgium. Belgium replied by letter dated 18 May 2001 (A/34107).

(3) By letter dated 12 April 2002 (SG 2002 D/229352), the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the Belgian tax ruling system for FSCs. By letter dated 27 May 2002 (A/33959), Belgium submitted its observations.

(4) The Commission decision to initiate the formal investigation procedure was published in the *Official Journal of the European Communities*. The Commission invited interested parties to submit their comments ([4]). No comments were received.

II. DESCRIPTION OF THE MEASURE

United States regime for FSCs

(5) A brief description of United States regime for FSCs is necessary in order to understand the operation of the tax ruling system for FSCs in Belgium.

(6) As background, the World Trade Organisation (WTO) has, in a number of rulings, found that the legislation on FSCs provided exporting firms in the United States with a prohibited tax incentive. To be more precise, the

([1]) OJ C 30, 8.2.2003, p. 21.
([2]) OJ C 2, 6.1.1998, p. 1.
([3]) OJ C 384, 10.12.1998, p. 3.
([4]) See footnote 1.

incentive has been found to be, *inter alia*, an export subsidy prohibited under Article 3 of the Agreement on Subsidies and Countervailing Measures (ASCM) and has thus been removed from the United States tax code.

(7) Under the United States regime, an FSC is a foreign corporation — typically a fully owned subsidiary of a United States domestic corporation — that elects to be subject to the FSC rules contained in Sections 921 to 927 of the Internal Revenue Code of 1986 (IRC 1986). The portion of the FSC's income deriving from exporting United States-produced goods is exempt from taxation even if it is normally taxable under United States tax law. In particular, under Section 882(a) of the IRC 1986 the above income would be taxable as 'income of a foreign corporation effectively connected with a trade or business carried on in the United States'. However, under the United States regime for FSCs this income is non-taxable in the United States because it is deemed not to be 'effectively connected' to United States trade or business. The United States regime also modifies the traditional transfer pricing rules under Section 482 of the IRC 1986 by artificially allocating a significant proportion of the income of a United States parent company trading with its FSC to the FSC. As a result, both an FSC and its United States parent company are exempted from United States corporation tax that would be normally borne by companies carrying on a trade or business in the United States.

(8) To complete the description of the relevant provisions of the United States regime, a domestic corporation holding shares in an FSC is allowed a 100 % 'dividends-received deduction' for dividends received from an FSC, in lieu of the traditional 'indirect foreign tax credit' normally applicable under United States law. Thus, a United States corporation holding shares in an FSC does not pay any United States tax on the exempt portion of the foreign trade income, while the non-exempt portion is taxed only once (either in the hands of the FSC or in the hands of the shareholder), instead of being taxed twice under general United States rules ([5]).

(9) Since, under the United States regime, the exempt income was only the 'foreign trade income' associated with the exportation of United States products, in late 1999 a WTO Panel found the scheme to be a 'prohibited' export subsidy in breach of, *inter alia*, Article 3 of the ASCM. In February 2000 an Appellate Body of the WTO definitively ruled that the United States legislation violated the United States' obligations under the WTO. The United States Congress responded to subsequent international pressure and its obligation to implement the WTO finding by repealing the regime on 30 September 2000 ([6]).

(10) Following the repeal, no corporation may, with effect from 30 September 2000, elect to be an FSC. For an FSC in existence on that date, the FSC rules continue to apply only for transactions in the ordinary course of trade and business performed before 2002. However, an existing FSC will continue to benefit from the regime with respect to transactions ongoing after 1 January 2002 pursuant to binding contracts between an FSC and unrelated third parties applicable as at 30 September 2000 and still in force. Consequently, it is only once such contracts have expired that the FSC regime will definitely cease to operate.

Belgian scheme for FSCs

(11) Under the United States regime, an FSC must be organised or have an office in a foreign country having an agreement with the United States for sharing tax information such as that in force with Belgium ([7]), where the FSC must keep a set of permanent accounts. Also under United States law, a portion of the foreign trade income earned by an FSC or its United States parent is exempt only if certain economic processes take place outside the United States. To provide a legal framework for the activities of FSCs in Belgium, in December 1984, the year preceding the entry into force of the United States regime, the Belgian tax administration issued a circular concerning a special

([5]) In addition, under the United States regime, the 'foreign trade income' of an FSC is excluded from the income of a United States company controlling that FSC, otherwise considered as taxable income under Subpart F of the IRC 1986. More particularly, pursuant to Section 954 (d)-(e) of the IRC 1986, the above income would ordinarily be characterised as deemed dividend income of the controlling United States company and would be subject to tax as 'foreign base company income' of a controlled foreign company (CFC).

([6]) US Pub. L. No. 106-519 (2000). The scheme that replaced the FSC scheme, the Extraterritorial Income Act, was subsequently found to be incompatible with the WTO by the WTO Panel and Appellate Body.

([7]) See, in particular, Article 26 of the United States — Belgium Income Tax Convention signed in Brussels on 9 July 1970, which contains provisions on the 'exchange of information'.

ruling system for FSC activities in Belgium (hereinafter the system).

(12) Under Belgian domestic and conventional law ([8]), a Belgian subsidiary is taxed in Belgium on its worldwide income while a permanent establishment in Belgium of a foreign company is taxed solely on income earned in Belgium. By way of derogation from the above rule, a Belgian FSC or a Belgian permanent establishment of an FSC is determined by applying a special method (cost-plus method) that consists in applying an 8 % mark-up to certain costs incurred. In particular, a Belgian FSC or a Belgian permanent establishment of an FSC or of its United States parent company can apply to the Belgian tax administration for an individual ruling with a view to determining the taxable profit of the entity in Belgium on the basis of this cost-plus computation. This indirect method of determining the taxable profit of certain taxable entities with respect to certain transactions with associated entities within the same group is designed to assess the correct profit attributable to such entities by adopting the 'arm's-length standard', which is the international standard that the OECD countries have agreed should be used for determining the taxable profit of associated enterprises in their business relations.

(13) Several provisions in Belgium's tax code concerned with potentially abusive transactions apply the arm's-length standard. The bilateral tax conventions concluded by Belgium with other countries also adhere to the principles of Article 9 of the OECD Model Tax Convention concerning the tax administration's right to adjust the profit allocation where transactions have been conducted between associated enterprises on other than arm's-length terms. A brief description of the arm's-length standard is therefore necessary in order to understand the operation of the ruling system for FSCs in Belgium.

(14) When international transactions are carried out between associated enterprises, the OECD member countries have agreed that, for corporation tax purposes, their profits may be adjusted in accordance with the arm's-length principle set out in Article 9 of the OECD Model Tax Convention. The cost-plus method is a transfer pricing method recommended by the OECD for indirectly determining the arm's-length price of an international transaction between associated enterprises operating within a single group, subject to certain conditions. When associated enterprises deal with one other, their commercial relations may be affected by the fact that they may try to manipulate their profit determination for tax reasons. On the other hand, the tax administrations of the different countries exercising their jurisdiction to tax may disallow deductions of certain costs for corporation tax purposes or may adjust the profits deriving from such international transactions between associated entities, thereby giving rise to double taxation.

(15) Unlike other recommended transfer pricing methods, which directly determine the arm's-length price by reference to the prices applied in comparable transactions between independent companies (uncontrolled transactions), the cost-plus method determines the arm's-length price by reference to the cost incurred by the supplier of goods or services in a transaction between two associated enterprises (controlled transaction). Under the cost-plus method, an appropriate mark-up is added to such costs by reference to the profit margin ordinarily charged by suppliers in comparable uncontrolled transactions. Such indirect profit determination is carried on in light of the functions performed by such a supplier, taking into account the assets used, the risks assumed and the market conditions. The results of the computation after adding this mark-up to the costs is regarded as the arm's-length price of the original controlled transaction.

(16) In its 1995 Report on Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration (hereinafter the 1995 OECD Report), the OECD recommends the cost-plus transfer pricing method as an alternative arrangement for computing the tax base for transactions between related companies. In particular, this method is appropriate for suppliers of semi-finished goods where the related parties participating in the transactions have concluded joint facility agreements or long-term buy-and-supply arrangements and where the controlled transactions consist in the supply of services.

(17) The tax scheme for FSCs in Belgium is a special scheme applicable to branches and subsidiaries of FSCs that differs from the general tax scheme applicable to other Belgian subsidiaries or branches of foreign companies. In principle, Belgian subsidiaries or branches determine their taxable profits on the basis of the general accounting principles as corrected by Belgian tax rules. Such rules are also applied to international intra-group transactions carried out between a Belgian subsidiary or

([8]) See, in particular, Articles 5 and 7, entitled 'permanent establishments' and 'business profits' respectively, of the aforementioned United States–Belgium Income Tax Convention.

branch and an associated entity within the same group. However, Belgian corporate tax law contains special anti-avoidance provisions that relate to certain specific aspects of transfer pricing. Under the most significant of these provisions (Article 26 of the Belgian Income Tax Code 1992 (CIR 1992)), all 'abnormal and gratuitous advantages' granted by a Belgian enterprise within the framework of a controlled transaction are added to the taxable income of that entity if the beneficiary is a foreign company enjoying a favourable tax status in its country of residence. Belgian tax law also contains anti-avoidance provisions concerning royalties, interest on loans and the income from the transfer of property abroad. Under these provisions, the taxpayer must demonstrate the bona fide nature of such controlled transactions in order to avoid arm's-length price adjustments by the tax administration. Lastly, rulings may be obtained as to whether or not certain controlled transactions are conducted at arm's length or whether a payment constitutes an abnormal or gratuitous advantage.

(18) The rules whereby an FSC may obtain from the Belgian tax administration an individual ruling on the determination of taxable profits by means of the cost-plus method differ according to whether these profits are generated in Belgium via an independent company residing in Belgium (an FSC or a subsidiary of a United States company) or via a permanent establishment in Belgium of an FSC or of a United States company. If the profits are attributable to a permanent establishment in Belgium (hereinafter the FSC branch), the tax base for corporation tax purposes is determined by using the cost-plus method consisting in applying a mark-up to the costs incurred by the FSC branch. However, these costs do not include direct costs relating to advertising, sales promotion, carriage of goods and credit risks as well as any income tax paid by the FSC branch. Furthermore, the mark-up applied to the total costs computed in this way is fixed at 8 %. Application of the 8 % rate to the cost base yields the taxable profits that are subject to Belgium's standard rate of corporation tax.

(19) If the profits are attributable to an independent company established in Belgium (the FSC subsidiary), its taxable profits are, in principle, determined on the basis of its accounting profits adjusted for tax purposes under the ordinary tax law in Belgium. However, where the profits determined in this way correspond to at least 8 % of the eligible costs incurred by the FSC subsidiary, the Belgian tax administration considers that the operations between the FSC subsidiary and its associated companies have been carried out at arm's length and waives the right to make any adjustment to the value of these controlled transactions. Again, the taxable profits generated in this way are subject to the standard rate of corporation tax in Belgium.

(20) The special scheme allowed by the Belgian tax administration is valid for three years and is renewable tacitly. Each party may give notice of termination six months before the end of the three-year period.

(21) The Belgian authorities have indicated that the legal basis for the ruling system is Article 182(1)(3) of the Royal Decree implementing Article 342(2) of the CIR 1992. These provisions set the minimum taxable amount for foreign commercial companies operating in Belgium. Furthermore, an FSC established in Belgium whose profits are determined under ordinary law rules will go unchallenged by the tax authorities under the 'gratuitous advantages' anti-abuse presumption contained in Article 26 of the CIR 1992 if its profits account for at least 8 % of the costs attributable to the FSC.

III. GROUNDS FOR INITIATING THE PROCEDURE

(22) In its decision to initiate the formal investigation procedure, the Commission took the view that the FSC scheme met all the four criteria under Article 87(1) of the EC Treaty, in that it conferred an advantage leading to a reduction in tax revenues for Belgium, affected competition and trade, and was selective in nature. In particular, it took the preliminary view that the regime conferred an advantage on the beneficiaries because:

— the exclusion of certain costs from the cost basis taken into account for the cost-plus method, and

— the application of the fixed 8 % mark-up

could lead to the determination of an artificially lower taxable income for FSC branches and subsidiaries than that which would have been calculated under the ordinary transfer pricing rules for controlled transactions in Belgium, without this difference being

justified by the nature or general scheme of the tax system in Belgium.

(23) The Commission also considered that none of the derogations from the general prohibition on aid provided for in Article 87(2) and (3) of the EC Treaty applied and that the measure was therefore incompatible with the common market.

IV. COMMENTS FROM BELGIUM

Preliminary observations

(24) In response to the assessment made by the Commission in its letter initiating the procedure, the Belgian authorities have presented some preliminary observations, claiming that the Belgian scheme for FSC branches remained largely theoretical, the large majority of FSCs in Belgium being permanent establishments of FSCs to which were applied the same rules as those applicable to all other permanent establishments of foreign companies in Belgium.

(25) In addition, Belgium took the view that on 10 June 1985, in an answer to a Parliamentary question concerning the need for harmonisation of Member States' tax rules governing FSCs, the Commission had implicitly considered the scheme to be compatible with the common market ([9]). The measure in question should therefore have been considered to constitute existing aid as defined in Article 1(b) of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([10]). As a result, the Commission would have committed a procedural error by pursuing Belgium for its failure to notify in advance to the Commission the tax scheme applicable to activities carried out by FSCs in Belgium.

Absence of any advantages

(26) With respect to the alleged advantage for FSC branches, Belgium maintains that the scheme corresponds to the ordinary tax regime applicable to any foreign company operating in Belgium. According to it, Article 182(1)(3)(e) of the Royal Decree implementing the CIR 1992 reinstated an administrative presumption originally enacted in 1964 regarding the minimum taxable profits of a permanent establishment of a foreign company carrying on business activities in Belgium. Under this scheme, the minimum taxable profit is set at 8 % of the eligible costs of such an establishment. For Belgium, the 8 % minimum mark-up fixed in advance is designed to relieve the tax administration of the obligation to determine on a case-by-case basis the arm's-length profit to be applied to controlled transactions between a permanent establishment and its foreign head office or other associated companies within the group.

Absence of reduction in tax revenue for the State

(27) Belgium considers that, since its introduction, the special scheme for FSCs has generated additional tax revenue for the Belgian State with respect to certain items of income that would otherwise have escaped taxation in Belgium. Therefore, the scheme in question would not have led to any reduction in tax revenue for the Belgian State.

Absence of effect on competition and trade between Member States

(28) Belgium first observes that the Commission has not identified the alleged negative impact on intra-Community trade and on competition caused by the scheme in question with regard to the actual activities carried on by FSCs under the relevant United States regime. According to Belgium, the Commission misconstrued legitimate international tax competition as illegitimate national measures in favour of multinational enterprises. More generally, it is claimed that the Commission failed to consider the effects of the non-harmonised tax regimes in force in various Member States on competition between multinationals based there.

(29) In addition, Belgium claims that the Commission did not demonstrate how the fixed 8 % mark-up under the cost-plus method and the exclusion of certain costs from the computation under that same method of taxable profits in Belgium might have resulted in a reduced tax base as compared with that resulting from the ordinary transfer-pricing method generally applicable to controlled transactions.

(30) Belgium also claims that the objective of both the Belgian and the United States arrangements for FSCs is to confer an advantage on United States exporting companies. Thus, the scheme could not affect competition and trade between Member States, but only

([9]) See the answer given on 10 June 1985 by Mr De Clerq on behalf of the Commission to Written Question No 1664/84 by Mrs Marijke Van Hemeldonck (OJ C 197, 5.8.1985, p. 6).

([10]) OJ L 83, 27.3.1999, p. 1.

competition and trade between the United States and the Community. For this reason, according to Belgium and as already mentioned, the Commission has explicitly excluded in the past any anti-competitive effect of the scheme in question on intra-Community trade and competition.

Absence of selectivity

(31) Lastly, Belgium considers that the scheme in question is not selective because its special legal basis formally consisting in a 1984 circular became void when in 2000 the FSC regime was repealed by the United States Congress.

(32) Although the scheme might still be applicable in a very small number of cases concerning certain earlier rulings, such rulings have as their sole legal basis Article 182(1)(3)(e) of the Royal Decree implementing Article 342(2) of the CIR 1992. This is the ordinary tax law to which all permanent establishments of foreign companies in Belgium are subject and so the scheme would not be selective.

(33) Furthermore, according to Belgium, the application of a special method for computing the tax base for FSC branches is justified by the impossibility of determining the taxable profits of a permanent establishment analytically because of the lack of adequate bookkeeping by such branches.

(34) Still according to Belgium, the exclusion of certain expenses (concerning advertising, sales promotion, transport and credit risk insurance) from the cost-plus computation for FSC branches is justified by the limited activities carried out by such branches. In fact, these activities correspond to business transactions whose economic benefit is attributable to the associated foreign entities with which FSC branches deal. As this benefit is attributable to the other party in the transaction, the resulting profits should not be taxable in the hands of the FSC branch in accordance with the arm's-length principle. In this respect, Belgium maintains that the tax scheme for the Belgian activities of FSC branches does not differ from the standard tax arrangements for other controlled cross-border transactions.

Conclusion

(35) The Belgian Government claims that, even if the tax ruling system were to be regarded as state aid, the Commission could not order repayment of the advantages that might have accrued to the beneficiaries by virtue of the principle of legitimate expectation. Furthermore, it would be impossible to compute and claim repayment of advantages allegedly enjoyed by non-resident taxpayers, which fall outside the scope of Belgian jurisdiction. Accordingly, recovery of the presumed aid should be forgone.

V. ASSESSMENT OF THE MEASURE

(36) In its letter opening the formal procedure, the Commission indicated that, in the case of FSC subsidiaries, the advantage conferred by the scheme derives from the way in which the mark-up applied to admissible costs is computed. These admissible costs account, in fact, for only a small portion of the transactions carried out by FSC subsidiaries. Furthermore, the fixed 8 % mark-up appears to be substantially lower than that normally generated by the activities of FSC subsidiaries.

(37) Having considered the comments by the Belgian authorities, the Commission maintains the position it expressed in its letter of 12 April 2002 ([11]) opening the formal procedure, namely that the scheme under examination constitutes operating aid within the meaning of Article 87(1) of the EC Treaty.

Preliminary observations

(38) The Commission rejects Belgium's remarks that the tax scheme for FSC activities in Belgium has little practical relevance as there are no FSC subsidiaries in Belgium and that the FSC branches were subjected to the same tax treatment as all other permanent establishments of foreign companies in Belgium. These remarks prompt the following observations by the Commission.

(39) Besides being governed by different legal bases, FSC subsidiaries and branches were treated in very similar fashion for corporation tax purposes and, furthermore, no conclusion as to the nature of the scheme can be drawn from the absence of FSC subsidiaries in Belgium.

([11]) See footnote 1.

In fact, the scheme could actually confer advantages exclusively on FSC branches and, as such, could constitute incompatible aid.

(40) The Commission rejects the Belgian authorities' remark concerning its supposed implicit approval of the tax scheme for FSC activities in Belgium. In its view, the argument that, by answering the abovementioned parliamentary question in 1985, it might have indirectly acknowledged the existence of the Belgian scheme has no bearing whatsoever on the classification of the measure. The Commission notes that it is settled case law that the answer to the question as to whether aid is illegal aid or existing aid cannot depend on a subjective assessment by the Commission ([12]).

(41) The scheme was introduced in 1984 and took effect in 1985 without having been previously notified to the Commission and, as such, the measure has been implemented unlawfully. Accordingly, the scheme may constitute unlawful aid if it fulfils all the four criteria discussed below.

Advantage

(42) First, the measure must confer on beneficiaries an advantage that relieves them of charges normally borne by their budgets. According to point 9 of the Notice ([13]), a tax advantage may be provided through a reduction in the company's tax burden in various ways, including through a reduction in the tax base.

(43) However, the Commission confirms its assessment according to which, by substantially deviating from the profit determination standard used for comparable taxpayers carrying on similar cross-border transactions, the measure constitutes for FSC branches and subsidiaries an advantage consisting in a reduction in their taxable profits as detailed below.

(44) At the time the United States regime for FSCs was set up, the United States took the view that the exemption from United States corporation tax would be given the go-ahead by the GATT provided that the economic activities yielding the exempt income took place outside the United States. Thus, the United States legislation required FSCs to perform substantial economic activities as independent foreign companies. However, the WTO Panel found that the FSC regime constituted a subsidy because it resulted in forgone revenue as compared with the United States general system for taxing the income of foreign subsidiaries. Furthermore, it concluded that the GATT should forbid the subsidy because it was linked to exports since only foreign trade income deriving from 'export property' ([14]) qualified for the measure.

(45) The Commission notes that, under the United States regime, the tax advantages conferred on FSCs specifically concern their 'exempt foreign trade income', which means the portion of the gross foreign trade income of an FSC computed in accordance with one of the special 'administrative pricing rules' ([15]). Such income includes:

— the sale or lease of goods purchased by an FSC from a person under the same control as the FSC (normally its controlling United States company),

— the agency services concerned with such sale or lease of goods, and

— all other services concerned with such sales and lease transactions.

(46) In connection with the United States regime, the Commission observes that the activities of an FSC or of its branch in Belgium correspond to the sale or lease of

([12]) See Case C-295/97 Piaggio [1999] ECR I-3735.
([13]) See footnote 3.

([14]) Under the regime for FSCs, 'export property' means goods that are 1. manufactured, produced, grown or extracted in the United States by a person other than the FSC, 2. held primarily for sale or lease in the ordinary course of FSC business, and 3. sold or leased for direct consumption, use or disposition outside of the United States — Section 927(a)(1) of the IRC 1986. Furthermore, not more than 50 % of the value of export property may be attributed to materials or components imported into the United States — Section 927(a)(1)(C) of the IRC 1986 and Reg. Section 1.927(a)-1T(e).

([15]) Under the United States legislation, the FSC's income from the controlled sale, lease and service transactions is determined using one of the following three inter-company pricing regimes: (a) the combined taxable income method; (b) the gross receipt method; or (c) the arm's-length pricing rule. Whichever method produces the highest taxable income for the FSC is the one accepted. Under the tax exemption, such 'exempt foreign source income' is deemed to be foreign-source income that is 'not effectively connected' with the conduct of an activity in the United States.

goods originating in the United States and purchased from an associated company within the group and to the supply of all the services related to those sales and lease transactions.

(47) Under the regime in question, a fixed 8 % mark-up is applied only to the eligible direct costs borne by an FSC branch or subsidiary to give the amount of taxable profits. The eligible costs do not include the direct costs relating to advertising, sales promotion, carriage of goods and credit risk since, according to Belgium, these expenses are directly imputed to the foreign controlled entities with which the FSC branch or subsidiary is dealing.

(48) The Commission notes, first of all, that the 8 % fixed mark-up may understate the profitability level attributable to the FSC branch or subsidiary relative to the mark-up that would have been applied in a comparable transaction by the same enterprise or by another enterprise with an uncontrolled partner. Under the OECD Report's guidelines on the cost-plus method, an appropriate mark-up is added to the direct and indirect costs incurred by a supplier of property or services in a controlled transaction in order to generate profit that is appropriate in the light of the functions performed and taking into account the assets used, the risks assumed and the market conditions. The Commission concludes that, by setting the mark-up at 8 %, the regime does not take into account all possible factors to arrive to an appropriate profit determination and that, in certain cases, it may therefore understate the taxable profits of an FSC branch or subsidiary.

(49) The Commission also notes that the United States exemption of a portion of the foreign trade income of an FSC is conditional on the fact that the 'economic process with respect to such transactions takes place outside the United States'. Under Section 924(b)(1)(B) of the IRC 1986, this requirement is met only if the FSC participates in the solicitations or negotiations leading to the sale of export property or in making the contract of sale and if at least 50 % of its direct costs for the transactions are incurred outside the United States. Under Section 924(e), direct costs include costs of 1. advertising and sales promotion, 2. processing customer orders and arranging for delivery, 3. transporting the goods, 4. invoicing customers and receiving payment, and 5. assuming credit risks. The Commission considers that these activities could generate considerable streams of income for the supplier. The exclusion of business activities from the cost-plus computation method leads to an artificial reduction in the taxable profit. More particularly, the Commission stresses the similarity between the activities that are expressly attributed to an FSC on the basis of costs incurred under Section 924(e) and the costs that are expressly excluded from the profit computation of FSC branches and subsidiaries under the Belgian scheme. The Commission concludes that, by not taking into account the above costs, the scheme has the effect of exempting most of the income attributable to an FSC branch or subsidiary in Belgium.

(50) The Commission thus confirms its assessment according to which the scheme confers on FSC branches and subsidiaries an advantage in the form of a reduction in taxable profits for Belgian corporation tax purposes.

State resources

(51) Second, the advantage must be granted by the State or through State resources. A reduction in taxable profits, such as that granted to companies under the fixed 8 % cost-plus method applied to certain eligible costs, is such as to yield a tax reduction for the beneficiaries and hence a reduction in tax revenue for the Belgian treasury.

(52) The Commission cannot accept the argument of the Belgian authorities that the scheme has led to an increase in tax revenues as a result of the establishment of FSC branches or subsidiaries in Belgium. In its analysis, it makes exclusive reference to the tax revenues that would have accrued to the Belgian treasury if the FSC subsidiaries and branches had been taxed under ordinary Belgian tax law. By comparison with the tax normally imposed on the business activities in Belgium of branches and the subsidiaries of foreign companies, the tax imposed on FSCs operating in Belgium is, in fact, reduced under the scheme. According to paragraph 10 of the Notice, this is equivalent to consumption of state resources in the form of fiscal expenditure.

Effects on competition and trade

(53) Third, the measure must affect competition and trade between Member States. Belgium has criticised the Commission for not having specified in its letter of

12 April 2002 ([16]) the negative effect that the scheme would have had on competition in the light of the purpose of the United States regime for FSCs, which is to confer an advantage on United States exporting companies.

(54) As explained in paragraph 11 of the Notice, competition is affected if the position of a company benefiting from the measure is strengthened compared with that of its competitors. From the above analysis of the functioning of the United States regime, it is clear that the application by Belgium of the cost-plus method under the scheme leads to the determination of lower taxable profit compared with other comparable controlled transactions in Belgium. It also appears that an FSC branch or subsidiary may be active in sectors such as advertising, sales promotion, carriage of goods and credit services, all of which are subject to strong intra-Community competition. The advantage that the special ruling system for the activities of United States FSCs in Belgium confers on beneficiaries in the form of a reduction in the tax base is such as to strengthen the position of FSC branches and subsidiaries as well as the position of the group to which they belong, to the detriment of competitors.

(55) Furthermore, as explained in paragraph 11 of the Notice, the above criterion is also fulfilled if a company benefiting from a measure carries on an economic activity involving trade between Member States. The FSC branches and subsidiaries that are granted a reduction in their tax base under the special ruling system for the activities of United States FSCs in Belgium necessarily form part of international groups that take part in international trade, including Community trade. The Commission concludes that, by conferring an advantage on certain group members, the scheme strengthens the trading position of the group to which the beneficiaries belong as compared with other groups that may also be actively involved in Community trade.

Selectivity

(56) Lastly, the measure must be specific or selective in that it favours 'certain undertakings or the production of certain goods'. The Belgian authorities maintain that, since the circular setting up the scheme has become void, the ruling system for FSCs in Belgium does not differ from the system applicable to any other Belgian subsidiary or branch of a foreign company and would not, therefore, be specific. Accordingly, the fixed 8 % cost-plus method would determine the minimum taxable income deriving from the exercise of commercial activities by a foreign company in Belgium (under Article 182(1)(3)(e) of the Royal Decree implementing Article 342(2) of the CIR 1992), irrespective of whether such activities are exercised by an FSC subsidiary, an FSC branch or any other subsidiary or branch of a foreign company. The exclusion of certain direct costs such as those relating to advertising, sales promotion, carriage of goods and credit risks from the basis for computing the taxable profits of an FSC subsidiary or branch using the cost-plus method would be justified by the fact that the costs relating to such activities constitute the associated company's revenues and, as such, are taxable in the foreign jurisdiction where that associated company is established. The Belgian activities of an FSC branch or subsidiary are only administrative and ancillary in nature, while advertising, sales promotion, carriage of goods and credit-risk costs are attributable to the foreign entities of the group.

(57) After close scrutiny of Belgium's arguments, the Commission confirms its opinion that the ruling system for the Belgian activities of FSCs constitutes a specific scheme applicable exclusively to FSC branches and subsidiaries, and this for the following reasons.

(58) Under ordinary Belgian law (Article 342(1) of the CIR 1992), if a taxpayer is unable to provide evidence of its taxable profits to the tax administration, the latter is to determine such profits by making a comparison with three other similar taxpayers having comparable invested capital, turnover, staff and other relevant elements. In such circumstances (taxpayer unable to substantiate its taxable profits to the authorities), specific rules may be enacted by royal decree in order to fix the minimum taxable profits of foreign companies operating in Belgium (Article 342(2) of the CIR 1992). Article 182(1)(3)(e) of the Royal Decree implementing Article 342(2) sets the minimum taxable profits of foreign companies supplying services not otherwise taxed at 10 % of the gross turnover deriving from such supplies.

(59) The Commission also observes that the arrangements laid down in Article 182(1)(3)(e) do not justify the special tax scheme applicable to FSC activities in Belgium. Furthermore, the flat-rate computation provided for by that Article allows the minimum taxable

([16]) See footnote 1.

profits to be fixed at 10 % applying the 'resale-minus method', as opposed to the fixed 8 % under the cost-plus method.

(60) As indicated above, both under Belgian domestic law and under the tax treaties concluded by Belgium, the tax administration has the power to adjust the book profits of a Belgian taxpayer, whether a separate company or a permanent establishment of a foreign company, that derive from controlled transactions with foreign taxable entities in cases where these profits do not comply with the arm's-length principle.

(61) The Commission recognises that the uncertainty attaching to the determination of arm's-length profit has contributed to the development of an advance ruling practice in Belgium under Article 345(1) of the CIR 1992 designed to ascertain whether certain controlled transactions are conducted at arm's length. Such a general ruling practice is consistent with the principles spelt out in the 1995 OECD Report, which authorises the indirect cost-plus profit determination method provided that it is applied in light of the functions performed by the taxpayer and takes into account the assets used, the risks assumed and the specific market conditions.

(62) The Commission finds that, by setting the appropriate taxable profit level calculated using the method with a fixed 8 % rate, the resulting profit does not take into account the relevant factors verified as part of an arm's-length analysis, such as the functions performed by the taxpayer, the assets used, the risks assumed and the market conditions. It concludes that the scheme for FSCs operating in Belgium is a specific tax scheme which diverges from the ordinary tax arrangements applicable to any other Belgian subsidiary or branch of a foreign company.

Justification by the nature or general scheme of the system

(63) Belgium also maintains that the scheme applies to all foreign enterprises operating in Belgium and not in a position to determine their taxable profits analytically and that this characteristic justifies the application of a special profit computation method.

(64) However, the impossibility of determining profit analytically is not a characteristic peculiar to an FSC subsidiary or branch. The Commission observes that, under the United States legislation, an FSC must be organised or have an office in a foreign country that has an agreement with the United States on sharing tax information, as is the case with Belgium ([17]), where the FSC must keep a set of permanent accounts. Thus, if to benefit from the United States tax incentives, the activities of an FSC must be determined on the basis of separate accounting records, the same records should be taken into account in substantiating before the tax administration in Belgium the FSC's profit deriving from the activities performed in Belgium.

(65) The Commission regards as unjustified Belgium's exclusion of certain direct costs such as advertising, sales promotion, carriage of goods and credit risks from the cost-plus computation basis for taxable profit. As indicated above, these costs relate to business activities normally carried on by FSC branches and subsidiaries in order for the FSC group to benefit from the partial exemption of FSC income from United States tax.

(66) Contrary to what was indicated by Belgium, the profits deriving from such activities are not normally taxed by the foreign jurisdictions in which the business partner of the Belgian FSC is based. The Commission notes that excluding the above-mentioned costs from the profit computation would result in the non-taxation of the corresponding profits both in Belgium and the United States, which is not justified under the international tax principles set out in Article 7(1) of the OECD Model Tax Convention:

'The profits of an enterprise of a Contracting State shall be taxable only in that State, unless an enterprise carries on a business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.'

Furthermore, the Commission observes that the same principles are applied under Belgian domestic law, which stipulates that resident companies are subject to Belgian tax on their worldwide income, while non-resident companies operating in Belgium are subject to tax on the income arising in Belgium.

([17]) See footnote 7.

The Commission concludes that, with respect to the business profits of an FSC subsidiary, the right to tax would arise in the State of residence of such a subsidiary, namely Belgium, while in the case of the profits of an FSC branch the right would arise in the State of the branch, again Belgium. A different allocation of the rights of taxation, as proposed by Belgium, would be an exception under both Belgian tax law and the tax treaties concluded by Belgium. Accordingly, the Commission rejects the justification given by Belgium and based on the fact that it would not have the right to tax FSC activities in Belgium. It thus confirms the specificity of the scheme in question.

Compatibility

(67) The Belgian authorities have not challenged the Commission's assessment in its letter of 12 April 2002 ([18]) that none of the derogations provided for in Article 87(2) and (3) of the EC Treaty, under which State aid may be considered compatible with the common market, applies in the present case. Accordingly, the Commission confirms its assessment, which can be summed up as follows.

(68) In so far as the Belgian scheme for FSCs constitutes state aid within the meaning of Article 87(1) of the EC Treaty, its compatibility must be evaluated in the light of the derogations provided for in Article 87(2) and (3) of the EC Treaty.

(69) The derogations in Article 87(2), which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.

(70) Nor does the exception provided for in Article 87(3)(a) apply, which authorises aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

(71) In the same way, the scheme cannot be regarded as promoting the execution of a project of common European interest or remedying a serious disturbance in the economy of Belgium, as provided for in Article 87(3)(b). Nor does it have as its object the promotion of culture and heritage conservation as provided for in Article 87(3)(d).

(72) Lastly, the scheme must be examined in the light of Article 87(3)(c), which authorises aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. The tax advantages granted under the scheme are not related to investment, job creation or specific projects. They simply relieve the firms concerned of charges normally borne by their budgets and must therefore be considered as operating aid the benefits of which cease as soon as the aid is withdrawn. In line with the standard practice of the Commission, such aid could not be considered to facilitate the development of certain activities or of certain economic areas.

Final observations on classification as State aid

(73) The Commission confirms the assessment made in its letter of 12 April 2002 ([19]) to the effect that the scheme for FSC activities in Belgium constitutes aid incompatible with the single market. As indicated above, the scheme entered into force in 1984 without prior notification to the Commission and is therefore considered to be unlawful State aid.

Legitimate expectation

(74) Where unlawfully granted State aid is found to be incompatible with the common market, it must be recovered from the beneficiary. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as is possible. However, Article 14(1) of Regulation (EC) No 659/1999 of 22 March 1999 states that 'the Commission shall not require the recovery of the aid if this would be contrary to a general principle of Community law'. The case-law of the Court of Justice and the Commission's own decision-making practice have established that, where, as a result of the Commission's actions, a legitimate

([18]) See footnote 1.

([19]) See footnote 1.

expectation exists on the part of the beneficiary of a measure that the aid has been granted in accordance with Community law, then an order to recover the aid would infringe a general principle of Community law.

(75) In the judgment in Van den Bergh en Jurgens ([20]), the Court ruled:

'The Court has consistently held that any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of protection of legitimate expectation. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.'

(76) Belgium has invoked the legitimate expectation of the beneficiaries with respect to a tax scheme in existence since 1984 and which in 1985 the Commission had considered to have a minimal effect on employment in the Community and thus, according to Belgium, on competition in general ([21]). In any event, Belgium has announced its willingness to dismantle the scheme as soon as the United States definitively complies with the WTO rulings and by 31 December 2003 at the latest.

(77) Pursuant to Article 14(1) of Council Regulation (EC) No 659/1999, the Commission takes into account the exceptional circumstances justifying non-recovery of aid unlawfully granted to the beneficiary of a scheme where this would be contrary to a general principle of Community law such as respect for legitimate expectation. In the present case, it notes that the scheme for FSC activities in Belgium bears a close resemblance in many respects to the scheme introduced in Belgium by Royal Decree No 187 of 30 December 1982 on the tax treatment of coordination centres. Both schemes concern intra-group activities and both use the cost-plus method to determine the tax base. In its decision of 2 May 1984, the Commission considered the scheme not to be aid within the meaning of Article 92(1) of the Treaty (now Article 87(1)). Even if this decision was not published, the fact that the Commission did not raise any objections to the Belgian coordination centres scheme was mentioned both in the Fourteenth Report on Competition Policy and in an answer to a parliamentary question ([22]).

([20]) Case C-265/85 Van den Bergh en Jurgens BV v Commission [1987] ECR 1155, paragraph 44.
([21]) See footnote 9.
([22]) Written Question No 1735/90 (OJ C 63, 11.3.1991).

(78) In this context, the Commission notes that its decision on the Belgian coordination centres scheme was taken before the entry into force of the scheme for FSC activities in Belgium. It thus considers that the beneficiaries of the scheme had a legitimate expectation that, at the time they benefited from the scheme, it did not constitute aid, thereby preventing the Commission from ordering the recovery of any aid granted.

(79) With reference to Belgium's willingness to dismantle the scheme by December 2003 at the latest, the Commission considers that the principle of legitimate expectation would cover enterprises approved under the scheme before the opening of the formal investigation procedure in respect of any aid granted up to the end of the tax year in which the procedure is closed.

VI. **CONCLUSIONS**

(80) The Commission finds that Belgium has, in breach of Article 88(3) of the Treaty, unlawfully implemented the tax ruling system for the business activities of FSCs as applied by the Belgian tax administration since January 1985. It concludes that the tax reliefs accorded under the scheme constitute State aid that is not covered by any of the derogations from the prohibition of such aid and is therefore incompatible with the common market.

(81) The Commission also finds that the enterprises approved under the scheme had a legitimate expectation that, at the time they benefited from such a scheme, it did not constitute aid. Accordingly, it will not require recovery of the aid,

HAS ADOPTED THIS DECISION:

Article 1

The State aid scheme implemented by Belgium in the form of the special ruling system for the business activities of United States foreign sales corporations in Belgium is incompatible with the common market.

Article 2

Belgium shall abolish the aid scheme referred to in Article 1 with effect from the first tax year following the date of notification of the present decision.

Article 3

Belgium shall inform the Commission, within two months of the date of notification of this decision, of the measures taken to comply with it.

Article 4

This decision is addressed to the Kingdom of Belgium.

Done at Brussels, 24 June 2003.

For the Commission

Mario MONTI

Member of the Commission

DECISION No 2/2003 OF THE JOINT VETERINARY COMMITTEE SET UP BY THE AGREEMENT BETWEEN THE EUROPEAN COMMUNITY AND THE SWISS CONFEDERATION ON TRADE IN AGRICULTURAL PRODUCTS

of 25 November 2003

amending Appendices 1, 2, 3, 4, 5, 6 and 11 to Annex 11 to the Agreement

(2004/78/EC)

THE COMMITTEE,

Having regard to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products [1] (hereinafter called the 'Agriculture Agreement'), and in particular Article 19(3) of Annex 11 thereto,

Whereas:

(1) The Agriculture Agreement entered into force on 1 June 2002.

(2) Appendices 1, 2, 3, 4, 5, 6 and 11 to Annex 11 to the Agreement should be amended in order to take account of changes in the Community and Swiss legislation in force at 31 December 2002.

(3) At the same time, Appendices 1 and 2 to Annex 11 to that Agreement should be amended to take account of the Community and Swiss legislation on bovine spongiform encephalopathy (BSE) and the detailed rules and arrangements for implementing that legislation as regards trade in live bovine animals, their semen, ova and embryos.

(4) Article 2.3.13.8 of the International Animal Health Code produced by the International Office of Epizootic Diseases (OIE) stipulates that 'regardless of the BSE status of the exporting country, Veterinary Administrations should authorise without restriction the import or transit through their territory' of bovine semen and embryos,

HAS DECIDED AS FOLLOWS:

Article 1

Appendices 1, 2, 3, 4, 5, 6 and 11 to Annex 11 to the Agreement between the European Community and the Swiss Confederation on trade in agricultural products are hereby replaced by the respective Appendices in the Annex to this Decision.

Article 2

This Decision, drawn up in duplicate, shall be signed by the joint chairmen or other persons empowered to act in the name of the Parties.

Article 3

This Decision shall be published in the *Official Journal of the European Union*.

It shall take effect on the date of the last signature.

Signed at Brussels, on 25 November 2003.

On behalf of the Swiss Confederation	*On behalf of the European Commission*
Head of Delegation	*Head of Delegation*
Hans WYSS	Alejandro CHECCHI LANG

[1] OJ L 114, 30.4.2002, p. 132.

ANNEX

'Appendix 1

CONTROL MEASURES/NOTIFICATION OF DISEASES

I. **Foot-and-mouth disease**

A. LEGISLATION

Community

1. Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease (OJ L 315, 26.11.1985, p. 11), as last amended by the Act of Accession of Austria, Finland and Sweden

2. Council Directive 90/423/EEC of 26 June 1990 amending Directive 85/511/EEC introducing Community measures for the control of foot-and-mouth disease, Directive 64/432/EEC on animal health problems affecting intra-Community trade in bovine animals and swine and Directive 72/462/EEC on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat or meat products from third countries (OJ L 224, 18.8.1990, p. 13)

Switzerland

1. Law on epizootic diseases (LFE) of 1 July 1966, as last amended on 15 December 2000 (RS 916.40), and in particular Articles 1, 1a and 9a (measures against highly contagious epizootic diseases, control objectives) and 57 (technical implementing provisions, international cooperation) thereof

2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001, (RS 916.401), and in particular Articles 2 (highly contagious epizootic diseases), 49 (handling micro-organisms that are pathogenic for animals), 73 and 74 (cleaning and disinfection), 77 to 98 (common provisions concerning highly contagious epizootic diseases) and 99 to 103 (specific measures to combat foot-and-mouth disease) thereof

3. Ordonnance of 14 June 1999 on the organisation of the Département fédéral de l'économie (RS 172.216.1), and in particular Article 8 thereof (reference laboratory, registration, control and provision of vaccine against foot-and-mouth disease)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. In principle, the Commission and the Office Vétérinaire Fédéral shall notify each other of any intention to carry out emergency vaccinations. In extreme emergencies, notification may cover the decision as taken and the rules and procedures governing its implementation. At all events, consultations must be held as soon as possible within the Joint Veterinary Committee.

2. Pursuant to Article 97 of the Ordonnance on epizootic diseases, Switzerland has established an emergency warning plan. Technical implementation rule No 95/65 issued by the Office Vétérinaire Fédéral lays down the procedures for that plan.

3. The joint reference laboratory for identifying foot-and-mouth virus shall be the Institute for Animal Health, Pirbright Laboratory, United Kingdom. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Decision 89/531/EEC (OJ L 279, 28.9.1989, p. 32).

II. **Classical swine fever**

A. LEGISLATION

Community	Switzerland
Council Directive 2001/89/EC of 23 October 2001 on Community measures for the control of classical swine fever (OJ L 316, 1.12.2001, p. 5)	1. Law on epizootic diseases (LFE) of 1 July 1966, as last amended on 15 December 2000 (RS 916.40), and in particular Articles 1, 1a and 9a (measures against highly contagious epizootic diseases, control objectives) and 57 (technical implementing provisions, international cooperation) thereof 2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001, (RS 916.401), and in particular Articles 2 (highly contagious epizootic diseases), 40 to 47 (disposal and use of waste), 49 (handling micro-organisms that are pathogenic for animals), 73 and 74 (cleaning and disinfection), 77 to 98 (common provisions concerning highly contagious epizootic diseases) and 116 to 121 (detection of swine fever at slaughter, specific measures to combat swine fever) thereof 3. Ordonnance of 14 June 1999 on the organisation of the Département fédéral de l'économie (RS 172.216.1), and in particular Article 8 thereof (reference laboratory) 4. Ordonnance of 3 February 1993 on the elimination of animal waste (OELDA), as last amended on 20 November 2002 (RS 916.441.22)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The Commission and the Office Vétérinaire Fédéral shall notify each other of any intention to carry out emergency vaccinations. Consultations shall be held as soon as possible within the Joint Veterinary Committee.

2. If necessary, pursuant to Article 117(5) of the Ordonnance on epizootic diseases, the Office Vétérinaire Fédéral shall lay down technical implementing rules on the marking and treatment of meat coming from protection and surveillance zones.

3. Pursuant to Article 121 of the Ordonnance on epizootic diseases, Switzerland undertakes to implement a plan to eradicate classical swine fever in wild pigs in accordance with Articles 15 and 16 of Directive 2001/89/EC. Consultations shall be held as soon as possible within the Joint Veterinary Committee.

4. Pursuant to Article 97 of the Ordonnance on epizootic diseases, Switzerland has established an emergency warning plan. Technical implementation rule No 95/65 issued by the Office Vétérinaire Fédéral lays down the procedures for that plan.

5. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 21 of Directive 2001/89/EC and Article 57 of the Law on epizootic diseases.

6. If necessary, pursuant to Article 89(2) of the Ordonnance on epizootic diseases, the Office Vétérinaire Fédéral shall lay down technical implementing rules on serological checks in protection and surveillance zones in accordance with Annex IV to Decision 2002/106/EC (OJ L 39, 9.2.2002, p. 71).

7. The joint reference laboratory for classical swine fever shall be the Institut für Virologie der Tierärztlichen Hochschule Hannover, Bünteweg 17, D-30559, Hannover, Germany. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Annex IV to Directive 2001/89/EC.

III. **African horse sickness**

A. LEGISLATION

Community	Switzerland
Council Directive 92/35/EEC of 29 April 1992 laying down control rules and measures to combat African horse sickness (OJ L 157, 10.6.1992, p. 19), as last amended by the Act of Accession of Austria, Finland and Sweden	1. Law on epizootic diseases (LFE) of 1 July 1966, as last amended on 15 December 2000 (RS 916.40), and in particular Articles 1, 1a and 9a (measures against highly contagious epizootic diseases, control objectives) and 57 (technical implementing provisions, international cooperation) thereof 2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 2 (highly contagious epizootic diseases), 49 (handling micro-organisms that are pathogenic for animals), 73 and 74 (cleaning and disinfection), 77 to 98 (common provisions concerning highly contagious epizootic diseases) and 112 to 115 (specific measures to combat African horse sickness) thereof 3. Ordonnance of 14 June 1999 on the organisation of the Département fédéral de l'économie (RS 172.216.1), and in particular Article 8 thereof (reference laboratory)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. Where an epizootic disease of particular severity develops in Switzerland, the Joint Veterinary Committee shall meet to consider the situation. The competent Swiss authorities undertake to take the measures found necessary in the light of that examination.

2. The joint reference laboratory for African horse sickness shall be the Laboratorio de Sanidad y Producción Animal, Ministerio de Agricultura, Pesca y Alimentación, 28110 Algete, Madrid, Spain. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Annex III to Directive 92/35/EEC.

3. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 16 of Directive 92/35/EEC and Article 57 of the Law on epizootic diseases.

4. Pursuant to Article 97 of the Ordonnance on epizootic diseases, Switzerland has established an action plan. Technical implementation rule No 95/65 issued by the Office Vétérinaire Fédéral lays down the procedures for that plan.

IV. **Avian influenza**

A. LEGISLATION

Community	Switzerland
Council Directive 92/40/EEC of 19 May 1992 introducing Community measures for the control of avian influenza (OJ L 167, 22.6.1992, p. 1) as last amended by the Act of Accession of Austria, Finland and Sweden	1. Law on epizootic diseases (LFE) of 1 July 1966, as last amended on 15 December 2000 (RS 916.40), and in particular Articles 1, 1a and 9a (measures against highly contagious epizootic diseases, control objectives) and 57 (technical implementing provisions, international cooperation) thereof 2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 2 (highly contagious epizootic diseases), 49 (handling micro-organisms that are pathogenic for animals), 73 and 74 (cleaning and disinfection), 77 to 98 (common provisions concerning highly contagious epizootic diseases) and 122 to 125 (specific measures concerning avian influenza) thereof 3. Ordonnance of 14 June 1999 on the organisation of the Département fédéral de l'économie (RS 172.216.1), and in particular Article 8 thereof (reference laboratory)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The joint reference laboratory for avian influenza shall be the Central Veterinary Laboratory, New Haw, Weybridge, Surrey KT15 3NB, United Kingdom. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Annex V to Directive 92/40/EEC.

2. Pursuant to Article 97 of the Ordonnance on epizootic diseases, Switzerland has established an emergency warning plan. Technical implementation rule No 95/65 issued by the Office Vétérinaire Fédéral lays down the procedures for that plan.

3. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 18 of Directive 92/40/EEC and Article 57 of the Law on epizootic diseases.

V. **Newcastle disease**

A. LEGISLATION

Community	Switzerland
Council Directive 92/66/EEC of 14 July 1992 introducing Community measures for the control of Newcastle disease (OJ L 260, 5.9.1992, p. 1), as last amended by the Act of Accession of Austria, Finland and Sweden	1. Law on epizootic diseases (LFE) of 1 July 1966, as last amended on 15 December 2000 (RS 916.40), and in particular Articles 1, 1a and 9a (measures against highly contagious epizootic diseases, control objectives) and 57 (technical implementing provisions, international cooperation) thereof 2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 2 (highly contagious epizootic diseases), 40 to 47 (disposal and use of waste), 49 (handling micro-organisms that are pathogenic for animals), 73 and 74 (cleaning and disinfection), 77 to 98 (common provisions concerning highly contagious epizootic diseases) and 122 to 125 (specific measures concerning Newcastle disease) thereof 3. Ordonnance of 14 June 1999 on the organisation of the Département fédéral de l'économie (RS 172.216.1), and in particular Article 8 thereof (reference laboratory) 4. Instruction (technical directive) of the Office Vétérinaire Fédéral of 20 June 1989 on combating paramyxovirosis in pigeons (Bulletin of the Office Vétérinaire Fédéral No 90(13) p. 113 (vaccination, etc.)) 5. Ordonnance of 3 February 1993 on the elimination of animal waste (OELDA), as last amended on 20 November 2002 (RS 916.441.22)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The joint reference laboratory for Newcastle disease shall be the Central Veterinary Laboratory, New Haw, Weybridge, Surrey KT15 3NB, United Kingdom. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Annex V to Directive 92/66/EEC.

2. Pursuant to Article 97 of the Ordonnance on epizootic diseases, Switzerland has established an emergency warning plan. Technical implementation rule No 95/65 issued by the Office Vétérinaire Fédéral lays down the procedures for that plan.

3. The information provided for in Articles 17 and 19 of Directive 92/66/EEC shall be the responsibility of the Joint Veterinary Committee.

4. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 22 of Directive 92/66/EEC and Article 57 of the Law on epizootic diseases.

VI. **Fish diseases**

A. LEGISLATION

Community	Switzerland
Council Directive 93/53/EEC of 24 June 1993 introducing minimum Community measures for the control of certain fish diseases (OJ L 175, 19.7.1993, p. 23), as last amended by Commission Decision 2001/288/EC of 3 April 2001 amending Council Directive 93/53/EEC introducing minimum Community measures for the control of certain fish diseases, in relation to the list of national reference laboratories for fish diseases (OJ L 99, 10.4.2001, p. 11)	1. Law of 1 July 1966 on epizootic diseases (LFE), as last amended on 15 December 2000 (RS 916.40), and in particular Articles 1, 1a and 10 (measures against epizootic diseases) and 57 (technical implementing provisions, international cooperation) thereof 2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 3 and 4 (epizootic diseases referred to), 61 (obligations of leasers of fishing rights and of bodies responsible for monitoring fishing), 62 to 76 (general measures for combating disease) 275 to 290 (specific measures relating to fish diseases, diagnostic laboratory) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. At present salmon farming is not authorised and the species is not present in Switzerland. In accordance with amendment I to the Ordonnance on epizootic diseases (OFE) of 28 March 2001 (RO 2001.1337), infectious anaemia in salmon is now classified in Switzerland as a disease to be eradicated. The situation shall be reviewed within the Joint Veterinary Committee one year after the entry into force of this Annex.

2. Flat oyster farming is not currently practised in Switzerland. Should cases of bonamiosis or marteiliosis appear, the Office Vétérinaire Fédéral undertakes to take the necessary emergency measures in accordance with Community rules on the basis of Article 57 of the Law on epizootic diseases.

3. In cases as referred to in Article 7 of Directive 93/53/EEC, the information shall be submitted to the Joint Veterinary Committee.

4. The joint reference laboratory for fish diseases shall be the Statens Veterinaere Serumlaboratorium, Landbrugsministeriet, Hangövej 2, 8200 Århus, Denmark. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Annex C to Directive 93/53/EEC.

5. Pursuant to Article 97 of the Ordonnance on epizootic diseases, Switzerland has established an action plan. Technical implementation rule No 95/65 issued by the Office Vétérinaire Fédéral lays down the procedures for that plan.

6. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 16 of Directive 93/53/EEC and Article 57 of the Law on epizootic diseases.

VII. **Bovine spongiforme Enzephalopathie**

A. LEGISLATION

Community

Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (OJ L 147, 31.5.2001, p. 1), as last amended by Commission Regulation (EC) No 1234/2003 of 10 July 2003 of 10 July 2003 amending Annexes I, IV and XI to Regulation (EC) No 999/2001 of the European Parliament and of the Council and Regulation (EC) No 1326/2001 as regards transmissible spongiform encephalopathies and animal feeding (OJ L 173, 11.7.2003, p. 6)

Switzerland

1. Ordonnance of 27 May 1981 on the protection of animals (OPAn), as last amended on 27 June 2001 (RS 455.1), and in particular Article 64f thereof (stunning procedures)

2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Articles 3 (Office Vétérinaire Fédéral), 25 to 58 (import) and 64 to 77 (exports) thereof

3. Ordonnance (1/90) of 13 June 1990 temporarily prohibiting the import of ruminants and the products of such animals from Great Britain (RS 916.443.39)

4. Law of 9 October 1992 on foodstuffs (LDA1), as last amended on 15 December 2000 (RS 817.0), and in particular Articles 24 (inspection and sampling) and 40 (inspection of foodstuffs) thereof

5. Ordonnance of 5 March 1995 on meat hygiene (OhyV), as last amended on 28 March 2001 (RS 817.190), and in particular Articles 31 to 33 (inspection of animals before slaughter), 48 (duties of meat inspectors) and 49 to 54 (duties of meat checkers)

6. Ordonnance of 1 March 1995 on foodstuffs (ODA1), as last amended on 27 March 2002 (RS 817.02), and in particular Article 122 thereof (parts of the carcase which may not be used)

7. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 6 (definitions and abbreviations), 36 (Patent), 61 (obligation to report), 130 (surveillance of Swiss livestock), 175 to 185 (transmissible spongiform encephalopathies), 297 (internal implementation), 301 (duties of the canton veterinarian), 303 (training and further training of veterinary officials) and 312 (diagnostic laboratories) thereof

8. Ordonnance of 10 June 1999 on the catalogue of feedingstuffs (OLAlA), as last amended on 17 October 2002 (RS 916.307.1), and in particular Article 28 thereof (transport of feedingstuffs for productive animals), Annex 1, Part 9 (products of land animals), Part 10 (fish, other marine animals and their products and by-products) and Annex 4 (list of banned substances) thereto

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The joint reference laboratory for bovine spongiform encephalopathy (BSE) shall be the Veterinary Laboratories Agency, Woodham Lane New Haw, Addlestone, Surrey KT15 3NB, United Kingdom. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Chapter B of Annex X to Regulation (EC) No 999/2001.

2. Pursuant to Article 57 of the Ordonnance on epizootic diseases, Switzerland shall establish an emergency plan for implementing measures to combat BSE.

3. Pursuant to Article 12 of Regulation (EC) No 999/2001, any animal suspected of being infected by a TSE in the Member States of the Community shall be placed under an official movement restriction until the results of a clinical and epidemiological examination carried out by the competent authority are known, or killed for laboratory examination under official control.

   Pursuant to Article 177 of the Ordonnance on epizootic diseases, Switzerland shall prohibit the slaughter of animals suspected of being infected by BSE. Suspect animals must be killed without spilling blood and incinerated, and their brains must be analysed in the Swiss reference laboratory for BSE.

   Pursuant to Article 10 of the Ordonnance on epizootic diseases, Switzerland shall identify bovine animals using a permanent identification system enabling them to be traced back to the dam and herd of origin and making it possible to establish that they are not the progeny of BSE suspected or confirmed females.

   Pursuant to Articles 178 and 179 of the Ordonnance on epizootic diseases, Switzerland shall slaughter animals infected with BSE and their progeny. Since 1 July 1999, Switzerland has also implemented slaughter by cohort (it practised slaughter by herd from 14 December 1996 until 30 June 1999).

4. Pursuant to Article 7 of Regulation (EC) No 999/2001, the Member States of the Community shall prohibit the feeding of processed animal proteins to farmed animals which are kept, fattened or bred for the production of food. There is a total prohibition on feeding proteins derived from animals to ruminants in the Member States of the Community.

   Pursuant to Article 183 of the Ordonnance on epizootic diseases, Switzerland has introduced a total prohibition on the feeding of animal protein to farmed animals, which entered into force on 1 January 2001.

5. Pursuant to Article 6 of Regulation (EC) No 999/2001 and in accordance with Chapter A of Annex III to that Regulation, the Member States of the Community shall introduce an annual BSE monitoring programme. This plan shall include a rapid BSE test for all cattle more than 24 months old subject to emergency slaughter, animals which have died on the farm or found to be ill during the ante mortem inspection and all animals more than 30 months old slaughtered for human consumption.

   The rapid BSE tests used by Switzerland are listed in Chapter C of Annex X to Regulation (EC) No 999/2001.

   Pursuant to Article 175a of the Ordonnance on epizootic diseases, Switzerland shall carry out a compulsory rapid BSE test for all bovine animals more than 30 months old subject to emergency slaughter, animals which have died on the farm or been found to be ill during the ante mortem inspection and all animals more than 30 months old slaughtered for human consumption. In addition, operators shall implement a voluntary programme for monitoring bovine animals more than 20 months old slaughtered for human consumption.

6. The Joint Veterinary Committee shall be responsible for providing the information required in Article 6 and Chapter B of Annex III and in Annex IV (3.II) to Regulation (EC) No 999/2001.

7. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 21 of Regulation (EC) No 999/2001 and Article 57 of the Law on epizootic diseases.

C. COMPLEMENTARY INFORMATION

1. From 1 January 2003, pursuant to the Ordonnance of 20 November 2002 on the allocation of contributions to cover the costs of eliminating animal waste in 2003 (RS 916.406), Switzerland has introduced a financial incentive for farms on which bovine animals are born and slaughterhouses where they are slaughtered, provided they comply with the procedures for declaring animal movements as provided for in the legislation in force.

2. Pursuant to Article 8 of Regulation (EC) No 999/2001 and in accordance with point 1 of Annex XI to that Regulation, the Member States of the Community shall remove and destroy specified risk materials (SRMs). The list of SRMs removed shall include, in particular, the spinal column of bovine animals more than 12 months old.

   Pursuant to Articles 181 and 182 of the Ordonnance on epizootic diseases and Article 122 of the Ordonnance on foodstuffs, Switzerland has introduced a policy of removing SRMs from the animal and human food chains. The list of SRMs removed includes, in particular, the spinal column of bovine animals more than 30 months old.

3. Regulation (EC) No 1774/2002 of the European Parliament and of the Council lays down health rules concerning animal by-products not intended for human consumption in the Member States of the Community.

   Pursuant to Article 4a of the Ordonnance on the elimination of animal waste, Switzerland shall incinerate animal by-products, including specified risk materials and animals which have died on the farm.

VIII. **Other diseases**

A. LEGISLATION

Community	Switzerland
Council Directive 92/119/EEC of 17 December 1992 introducing general Community measures for the control of certain animal diseases and specific measures relating to swine vesicular disease (OJ L 62, 15.3.1993, p. 69), as last amended by Council Directive 2002/60/EC of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Teschen disease and African swine fever (OJ L 192, 20.7.2002, p. 27)	1. Law of 1 July 1966 on epizootic diseases (LFE), as last amended on 15 December 2000 (RS 916.40), and in particular Articles 1, 1a and 9a (measures against highly contagious epizootic diseases, control objectives) and 57 (technical implementing provisions, international cooperation) thereof 2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 2 (highly contagious epizootic diseases), 49 (handling micro-organisms that are pathogenic for animals), 73 and 74 (cleaning and disinfection), 77 to 98 (common provisions concerning highly contagious epizootic diseases) and 103 to 105 (specific measures concerning the control of swine vesicular disease) thereof 3. Ordonnance of 14 June 1999 on the organisation of the Département fédéral de l'économie (RS 172.216.1), and in particular Article 8 thereof (reference laboratory)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. In cases as referred to in Article 6 of Directive 92/119/EEC, the information shall be submitted to the Joint Veterinary Committee.

2. The joint reference laboratory for swine vesicular disease shall be the AFR Institute for Animal Health, Pirbright Laboratory, Ash Road, Pirbright, Woking, Surrey GU24 0NF, United Kingdom. Switzerland shall pay the costs it incurs for operations carried out by the laboratory in that capacity. The functions and tasks of the laboratory shall be as laid down in Annex III to Directive 92/119/EEC.

3. Pursuant to Article 97 of the Ordonnance on epizootic diseases, Switzerland has established an emergency warning plan. Technical implementation rule No 95/65 issued by the Office Vétérinaire Fédéral lays down the procedures for that plan.

4. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 22 of Directive 92/119/EEC and Article 57 of the Law on epizootic diseases.

IX. **Notification of diseases**

A. LEGISLATION

Community	Switzerland
Council Directive 82/894/EEC of 21 December 1982 on the notification of animal diseases within the Community (OJ L 378, 31.12.1982, p. 58), as last amended by Commission Decision 2002/788/EC of 10 October 2002 amending Council Directive 82/894/EEC on the notification of animal diseases within the Community (OJ L 274, 11.10.2002, p. 33)	1. Law of 1 July 1966 on epizootic diseases (LFE), as last amended on 15 December 2000 (RS 916.40), and in particular Articles 11 (reporting and declaration of diseases) and 57 (technical implementing provisions, international cooperation) thereof 2. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 2 to 5 (diseases referred to), 59 to 65 and 291 (obligation to report, notification) and 292 to 299 (monitoring, implementation, administrative assistance) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

The Commission, in cooperation with the Office Vétérinaire Fédéral, shall integrate Switzerland into the animal disease notification system provided for in Directive 82/894/EEC.

Appendix 2

ANIMAL HEALTH: TRADE AND PLACING ON THE MARKET

I. **Bovine animals and swine**

A. LEGISLATION

Community	Switzerland
Council Directive 64/432/EEC of 26 June 1964 on animal health problems affecting intra-Community trade in bovine animals and swine (OJ L 121, 29.7.1964, p. 1977/64), as last amended by Commission Regulation (EC) No 1226/2002 of 8 July 2002 amending Annex B to Council Directive 64/432/EEC (OJ L 179, 9.7.2002, p. 13)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 27 to 31 (markets, exhibitions), 34 to 37 (trade), 73 and 74 (cleaning and disinfection), 116 to 121 (African swine fever), 135 to 141 (Aujeszky's disease), 150 to 157 (bovine brucellosis), 158 to 165 (tuberculosis), 166 to 169 ((enzootic bovine leucosis), 170 to 174 (IBR/IPV), 175 to 195 (spongiform encephalopathies), 186 to 189 (bovine genital infections), 207 to 211 (porcine brucellosis), 297 (approval of markets, assembly centres and disinfection points) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. Pursuant to the first paragraph of Article 297 of the Ordonnance on epizootic diseases, the Office Vétérinaire Fédéral shall approve assembly centres as defined in Article 2 of Directive 64/432/EEC.

2. The information provided for in Article 11(3) of Directive 64/432/EEC shall be submitted to the Joint Veterinary Committee.

3. For the purposes of this Annex, Switzerland is recognised as fulfilling the conditions laid down in AnnexA(II)(7) of Directive 64/432/EEC as regards bovine brucellosis. In order to maintain its status as having an officially brucellosis-free bovine herd, Switzerland undertakes to meet the following conditions:

   (a) Any animal of the bovine species suspected of being infected with brucellosis shall be reported to the competent authorities and the animal concerned shall undergo the official tests for brucellosis, comprising at least two serological tests with complement fixation and a microbiological examination of suitable samples taken in cases of abortion.

   (b) Until such time as suspicion of the disease is lifted, i.e. when the tests provided for in (a) have produced negative results, the officially brucellosis-free status of the herd to which the animal (or animals) of the bovine species suspected of infection belongs shall be suspended.

   Detailed information concerning herds testing positive and an epidemiological report shall be submitted to the Joint Veterinary Committee. If any of the conditions laid down in the first subparagraph of Annex A(II)(7) of Directive 64/432/EEC is not fulfilled by Switzerland, the Office Vétérinaire Fédéral shall immediately notify the Commission. The situation shall be considered within the Joint Veterinary Committee with a view to reviewing this paragraph.

4. For the purposes of this Annex, Switzerland is recognised as fulfilling the conditions laid down in Annex A(I)(4) of Directive 64/432/EEC as regards bovine tuberculosis. In order to maintain its status as having an officially tuberculosis-free bovine herd, Switzerland undertakes to meet the following conditions:

   (a) An identification system shall be introduced allowing each bovine animal to be traced back to its herd of origin.

(b) All slaughtered animals shall undergo a post mortem inspection carried out by an official veterinarian.

(c) Any suspected cases of tuberculosis in live, dead or slaughtered animals shall be reported to the competent authorities.

(d) In each case the competent authorities shall carry out the investigations necessary to establish whether the suspected disease is present, including upstream research on the herds of origin and transit herds. Where lesions suspected to have been caused by tuberculosis are discovered during an autopsy or on slaughter, the competent authorities shall have a laboratory examination conducted on the lesions.

(e) The officially tuberculosis-free status of the herds of origin and transit herds to which the bovine animal suspected of infection belong shall be suspended until clinical, laboratory or tuberculin tests have confirmed that no bovine tuberculosis is present.

(f) Where tuberculin, clinical or laboratory tests confirm that tuberculosis is present, the officially tuberculosis-free status of the herds of origin and transit herds shall be withdrawn.

(g) Officially tuberculosis-free status shall not be established until all the animals suspected of being infected have been removed from the herd, the premises and equipment have been disinfected and all the remaining animals aged over six weeks have reacted negatively to at least two official intradermal injections of tuberculin pursuant to Annex B to Directive 64/432/EEC, the first being carried out at least six months after the infected animal has left the herd and the second at least six months after the first.

Detailed information on the infected herds and an epidemiological report shall be submitted to the Joint Veterinary Committee. If any of the conditions laid down in the first subparagraph of Annex A(I)(4) of Directive 64/432/EEC is not fulfilled by Switzerland, the Office Vétérinaire Fédéral shall immediately notify the Commission. The situation shall be considered within the Joint Veterinary Committee with a view to reviewing this paragraph.

5. For the purposes of this Annex Switzerland is recognised as fulfilling the conditions laid down in Chapter I.F of Annex D to Directive 64/432/EEC as regards enzootic bovine leucosis. In order to maintain its status as having an officially enzootic bovine leucosis-free herd, Switzerland undertakes to meet the following conditions:

(a) The Swiss herd shall be monitored by sampling checks. The size of the sample shall be such that it can be declared with 99 % reliability that less than 0,2 % of herds are infected with enzootic bovine leucosis.

(b) All slaughtered animals shall undergo a post mortem inspection carried out by an official veterinarian.

(c) Any suspected cases of enzootic bovine leucosis found in clinical examinations, autopsies or checks on meat shall be reported to the competent authorities.

(d) Where enzootic bovine leucosis is suspected or found to be present, the officially leucosis-free status of the herd shall be suspended until the isolation period is terminated.

(e) The isolation period shall be terminated when, after the infected animals and, where appropriate, their calves have been eliminated, two serological examinations carried out at an interval of at least 90 days have produced negative results.

If enzootic bovine leucosis has been found in 0,2 % of herds, the Office Vétérinaire Fédéral shall immediately notify the Commission. The situation shall be considered within the Joint Veterinary Committee with a view to reviewing this paragraph.

6. For the purposes of this Annex, Switzerland is recognised as officially free from infectious bovine rhinotracheitis. In order to maintain that status, Switzerland undertakes to meet the following conditions:

(a) The Swiss herd shall be monitored by sampling checks. The size of the sample shall be such that it can be declared with 99 % reliability that less than 0,1 % of herds are infected with infectious bovine rhinotracheitis.

(b) Breeding bulls aged over 24 months shall undergo an annual serological examination.

(c) Any suspected cases of infectious bovine rhinotracheitis shall be reported to the competent authorities and the animals concerned shall undergo official tests for infectious bovine rhinotracheitis, comprising virological or serological tests.

(d) Where infectious bovine rhinotracheitis is suspected or found to be present, the officially infection-free status of the herd shall be suspended until the isolation period is terminated.

(e) The isolation period shall be terminated when a serological examination carried out at least 30 days after the infected animals have been eliminated produces negative results.

By virtue of the recognised status of Switzerland, Decision 93/24/EEC, as last amended by Decision 2000/502/EC (OJ L 200, 8.8.2000, p. 62), shall apply *mutatis mutandis*.

The Office Vétérinaire Fédéral shall immediately notify the Commission of any change in the conditions on which recognition of that status was based. The situation shall be considered within the Joint Veterinary Committee with a view to reviewing this paragraph.

7. For the purposes of this Annex, Switzerland is recognised as officially free from Aujeszky's disease. In order to maintain that status, Switzerland undertakes to meet the following conditions:

(a) The Swiss herd shall be monitored by sampling checks. The size of the sample shall be such that it can be declared with 99 % reliability that less than 0,1 % of herds are infected with Aujeszky's disease.

(b) Any suspected cases of Aujeszky's disease shall be reported to the competent authorities and the animals concerned shall undergo official tests for Aujeszky's disease including virological or serological tests.

(c) Where Aujeszky's disease is suspected or found to be present, the officially infection-free status of the herd shall be suspended until the isolation period is terminated.

(d) Isolation shall be terminated when, after the infected animals have been eliminated, two serological examinations of all breeding animals and a representative number of fattening animals carried out at an interval of least 21 days have produced negative results.

By virtue of the recognised status of Switzerland, Decision 2001/24/EC (OJ 215, 9.8.2001, p. 48), as last amended by Decision 2002/270/EC (OJ L 93, 10.4.2002, p. 7), shall apply *mutatis mutandis*.

The Office Vétérinaire Fédéral shall immediately notify the Commission of any change in the conditions on which recognition of that status was based. The situation shall be considered within the Joint Veterinary Committee with a view to reviewing this paragraph.

8. The question of possible additional guarantees concerning transmissible gastroenteritis of pigs (TGE) and porcine reproductive and respiratory syndrome (PRRS) shall be considered as soon as possible by the Joint Veterinary Committee. The Commission shall inform the Office Vétérinaire Fédéral of any developments in this area.

9. In Switzerland the Institut de Bactériologie Vétérinaire of the University of Bern is responsible for the official testing of tuberculins within the meaning of Annex B.4 to Directive 64/432/EEC.

10. The Institut de Bactériologie Vétérinaire of the University of Bern shall be responsible for the official testing of antigens (brucellosis) in Switzerland in accordance with Annex C(A)(4) to Directive 64/432/EEC.

11. Bovine animals and swine traded between the Member States of the Community and Switzerland shall be accompanied by health certificates in accordance with the models set out in Annex F to Directive 64/432/EEC. The following adjustments shall apply:

Model 1:

— in the first paragraph, "Country of origin: Switzerland (13) or" is inserted before "Member State",

— in section A, the certifications are adapted as follows:

— in the fourth subparagraph, "in Switzerland or" is inserted after "assembly centre",

— in point 2, "in Switzerland or" is inserted after "situated",

— where this document is drawn up by the Swiss authorities, in points 2(a) and (b), "by Commission Decision …/…/EC" and "Commission Decision …./…/EC" shall be replaced by "for Switzerland, by the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11)",

— in section C, the certifications are adapted as follows:

— in the second subparagraph, "in Switzerland or" is inserted before "in the Member State", and for the address, "or Switzerland" is inserted after "Member State",

— in point 4, relating to the additional guarantees, the following is added to the indents:

"— disease: infectious bovine rhinotracheitis,

— in accordance with Commission Decision 93/42/EEC, which shall apply *mutatis mutandis*,

— in accordance with the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11),"

— in note 4 to model 1, "or, for Switzerland, by the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11)" is inserted after "Decision …/…/EC".

Model 2:

— in the first paragraph, "Country of origin: Switzerland (9) or" is inserted before "Member State",

— in the fourth subparagraph of section A, "in Switzerland or" is inserted after "assembly centre",

— in section C, the certifications are adapted as follows:

— in the second subparagraph, "in Switzerland or" is inserted before "in the Member State", and for the address, "or Switzerland" is inserted after "Member State",

— in point 4, relating to the additional guarantees, the following is added to the indents:

"— disease: Aujeszky's,

— in accordance with Commission Decision 2001/618/EC, which shall apply *mutatis mutandis*,

— in accordance with the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11)."

Models 1 and 2:

— When these documents are drawn up by the Swiss authorities, "veterinarian carrying out the export check" shall replace "official veterinarian or approved veterinarian" and "official veterinarian",

— when these documents are drawn up by the Swiss authorities, in note (*) on the signature at the end of section B in both Models 1 and 2:

— "or Switzerland" shall be inserted after "dispatch",

— "under Commission Decision …/…/EC" shall be replaced by "for Switzerland, by the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11)",

— when these documents are drawn up by the Swiss authorities, in note (*) on the signature at the end of section C for Models 1 and 2: the reference shall be to Switzerland ("within Switzerland" or "to Switzerland"),

— in point 2 of the additional information, "in Switzerland or" is inserted before "in the Member State",

— in notes 4 and 5 to model 2 and notes 7 and 8 to model 1, the following words are added: "for Switzerland: by the veterinarian carrying out the export check",

— the following notes 9 to model 2 and 13 to model 1 are added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

12. For the purposes of applying this Annex, bovine animals traded between the Member States of the Community and Switzerland must be accompanied by additional health certificates containing the following health declarations:

"— The bovine animals:

— are identified by a permanent identification system enabling them to be traced back to the dam and herd of origin and making it possible to establish that they are not the progeny of BSE suspect or confirmed females born during the two years preceding the diagnosis,

— do not come from herds where a suspected case of BSE is under investigation,

— were born after 1 June 2001."

II. **Sheep and goats**

A. LEGISLATION

Community	Switzerland
Council Directive 91/68/EEC of 28 January 1991 on animal health conditions governing intra-Community trade in ovine and caprine animals (OJ L 46, 19.2.1991 p. 19), as last amended by Commission Decision 2002/261/EC of 25 March 2002 amending Decision 93/198/EEC laying down a model for the animal health conditions and veterinary certification for the import of domestic ovine and caprine animals from third countries and amending Annex E of Council Directive 91/68/EEC laying down the animal health conditions governing intra-Community trade in ovine and caprine animals (OJ L 91, 6.4.2002, p. 31)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 27 to 31 (markets, exhibitions), 34 to 37 (trade), 73 and 74 (cleaning and disinfection), 142 to 149 (rabies), 158 to 165 (tuberculosis), 166 to 169 (scrapie), 190 to 195 (ovine and caprine brucellosis), 196 to 199 (contagious agalactia), 200 to 203 (caprine arthritis/encephalitis), 233 to 235 (brucellosis in rams) and 297 (approval of markets, assembly centres and disinfection points) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (SR 916.443.11)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. For the purposes of the second subparagraph of Article 3(2) of Directive 91/68/EEC, the information referred to therein shall be submitted to the Joint Veterinary Committee.

2. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 11 of Directive 91/68/EEC and Article 57 of the Law on epizootic diseases.

3. For the purposes of this Annex, Switzerland is recognised as officially free from ovine and caprine brucellosis. In order to maintain that status, Switzerland undertakes to implement the measures provided for in point II(2) of Chapter I of Annex A to Directive 91/68/EEC.

Should ovine and caprine brucellosis appear or reappear, Switzerland shall inform the Joint Veterinary Committee so that the necessary measures can be taken in line with developments in the situation.

4. For one year from the date of entry into force of this Annex, caprine animals (goats) for fattening and breeding intended for Switzerland shall be subject to the following conditions:

— all the goats of the establishment of origin aged over six months must have tested negative to serological tests for caprine viral arthritis/encephalitis carried out three times over the preceding three years at 12-month intervals,

— the goats must have tested negative to serological tests for caprine viral arthritis/encephalitis within 30 days prior to dispatch.

This paragraph will be reconsidered by the Joint Veterinary Committee within one year of the entry into force of this Annex.

5. Ovine and caprine animals traded between the Member States of the Community and Switzerland shall be accompanied by health certificates in accordance with the models set out in Annex E to Directive 91/68/EEC. The following adjustments shall apply:

— in the titles, "and Switzerland (6)" is added after "Communities",

— in the first paragraph, "Country of origin: Switzerland or" is inserted before "Member State of consignor",

— "or from Switzerland" is added to point III(a),

— in the second indent of point III(b), "in Switzerland or" is added after "30 days",

— in point IV, "or Switzerland" is inserted after "Member State",

— in point V(E)(iii) of Model III, "for Switzerland or" is inserted after "destined",

— in point VI, "or the veterinarian carrying out the export check" is inserted after "official veterinarian",

— the following note 6 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

III. **Equidae**

A. LEGISLATION

Community	Switzerland
Council Directive 90/426/EEC of 26 June 1990 on animal health conditions governing the movement and import from third countries of equidae (OJ L 224, 18.8.1990 p. 42), as last amended by Commission Decision 2002/160/EC of 21 February 2002 amending Annex D to Council Directive 90/426/EEC with regard to diagnostic tests for African horse sickness (OJ L 53, 23.2.2002, p. 37)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 112 to 115 (African horse disease), 204 to 206 (dourine, encephalomyelitis, infectious anaemia, glanders), and 240 to 244 (contagious equine metritis) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. For the purposes of Article 3 of Directive 90/426/EEC, information shall be submitted to the Joint Veterinary Committee.

2. For the purposes of Article 6 of Directive 90/426/EEC, information shall be submitted to the Joint Veterinary Committee.

3. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 10 of Directive 90/426/EEC and Article 57 of the Law on epizootic diseases.

4. (a) Annex B to Directive 90/426/EEC shall apply mutatis mutandis to Switzerland, with the following adaptations:

— "in a Member State or in Switzerland (f)" is inserted at the end of point (b),

— in point 2, "of Switzerland or" is inserted after "territory",

— in the table at the bottom of the page, the stamp and signature in the case of Switzerland shall be that of the veterinarian carrying out the export check,

— the following note (f) is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) Annex C to Directive 90/426/EEC shall apply *mutatis mutandis* to Switzerland, with the following adaptations:

— "and Switzerland (e)" is added to the title,

— in the second paragraph, "Country of dispatch: Switzerland" is inserted before "Member State",

— in point III, "or Switzerland" is inserted after "Member State",

— in point IV(2), "in Switzerland or" is inserted before "in the Member State",

— in footnote (c), the term applicable to Switzerland shall be "vétérinaire de contrôle d'exportation",

— the following note (e) is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

IV. **Poultry and hatching eggs**

A. LEGISLATION

Community	Switzerland
Council Directive 90/539/EEC of 15 October 1990 on animal health conditions governing intra-Community trade in, and imports from third countries of, poultry and hatching eggs (OJ L 303, 31.10.1990, p. 6), Commission Decision 2001/867/EC of 3 December 2001 amending Council Directive 90/539/EEC as regards health certificates for intra-Community trade in poultry and hatching eggs (OJ L 323, 7.12.2001, p. 29)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 25 (transport), 122 to 125 (avian influenza and Newcastle disease), 255 to 261 (*Salmonella enteritidis*) and 262 to 265 (avian infectious laryngotracheitis) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Article 64a (approval of export establishments) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. For the purposes of Article 3 of Directive 90/539/EEC, Switzerland shall submit a plan to the Joint Veterinary Committee setting out the measures it intends to implement for the approval of its establishments.

2. For the purposes of Article 4 of Directive 90/539/EEC, the national reference laboratory for Switzerland shall be the Institut de Bactériologie Vétérinaire of the University of Bern.

3. The holding requirement specified in the first indent of Article 7(1) of Directive 90/539/EEC shall apply *mutatis mutandis* to Switzerland.

4. For consignments of hatching eggs to the Community, the Swiss authorities undertake to comply with the rules on marking laid down in Commission Regulation (EEC) No 1868/77. The mark for Switzerland shall be "CH".

5. The holding requirement specified in Article 9(a) of Directive 90/539/EEC shall apply *mutatis mutandis* to Switzerland.

6. The holding requirement specified in Article 10(a) of Directive 90/539/EEC shall apply *mutatis mutandis* to Switzerland.

7. The holding requirement specified in the first indent of Article 11(2) of Directive 90/539/EEC shall apply *mutatis mutandis* to Switzerland.

8. For the purposes of this Annex, Switzerland is recognised as meeting the requirements of Article 12(2) of Directive 90/539/EEC with regard to Newcastle disease and therefore shall have the status of not vaccinating against Newcastle disease. The Office Vétérinaire Fédéral shall immediately notify the Commission of any change in the conditions on which recognition of that status was based. The situation shall be considered within the Joint Veterinary Committee with a view to reviewing this paragraph.

9. For one year from the date of entry into force of this Annex, breeding poultry and productive poultry intended for Switzerland shall comply with the following conditions:

   — no cases of avian infectious laryngotracheitis (ILT) must have been diagnosed in the flock of origin or in the hatchery for at least six months prior to dispatch,

   — the breeding poultry and productive poultry must not have been vaccinated against avian infectious laryngotracheitis.

   This paragraph will be reconsidered by the Joint Veterinary Committee within one year of the entry into force of this Annex.

10. The references to the name of the Member State in Article 15 shall apply *mutatis mutandis* to Switzerland.

11. (a) For consignments from the Community to Switzerland, the health certificates shall be as provided for in Annex IV to Directive 90/539/EEC, adapted as follows:

   — in section 7, of models 1, 2, 3, 4 and 5, "Member State of destination" is replaced by "Country of destination: Switzerland (5)",

   — in section 9 of model 2, "Member State of destination" is replaced by "Country of destination: Switzerland (6)",

   — in section 12 of model 3 and section 13 of model 2, "of Commission Decision(s) …/…/EC concerning additional guarantees with regard to …… (indicate disease(s))" is replaced by "of the Agreement of 21 June 1999 between the Community and Switzerland (point IV of Appendix 2 to Annex 11)",

— in note 3 to Models 1, 3, 4 and 5 and in note 4 of model 2, "or in case of dispatch to Switzerland" is inserted after "Sweden",

— the following note 5 to models 1, 3, 4 and 5 and note 6 to model 2 are added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments from Switzerland to the Community, the health certificates shall be as provided for in Annex IV to Directive 90/539/EEC, adapted as follows:

— in the heading, "Community" shall be replaced by "Switzerland",

— in section 2, "Member State of origin" is replaced by "Country of origin: Switzerland",

— in section 12 of model 3 and section 13 of models 1, 2, 4, 5 and 6, "official veterinarian" is replaced by "veterinarian carrying out the export check" and the certification at (a) in each model is replaced as follows:

Model 1:

"The eggs described above comply with the Agreement of 21 June 1999 between the Community and Switzerland (point IV of Appendix 2 to Annex 11)",

Model 2:

"The chicks described above comply with the Agreement of 21 June 1999 between the Community and Switzerland (point IV of Appendix 2 to Annex 11)",

Model 3:

"The birds described above comply with the Agreement of 21 June 1999 between the Community and Switzerland (point IV of Appendix 2 to Annex 11)",

Model 4:

"The birds or eggs described above comply with the Agreement of 21 June 1999 between the Community and Switzerland (point IV of Appendix 2 to Annex 11)",

Model 5:

"The birds described above comply with the Agreement of 21 June 1999 between the Community and Switzerland (point IV of Appendix 2 to Annex 11)",

Model 6:

"The birds described above comply with the Agreement of 21 June 1999 between the Community and Switzerland (point IV of Appendix 2 to Annex 11)";

— at the bottom of the page, the stamp and signature in the case of Switzerland shall be that of the veterinarian carrying out the export check.

12. In the case of consignments from Switzerland to Finland or Sweden, the Swiss authorities undertake to supply the guarantees concerning salmonella required under Community legislation.

V. **Aquaculture animals and products**

A. LEGISLATION

Community	Switzerland
Council Directive 91/67/EEC of 28 January 1991 concerning the animal health conditions governing the placing on the market of aquaculture animals and products (OJ L 46, 19.2.1991, p. 1), as last amended by Council Directive 98/45/EC amending Directive 91/67/EEC (OJ L 91, 24 June 1998, p. 12) concerning the animal health conditions governing the placing on the market of aquaculture animals and products (OJ L 189, 3.7.1998, p. 12)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 275 to 290 (fish and crayfish diseases) and 297 (approval of establishments, zones and laboratories) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Article 64a (approval of export establishments) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The information provided for in Article 4 of Directive 91/67/EEC shall be submitted to the Joint Veterinary Committee.

2. The Joint Veterinary Committee shall decide on any application of Articles 5, 6 and 10 of Directive 91/67/EEC to Switzerland.

3. The Joint Veterinary Committee shall decide on any application of Articles 12 and 13 of Directive 91/67/EEC to Switzerland.

4. For the purposes of Article 15 of Directive 91/67/EEC, the Swiss authorities undertake to implement sampling plans and diagnostic methods in accordance with Community legislation.

5. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 17 of Directive 91/67/EEC and Article 57 of the Law on epizootic diseases.

6. (a) Where live fish, eggs or gametes from an approved zone are placed on the market, the movement document shall be as set out in Chapter 1 of Annex E to Directive 91/67/EEC.

   Where that document is drawn up by the Swiss authorities, in point VI, "of Directive 91/67/EEC" shall be replaced by "of the Agreement of 21 June 1999 between the Community and Switzerland (point V of Appendix 2 to Annex 11)".

   (b) Where live fish, eggs or gametes from an approved farm are placed on the market, the movement document shall be as set out in Chapter 2 of Annex E to Directive 91/67/EEC.

   Where that document is drawn up by the Swiss authorities, in point VI, "of Directive 91/67/EEC" shall be replaced by "of the Agreement of 21 June 1999 between the Community and Switzerland (point V of Appendix 2 to Annex 11)".

   (c) Where molluscs from an approved coastal zone are placed on the market, the movement document shall be as set out in Chapter 3 of Annex E to Directive 91/67/EEC.

   (d) Where molluscs from an approved farm are placed on the market, the movement document shall be as set out in Chapter 4 of Annex E to Directive 91/67/EEC.

   (e) Where farmed fish, molluscs or crustaceans, their eggs or gametes not belonging to species susceptible to IHN, VHS or bonamiosis or marteiliosis, as applicable, are placed on the market, the movement document shall be as set out in Annex I to Commission Decision 93/22/EEC. That document shall apply, subject to the following amendments:

   — where the document is drawn up by the Swiss authorities, in point I, "Member State of origin" is replaced by "Country of origin: Switzerland (6)",

— in point III, "Member State of destination" is replaced by "Country of destination: Switzerland",

— in note 1, "of the country of destination or" is inserted after "languages",

— the following note 6 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

Where that document is drawn up by the Swiss authorities, in point V(c), "susceptible species referred to in Annex A column 2, lists I and II of Directive 91/67/EEC" shall be replaced by "species susceptible to IHN, VHS or bonamiosis or marteiliosis, as applicable".

(f) Where live wild fish, molluscs or crustaceans, their eggs or gametes are placed on the market, the movement document shall be as set out in Annex II to Commission Decision 93/22/EEC. That document shall apply, subject to the following amendments:

— where the document is drawn up by the Swiss authorities, in point I, "Member State of origin" is replaced by "Country of origin: Switzerland(5)",

— in point III, "Member State of destination" is replaced by "Country of destination: Switzerland",

— in note 1, "of the country of destination or" is inserted after "languages",

— the following note 5 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

VI. **Bovine embryos**

A. LEGISLATION

Community	Switzerland
Council Directive 89/556/EEC of 25 September 1989 on animal health conditions governing intra-Community trade in and importation from third countries of embryos of domestic animals of the bovine species (OJ L 302, 19.10.1989 p. 1), as last amended by Commission Decision 94/113/EC (OJ L 53, 24.2.1994, p. 23)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 56 to 58 (embryo transfer) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Articles 64a and 76 (approval of assembly agencies as export enterprises) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 15 of Directive 89/556/EEC and Article 57 of the Law on epizootic diseases.

2. (a) For consignments from the Community to Switzerland, the health certificate shall be as set out in Annex C to Directive 89/556/EEC, adapted as follows:

— in section 9, "Member State of destination" is replaced by "Country of destination: Switzerland(3)",

— the following note 3 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments from Switzerland to the Community, the health certificate shall be as set out in Annex C to Directive 89/556/EEC, adapted as follows:

— in section 2, "Member State of collection" is replaced by "Country of collection: Switzerland",

— in section 13, "official veterinarian" is replaced by "veterinarian carrying out the export check",

— in section 13(a) and (b), "Directive 89/556/EEC" is replaced by "the Agreement of 21 June 1999 between the Community and Switzerland (point VI of Appendix 2 to Annex 11)".

(c) No specific implementing rules relating to bovine spongiform encephalopathy may be required for bovine embryos traded between the Member States of the Community and Switzerland.

VII. **Bovine semen**

A. LEGISLATION

Community	Switzerland
Council Directive 88/407/EEC of 14 June 1988 laying down the animal health requirements applicable to intra-Community trade in and imports of deep-frozen semen of domestic animals of the bovine species (OJ L 194, 22.7.1988 p. 10), as last amended by the Act of Accession of Austria, Finland and Sweden	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 51 to 55 (artificial insemination) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Articles 64a and 76 (approval of insemination centres as export enterprises) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. For the purposes of Article 4(2) of Directive 88/407/EEC, in Switzerland all centres keep only animals giving a negative reaction to the serum neutralisation test or the Elisa test.

2. The information provided for in Article 5(2) of Directive 88/407/EEC shall be submitted to the Joint Veterinary Committee.

3. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 16 of Directive 88/407/EEC and Article 57 of the Law on epizootic diseases.

4. (a) For consignments from the Community to Switzerland, the health certificate shall be as set out in Annex D to Directive 88/407/EEC.

(b) For consignments from Switzerland to the Community, the health certificate shall be as set out in Annex D to Directive 88/407/EEC, adapted as follows:

— in section IV and note 2, the references to "Directive 88/407/EEC" is replaced by "the Agreement of 21 June 1999 between the Community and Switzerland (point VII of Appendix 2 to Annex 11)".

(c) No specific implementing rules relating to bovine spongiform encephalopathy may be required for bovine semen traded between the Member States of the Community and Switzerland.

VIII. **Porcine semen**

A. LEGISLATION

Community	Switzerland
Council Directive 90/429/EEC of 26 June 1990 laying down the animal health requirements applicable to intra-Community trade in and imports of semen of domestic animals of the porcine species (OJ L 224, 18.8.1990, p. 62), as last amended by Commission Decision 2000/39/EC of 16 December 1999 amending Annex B to Council Directive 90/429/EEC laying down the animal health requirements applicable to intra-Community trade in and imports of semen of domestic animals of the porcine species (OJ L 13, 19.1.2000, p. 21)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 51 to 55 (artificial insemination) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Articles 64a and 76 (approval of insemination centres as export enterprises) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The information provided for in Article 5(2) of Directive 90/429/EEC shall be submitted to the Joint Veterinary Committee.

2. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 16 of Directive 90/429/EEC and Article 57 of the Law on epizootic diseases.

3. (a) For consignments from the Community to Switzerland, the health certificate shall be as set out in Annex D to Directive 90/429/EEC, adapted as follows:

— in section 9, "Member State of destination" is be replaced by "Country of destination: Switzerland(3)",

— the following note 3 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

b) For consignments from Switzerland to the Community, the health certificate shall be as set out in Annex D to Directive 90/429/EEC, adapted as follows:

— in section 2, "Member State of collection" is replaced by "Country of collection: Switzerland",

— in section 13, "official veterinarian" is replaced by "veterinarian carrying out the export check",

— in section 13, the references to "Directive 90/429/EEC" is replaced by "the Agreement of 21 June 1999 between the Community and Switzerland (point VIII of Appendix 2 to Annex 11)",

— in note 2, "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland." is inserted after the reference to Directive 90/429/EEC.

IX. **Other species**

A. LEGISLATION

Community	Switzerland
Council Directive 92/65/EEC of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A(I) to Directive 90/425/EEC (OJ L 268, 14.9.1992 p. 54), as last amended by Commission Regulation (EC) No 1802/2002 of 10 October 2002 correcting Regulation (EC) No 1282/2002 amending Annexes to Council Directive 92/65/EEC laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A(1) to Directive 90/425/EEC (OJ L 274, 11.10.2002, p. 21)	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 51 to 55 (artificial insemination) and 56 to 58 (embryo transfer) thereof 2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Articles 25 to 30 (import of dogs, cats and other animals), 64 (conditions of export), 64a and 76 (approval of insemination centres and assembly agencies as export enterprises) thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. For the purposes of this Annex, this point shall cover trade in live animals not subject to points I to V inclusive, and in semen, ova and embryos not subject to points VI to VIII inclusive.

2. The Community and Switzerland undertake not to ban or restrict trade in the live animals, semen, ova and embryos as referred to in point 1 for animal-health reasons other than those resulting from the application of this Annex, and in particular any safeguard measures taken pursuant to Article 20 thereof.

3. (a) For consignments from the Community to Switzerland of ungulates other than as referred to in points I, II and III, the health certificate shall be that set out in Annex E to Directive 92/65/EEC, adapted as follows:

— in section 7, "Member State of destination" is replaced by "Country of destination: Switzerland (11)",

— in section 14.5, "in the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11)" is inserted after "laid down",

— note 8 is amended as follows: "As requested by a Member State benefiting from additional guarantees under Community legislation, or Switzerland under the Agreement of 21 June 1999 between the European Community and Switzerland (point IX of Appendix 2 to Annex 11).",

— the following note 11 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments from Switzerland to the Community, the health certificate shall be as set out in Part 1 of Annex E to Directive 92/65/EEC, adapted as follows:

— in section 1, "Member State of origin" is replaced by "Country of origin: Switzerland (11)",

— in sections 14, 17 and 18, "official veterinarian" and "official/approved veterinarian" is replaced by "veterinarian carrying out the export check",

— note 8 is amended as follows: "As requested by a Member State benefiting from additional guarantees under Community legislation, or Switzerland under the Agreement of 21 June 1999 between the European Community and Switzerland (point IX of Appendix 2 to Annex 11).",

— the following note 11 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

4. (a) For consignments of lagomorphs from the Community to Switzerland, the health certificate shall be as set out in Part 1 of Annex E to Directive 92/65/EEC, bearing where necessary the declaration provided for in the second subparagraph of Article 9(2) of Directive 92/65/EEC, adapted as follows:

— in section 7, "Member State of destination" is replaced by "Country of destination: Switzerland (11)",

— in section 14.5, "in the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11)" is inserted after "laid down",

— note 8 is amended as follows: "As requested by a Member State benefiting from additional guarantees under Community legislation, or Switzerland under the Agreement of 21 June 1999 between the European Community and Switzerland (point IX of Appendix 2 to Annex 11).",

— the following note 11 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments of lagomorphs from Switzerland to the Community, the health certificate shall be as set out in Part 1 of Annex E to Directive 92/65/EEC, bearing where necessary the declaration provided for in the second subparagraph of Article 9(2) of Directive 92/65/EEC, adapted as follows:

— in section 7, "Member State of destination" is replaced by "Country of destination: Switzerland (11)",

— in section 14.5, "in the Agreement of 21 June 1999 between the European Community and Switzerland (point I of Appendix 2 to Annex 11)" is inserted after "laid down",

— note 8 is amended as follows: "As requested by a Member State benefiting from additional guarantees under Community legislation, or Switzerland under the Agreement of 21 June 1999 between the European Community and Switzerland (point IX of Appendix 2 to Annex 11).",

— the following note 11 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

That declaration may be adapted by the Swiss authorities to include in full the requirements of Article 9 of Directive 92/65/EEC.

5. The information provided for in the fourth subparagraph of Article 9(2) of Directive 92/65/EEC shall be submitted to the Joint Veterinary Committee.

6. (a) Consignments of cats and dogs from the Community to Switzerland shall be subject to Article 10(2) of Directive 92/65/EEC.

(b) Consignments of cats and dogs from Switzerland to the Member States of the Community other than the United Kingdom, Ireland and Sweden shall be subject to the requirements of Article 10(2) of Directive 92/65/EEC. The Swiss authorities may adapt the declaration provided for in the fifth indent of Article 10(2)(a) of Directive 92/65/EEC to include in full the requirements of Article 10(2)(a) and (b) and 10(3)(b) thereof.

(c) Consignments of cats and dogs from Switzerland to the United Kingdom, Ireland and Sweden shall be subject to the requirements of Article 10(3) of Directive 92/65/EEC. The identification system shall be as laid down in Commission Decision 94/274/EC. The certificate to be used shall be that provided for in Commission Decision 94/273/EC, adapted as follows:

— "Consignor Member State" is replaced by "Consignor country: Switzerland (6)",

— after the signature, "official veterinarian" is replaced by "veterinarian carrying out the export check",

— the following note 6 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

7. (a) For consignments of semen, ova or embryos of the ovine or caprine species from the Community to Switzerland, the certificates provided for in Decision 95/388/EC shall apply, adapted as follows:

— in the titles, "or trade with Switzerland (2)" is inserted after "intra-Community trade",

— in section 9, "Member State of destination" is replaced by "Country of destination: Switzerland",

— the following note 2 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments of semen, ova or embryos of the ovine or caprine species from Switzerland to the Community, the certificates provided for in Decision 95/388/EC shall apply, adapted as follows:

— in the titles, "or trade with Switzerland (2)" is inserted after "intra-Community trade",

— in section 2, "Member State of collection" is replaced by "Country of collection: Switzerland",

— in section 13, "carrying out the export check" is inserted after "veterinarian",

— in section 13, the Swiss authorities may set out in full the requirements referred to therein,

— the following note 2 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland.",

— after the signature, "official veterinarian" is replaced by "veterinarian carrying out the export check".

8. (a) For consignments of semen of the equine species from the Community to Switzerland, the certificate provided for in Decision 95/307/EC shall apply, adapted as follows:

— in section 9, "Member State of destination" is replaced by "Country of destination: Switzerland (6)",

— the following note 6 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments of semen of the equine species from Switzerland to the Community, the certificate provided for in Decision 95/307/EC shall apply, adapted as follows:

— in section 2, "Member State of collection" is replaced by "Country of collection: Switzerland (6)",

— in section 13 and after the signature, "official veterinarian" is replaced by "veterinarian carrying out the export check",

— in section 13.1.2, "of a Member State" is replaced by "of Switzerland",

— the following note 6 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

9. (a) For consignments of ova and embryos of the equine species from the Community to Switzerland, the certificate provided for in Decision 95/294/EC shall apply, adapted as follows:

— in section 9, "Member State of destination" is replaced by "Country of destination: Switzerland (5)",

— the following note 5 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments of ova and embryos of the equine species from Switzerland to the Community, the certificate provided for in Decision 95/294/EC shall apply, adapted as follows:

— in section 2, "Member State of collection" is replaced by "Country of collection: Switzerland (5)",

— in section 13, "official veterinarian" is replaced by "veterinarian carrying out the export check",

— in section 13.1.2, "of a Member State" is replaced by "of Switzerland",

— the following note 5 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

10. (a) For consignments of ova and embryos of the porcine species from the Community to Switzerland, the certificate provided for in Decision 95/483/EC shall apply, adapted as follows:

— in the title, "or trade with Switzerland (3)" shall be inserted after "intra-Community trade",

— in section 9, "Member State of destination" is replaced by "Country of destination: Switzerland",

— the following note 3 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland."

(b) For consignments of ova and embryos of the porcine species from Switzerland to the Community, the certificate provided for in Decision 95/483/EC shall apply, adapted as follows:

— in the title, "or trade with Switzerland (3)" shall be inserted after "intra-Community trade",

— in section 2, "Member State of collection" is replaced by "Country of collection: Switzerland",

— in section 13, "carrying out the export check" is inserted after "veterinarian",

— the following note 3 is added: "For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland.",

— after the signature, "official veterinarian" is replaced by "veterinarian carrying out the export check".

11. For the purposes of Article 24 of Directive 92/65/EEC, the information provided for in paragraph 2 of that Article shall be submitted to the Joint Veterinary Committee.

12. For trade between the Community and Switzerland in live animals as referred to in point 1, the certificates provided for in Parts 2 and 3 of Annex E to Directive 92/65/EEC shall apply *mutatis mutandis*, adapted as follows:

for the certificate in Part 2:

— in section 1, "Country of origin: Switzerland (8) or" is inserted before "Member State",

— in section 7, "Country of destination: Switzerland (8) or" is inserted before "Member State",

— where this document is drawn up by the Swiss authorities, in sections 16 and 17 “official veterinarian” and “official/approved veterinarian” is replaced by “veterinarian carrying out the export check”,

— note 5 is amended as follows: “As requested by a Member State benefiting from additional guarantees under Community legislation, or Switzerland under the Agreement of 21 June 1999 between the European Community and Switzerland (point IX of Appendix 2 to Annex 11).”,

— the following note 8 is added: “For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland.”,

for the certificate in Part 3:

— in section 1, “Country of origin: Switzerland (10) or” is inserted before “Member State”,

— in section 7, “Country of destination: Switzerland (8) or” is inserted before “Member State”,

— in section 14, “or, for Switzerland, the veterinarian carrying out the export check” is inserted after “competent authority”,

— where this document is drawn up by the Swiss authorities, in sections 17 and 18 “official veterinarian” and “official/approved veterinarian” is replaced by “veterinarian carrying out the export check”,

— note 7 is amended as follows: “As requested by a Member State benefiting from additional guarantees under Community legislation, or Switzerland under the Agreement of 21 June 1999 between the European Community and Switzerland (point IX of Appendix 2 to Annex 11).”,

— the following note 10 is added: “For Switzerland, in accordance with RO 2002 2147 and the Agreement of 21 June 1999 between the European Community and Switzerland.”.

Appendix 3

IMPORTS OF LIVE ANIMALS AND CERTAIN ANIMAL PRODUCTS FROM THIRD COUNTRIES

I. **Community — Legislation**

A. **Bovine, porcine, ovine and caprine animals**

Council Directive 72/462/EEC of 12 December 1972 on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries (OJ L 302, 31.12.1972, p. 28), as last amended by Council Regulation (EC) No 1452/2001 (OJ L 198, 21.7.2001, p. 11)

B. **Equidae**

Council Directive 90/426/EEC of 26 June 1990 on animal health conditions governing the movement and import from third countries of equidae (OJ L 224, 18.8.1990 p.42), as last amended by Commission Decision 2002/160/EC (OJ L 53, 23.2.2002, p. 37)

C. **Poultry and hatching eggs**

Council Directive 90/539/EEC of 15 October 1990 on animal health conditions governing intra-Community trade in, and imports from third countries of, poultry and hatching eggs (OJ L 303, 31.10.1990, p. 6), as last amended by Commission Decision 2001/867/EC (OJ L 323, 7.12.2001, p. 29)

D. **Aquaculture animals**

Council Directive 91/67/EEC of 28 January 1991 concerning the animal health conditions governing the placing on the market of aquaculture animals and products (OJ L 46, 19.2.1991, p. 1), as last amended by Council Directive 98/45/EC (OJ L 189, 3.7.1998, p. 12)

E. **Molluscs**

Council Directive 91/492/EEC of 15 July 1991 laying down the health conditions for the production and the placing on the market of live bivalve molluscs (OJ L 268, 24.9.1991, p. 1), as last amended by Commission Decision 2002/226/EC (OJ L 75, 16.3.2002, p. 65)

F. **Bovine embryos**

Council Directive 89/556/EEC of 25 September 1989 on animal health conditions governing intra-Community trade in and importation from third countries of embryos of domestic animals of the bovine species (OJ L 302, 19.10.1989, p. 1), as last amended by Commission Decision 94/113/EC (OJ L 53, 24.2.1994, p. 23)

G. **Bovine semen**

Council Directive 88/407/EEC of 14 June 1988 laying down the animal health requirements applicable to intra-Community trade in and imports of deep-frozen semen of domestic animals of the bovine species (OJ L 194, 22.7.1988 p. 10), as last amended by the Act of Accession of Austria, Finland and Sweden

H. **Porcine semen**

Council Directive 90/429/EEC of 26 June 1990 laying down the animal health requirements applicable to intra-Community trade in and imports of semen of domestic animals of the porcine species (OJ L 224, 18.8.1990, p. 62), as last amended by Commission Decision 2000/39/EC (OJ L 13, 19.1.2000, p. 21)

I. **Other live animals**

Council Directive 92/65/EEC of 13 July 1992 laying down animal health requirements governing trade in and imports into the Community of animals, semen, ova and embryos not subject to animal health requirements laid down in specific Community rules referred to in Annex A(I) to Directive 90/425/EEC (OJ L 268, 14.9.1992 p. 54), as last amended by Commission Regulation (EC) No 1802/2002 (OJ L 274, 11.10.2002, p. 21)

II. **Switzerland — Legislation**

Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11)

III. **Implementing rules**

As a general rule, the Office Vétérinaire Fédéral shall apply the same rules as those covered by point I of this Appendix. However, the Office Vétérinaire Fédéral may adopt more restrictive measures and require additional guarantees. In that case, without prejudice to its right to implement those measures immediately, consultations shall be held within the Joint Veterinary Committee to find appropriate solutions. Where the Office Vétérinaire Fédéral wishes to implement less restrictive measures, it shall inform the competent Commission departments in advance. In such cases, consultations shall be held within the Joint Veterinary Committee to find suitable solutions. Pending such solutions, the Swiss authorities shall refrain from implementing the planned measures.

Appendix 4

ZOOTECHNICAL PROVISIONS, INCLUDING THOSE GOVERNING IMPORTS FROM THIRD COUNTRIES

I. **Community — Legislation**

A. **Bovine animals**

Council Directive 77/504/EEC of 25 July 1977 on pure-bred breeding animals of the bovine species (OJ L 206, 12.8.1977, p. 8), as last amended by Directive 94/28/EC (OJ L 178, 12.7.1994, p. 66)

B. **Porcine animals**

Council Directive 88/661/EEC of 19 December 1988 on the zootechnical standards applicable to breeding animals of the porcine species (OJ L 382, 31.12.1988, p. 36), as last amended by the Act of Accession of Austria, Finland and Sweden

C. **Ovine and caprine animals**

Council Directive 89/361/EEC of 30 May 1989 concerning pure-bred breeding sheep and goats (OJ L 153, 6.6.1989, p. 30)

D. **Equidae**

(a) Council Directive 90/427/EEC of 26 June 1990 on the zootechnical and genealogical conditions governing intra-Community trade in equidae (OJ L 224, 18.8.1990, p. 55)

(b) Council Directive 90/428/EEC of 26 June 1990 on trade in equidae intended for competitions and laying down the conditions for participation therein (OJ L 224, 18.8.1990, p. 60)

E. **Pure-bred animals**

Council Directive 91/174/EEC of 25 March 1991 laying down zootechnical and pedigree requirements for the marketing of pure-bred animals and amending Directives 77/504/EEC and 90/425/EEC (OJ L 85, 5.4.1991, p. 37)

F. **Imports from third countries**

Council Directive 94/28/EC of 23 June 1994 laying down the principles relating to the zootechnical and genealogical conditions applicable to imports from third countries of animals, their semen, ova and embryos, and amending Directive 77/504/EEC on pure-bred breeding animals of the bovine species (OJ L 178, 12.7.1994, p. 66)

II. **Switzerland — Legislation**

Ordonnance of 7 December 1998 on livestock farming, as last amended on 18 October 2000 (RS 916.310). This Appendix shall be reviewed as soon as possible in the light of the new provisions adopted by the Swiss authorities.

III. **Transitional arrangements**

Without prejudice to the rules on zootechnical checks in Appendices 5 and 6, the Swiss authorities undertake to ensure that consignments of animals, semen, ova and embryos are carried out in accordance with Council Directive 94/28/EC.

Where difficulties arise in trade, the matter shall be referred to the Joint Veterinary Committee at the request of either Party.

Appendix 5

CHECKS AND FEES

CHAPTER 1

Trade between the Community and Switzerland

I. **ANIMO system**

The Commission, in cooperation working with the Office Vétérinaire Fédéral, shall integrate Switzerland into the ANIMO computerised system. If necessary, transitional measures shall be laid down in the Joint Veterinary Committee.

II. **Rules for equidae**

Checks relating to trade between the Community and Switzerland shall be carried out in accordance with Council Directive 90/425/EEC of 26 June 1990 concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market (OJ L 224, 18.8.1990, p. 29), as last amended by Directive 2002/33/EEC of the European Parliament and of the Council (OJ L 315, 19.11.2002, p. 14).

The Joint Veterinary Committee shall be responsible for implementing Articles 9 and 22.

III. **Rules for animals sent for grazing in border areas**

1. The official veterinarian of the country of dispatch shall:

   — notify the official veterinarian of the country of destination 48 hours in advance that the animals are to be dispatched,

   — examine the animals within 48 hours prior to their departure for the grazing ground; the animals must be duly identified,

   — issue a certificate in accordance with a model to be drawn up by the Joint Veterinary Committee.

2. The official veterinarian of the country of destination shall inspect the animals upon arrival in the country of destination to ensure that they comply with the standards laid down in this Annex.

3. Throughout the duration of the grazing period, the animals shall remain under customs control.

4. The holder of the animals shall make a written statement undertaking:

   (a) to comply with all measures taken pursuant to this Annex and any other measures introduced at local level, in the same way as any holder originating in the Community or Switzerland;

   (b) to pay the costs of the checks required pursuant to this Annex;

   (c) to cooperate fully with arrangements for customs or veterinary checks required by the authorities of the country of dispatch or of destination.

5. Grazing shall be limited to a 10 km strip both sides of the border between Switzerland and the Community; this distance may be increased in special duly substantiated conditions.

6. Where there are outbreaks of diseases, suitable appropriate measures shall be taken by common consent between the competent veterinary authorities.

   Those authorities shall consider how to cover any costs involved. If necessary the matter shall be referred to the Joint Veterinary Committee.

IV. **Special rules**

A. Where animals for slaughter are bound for the abattoir in Basle, documentary checks only shall be carried out at one of the points of entry into Swiss territory. This rule shall apply only to animals originating in the department of Haut Rhin or the rural districts Lörrach, Waldshut, Breisgau-Hochschwarzwald and the town of Freiburg i.B. This provision may be extended to other abattoirs along the border between the Community and Switzerland.

B. Where animals are bound for the customs enclave of Livigno, documentary checks only shall be carried out at Ponte Gallo. This rule shall apply only to animals originating in the canton of Grisons. This provision may be extended to other areas under customs control along the border between the Community and Switzerland.

C. Where animals are bound for the canton of Grisons, documentary checks only shall be carried out at La Drossa. This rule shall apply only to animals originating in the customs enclave of Livigno. This provision may be extended to other areas along the border between the Community and Switzerland.

D. Where live animals are loaded directly or indirectly onto a train at a point in the territory of the Community for unloading at another point in the territory of the Community after transit through Swiss territory, the only requirement shall be to inform the Swiss veterinary authorities beforehand. This rule shall apply only to trains the composition of which does not change in the course of transport.

V. **Rules for animals crossing through Community or Swiss territory**

A. Where live animals originating in the Community are to cross through Swiss territory, the Swiss authorities shall carry out documentary checks only. In suspicious cases, they may carry out any other inspections required.

B. Where live animals originating in Switzerland are to cross through Community territory, the Community authorities shall carry out documentary checks only. In suspicious cases, they may carry out any other inspections required. The Swiss authorities guarantee that the animals will be accompanied by a certificate of non-refoulement issued by the authorities of the third country of first destination.

VI. **General rules**

These provisions shall apply to cases not covered by points II to IV.

A. For live animals originating in the Community or Switzerland and intended for import, the following checks shall be carried out:

— documentary checks.

B. For live animals from countries other than those covered by this Annex which have been checked as provided for in Directive 91/496/EEC, as last amended by Council Directive 96/43/EC (OJ L 162, 1.7.1996, p. 1), the following checks shall be carried out:

— documentary checks.

VII. **Points of entry — trade between the European Community and Switzerland**

A. For the Community:

Germany:	
— Konstanz Straße	road
— Weil am Rhein/Mannheim	rail, road
France:	
— Saint Julien/Bardonnex	road
— Ferney-Voltaire/Geneva	air
— Saint-Louis/Basle	road/air
Italy:	
— Campocologno	rail
— Chiasso	rail, road
— Grand San Bernardo-Pollein	road

Austria:	
— Feldkirch-Tisis	road
— Höchst	road
— Feldkirch-Buchs	rail

B. For Switzerland:

— Germany:	Thayngen	road
	Kreuzlingen	road
	Basle	road/rail/air
— France:	Bardonnex	road
	Basle	road/air
	Geneva	air
— Italy:	Campocologno	Bahn
	Chiasso	road/rail
	Martigny	road
— Austria:	Schaanwald	road
	St Margrethen	road
	Feldkirch-Buchs	rail

CHAPTER 2

Imports from third countries

I. **Legislation**

Checks on imports from third countries shall be carried out in accordance with Council Directive 91/496/EEC of 15 July 1991 laying down the principles governing the organisation of veterinary checks on animals entering the Community from third countries and amending Directives 89/662/EEC, 90/425/EEC and 90/675/EEC (OJ L 268, 24.4.1991, p. 56), as last amended by Council Directive 96/43/EC (OJ L 162, 1.7.1996, p. 1).

II. **Implementing rules and procedures**

A. For the purposes of Article 6 of Directive 91/496/EEC, the border inspection posts shall be: Basle-Mulhouse airport, Ferney-Voltaire/Geneva airport and Zurich airport. The Joint Veterinary Committee shall be responsible for subsequent amendments.

B. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 19 of Directive 91/496/EEC and Article 57 of the Law on epizootic diseases.

CHAPTER 3

Special provisions

— For France, the cases of Ferney-Voltaire/Geneva airport and St. Louis/Basle airport shall be the subject of consultations within the Joint Veterinary Committee.

— For Switzerland, the cases of Geneva-Cointrin airport and Basle-Mulhouse airport shall be the subject of consultations within the Joint Veterinary Committee.

I. **Mutual assistance**

A. LEGISLATION

Community	Switzerland
Council Directive 89/608/EEC of 21 November 1989 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of legislation on veterinary and zootechnical matters (OJ L 351, 2.12.1989, p. 34)	Law of 1 July 1996 on epizootic diseases (LFE), as last amended on 15 December 2000 (RS 916.40), and in particular Article 57 thereof

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

The Joint Veterinary Committee shall be responsible for the application of Articles 10, 11 and 16 of Directive 89/608/EEC.

II. **Identification of animals**

A. LEGISLATION

Community	Switzerland
1. Council Directive 92/102/EEC of 27 November 1992 on the identification and registration of animals (OJ L 355, 5.12.1992, p. 32), as amended by the Act of Accession of Austria, Finland and Sweden	1. Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 7 to 22 (registration and identification) thereof
2. Regulation (EC) No 1760/2000 of the European Parliament and of the Council of 17 July 2000 establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97 (OJ L 204, 11.8.2000, p. 1), as last amended by Commission Regulation (EC) No 1825/2000 of 25 August 2000 laying down detailed rules for the application of Regulation (EC) No 1760/2000 of the European Parliament and of the Council as regards the labelling of beef and beef products (OJ L 216, 26.8.2000, p. 8)	2. Ordonnance of 18 August 1999 on the data base for animal movements, as last amended on 20 November 2002 (RS 916.404)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The Joint Veterinary Committee shall be responsible for the application of Article 3(2), the fifth subparagraph of Article 4(1)(a) and Article 4(2) of Directive 92/102/EEC.

2. For movements of swine and ovine and caprine animals within Switzerland, the date to be taken into account for the purposes of Article 5(3) shall be 1 July 1999.

3. In the context of Article 10 of Directive 92/102/EEC, the Joint Veterinary Committee shall be responsible for coordination where any electronic identification systems are set up.

III. **SHIFT system**

A. LEGISLATION

Community	Switzerland
Council Decision 92/438/EEC of 13 July 1992 on computerisation of veterinary import procedures (SHIFT project), amending Directives 90/675/EEC, 91/496/EEC, 91/628/EEC and Decision 90/424/EEC and repealing Decision 88/192/EEC (OJ L 243, 25.8.1992, p. 27), as last amended by the Act of Accession of Austria, Finland and Sweden	Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

The Commission, in cooperation with the Office Vétérinaire Fédéral, shall integrate Switzerland into the SHIFT system provided for by Council Decision 92/438/EEC.

IV. **Protection of animals**

A. LEGISLATION

Community	Switzerland
1. Council Directive 91/628/EEC of 19 November 1991 on the protection of animals during transport and amending Directives 90/425/EEC and 91/496/EEC (OJ L 340, 11.12.1991, p. 17), as last amended by Council Directive 95/29/EC (OJ L 148, 30.6.1995, p. 52)	1. Ordonnance of 27 May 1981 on the protection of animals, as last amended on 17 June 2001 (RS 455.1)
2. Council Regulation (EC) No 1255/97 of 25 June 1997 concerning Community criteria for staging points and amending the route plan referred to in the Annex to Directive 91/628/EEC (OJ L 174, 2.7.1997, p. 1)	2. Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products (OITE), as last amended on 16 October 2002 (RS 916.443.11)

B. SPECIAL RULES AND PROCEDURES FOR IMPLEMENTATION

1. The Swiss authorities undertake to comply with the requirements laid down in Directive 91/628/EEC for trade between Switzerland and the Community and for imports from third countries.

2. The information provided for in the fourth paragraph of Article 8 of Directive 91/628/EEC shall be submitted to the Joint Veterinary Committee.

3. On-the-spot inspections shall be carried out under the responsibility of the Joint Veterinary Committee in accordance in particular with Article 10 of Directive 91/628/EEC and Article 65 of the Ordonnance of 20 April 1988 on the import, transit and export of animals and animal products, as last amended on 16 October 2002 (RS 916.443.11).

4. The information provided for in the second subparagraph of Article 18(3) of Directive 91/628/EEC shall be submitted to the Joint Veterinary Committee.

V. **Semen, ova and embryos**

Section VI of Chapter 1 and Chapter 2 of this Appendix shall apply *mutatis mutandis*.

VI. **Fees**

A. For checks on live animals from countries other than those covered by this Annex, the Swiss authorities undertake to collect at least the fees provided for in Annex C, Chapter 2 of Directive 96/43/EC.

B. The fees payable on live animals originating in the Community or Switzerland and intended for import into the Community or Switzerland shall be:

EUR 2,5/t, with a minimum of EUR 15 and a maximum of EUR 175 being charged per consignment.

C. No fees shall be charged:

— on animals for slaughter bound for the abattoir in Basle,

— on animals bound for the customs enclave of Livigno,

— on animals bound for the canton of Grisons,

— on live animals loaded directly or indirectly onto a train at one point in Community territory for unloading at another point in Community territory,

— on live animals originating in the Community crossing Swiss territory,

— on live animals originating in Switzerland crossing Community territory,

— on equidae.

D. The fees payable on animals sent for grazing in border areas shall be:

EUR 1/head for the country of dispatch and EUR 1/head for the country of destination, with a minimum of EUR 10 and a maximum of EUR 100 being charged in each case per consignment.

E. For the purposes of this chapter, "consignment" means a number of animals of the same type, covered by the same health certificate or document, carried on the same means of transport, dispatched by the same consignor, coming from the same exporting country or region and bound for the same destination.

Appendix 6

ANIMAL PRODUCTS

CHAPTER 1

Sectors where recognition of equivalence is mutual

Products: **Milk and products of milk of bovine species intended for human consumption**
Milk and products of milk of bovine species not intended for human consumption

	Exports from the Community to Switzerland			Exports from Switzerland to the Community		
	Trade conditions		Equivalence	Trade conditions		Equivalence
	Community standards	Swiss standards		Swiss standards	Community standards	
Animal health — bovine animals	64/432/EEC 92/46/EEC 92/118/EEC	Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 47, 61, 65, 101, 155, 163, 169, 173, 177, 224 and 295 thereof.	Yes	Ordonnance of 27 June 1995 on epizootic diseases (OFE), as last amended on 17 October 2001 (RS 916.401), and in particular Articles 47, 61, 65, 101, 155, 163, 169, 173, 177, 224 and 295 thereof.	64/432/EEC 92/46/EEC 92/118/EEC	Yes
Public health	92/46/EEC 92/118/EEC	Ordonnance of 7 December 1998 on ensuring quality in the dairy sector (Ordonnance on milk quality, OQL) as last amended on 8 March 2002 (RS 916.351.0) Ordonnance of 13 April 1999 on ensuring quality in industrial milk processing, as last amended on 20 December 2002 (RS 916.351.021.2) Ordonnance of 13 April 1999 on ensuring quality in milk production, as last amended on 20 December 2002 (RS 916.351.021.1) Ordonnance of 13 April 1999 on ensuring quality in artisanal processing of milk, as last amended on 20 December 2002 (RS 916.351.021.3) Ordonnance of 13 April 1999 on ensuring quality during maturing and pre-packaging of cheese, as last amended on 20 December 2002 (RS 916.351.021.4)	Yes	Ordonnance of 7 December 1998 on ensuring quality in the dairy sector (Ordonnance on milk quality, OQL) as last amended on 8 March 2002 (RS 916.351.0) Ordonnance of 13 April 1999 on ensuring quality in industrial milk processing, as last amended on 20 December 2002 (RS 916.351.021.2) Ordonnance of 13 April 1999 on ensuring quality in milk production, as last amended on 20 December 2002 (RS 916.351.021.1) Ordonnance of 13 April 1999 on ensuring quality in artisanal processing of milk, as last amended on 20 December 2002 (RS 916.351.021.3) Ordonnance of 13 April 1999 on ensuring quality during maturing and pre-packaging of cheese , as last amended on 20 December 2002 (RS 916.351.021.4)	92/46/EEC 92/118/EEC	Yes

Products: Animal waste

Exports from the Community to Switzerland				Exports from Switzerland to the Community			
Trade conditions		Equivalence	Special requirements	Trade conditions		Equivalence	Special requirements
Community standards	Swiss standards			Swiss standards	Community standards		
Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ L 273, 10.10.2002, p. 1), as last amended by Commission Regulation (EC) No 808/2003 of 12 May 2003 amending Regulation (EC) No 1774/2002 of the European Parliament and of the Council laying down health rules concerning animal by-products not intended for human consumption (OJ L 117, 13.5.2003, p. 1)	Ordonnance of 3 February 1993 on the elimination of animal waste (OELDA), as last amended on 20 November 2002 (RS 916.441.22) Ordonnance of 20 April 1988 concerning the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Articles 64a, 76 and 77 (approval of export establishments, conditions for the exporting of animal waste) thereof For the purposes of this Appendix and in the light of the developments of Community legislation, the Swiss authorities undertake to amend their legislation with a view to adopting equivalent legislation for trade purposes. The Swiss authorities have drawn up and submitted a draft Ordonnance for consultation. This draft provides for a detailed review of the Ordonnance of 3 February 1993 on the elimination of animal waste.	Yes	Trade in high-risk material is prohibited. To be reconsidered by the Joint Veterinary Committee.	Ordonnance of 3 February 1993 on the elimination of animal waste (OELDA), as last amended on 20 November 2002 (RS 916.441.22) Ordonnance of 20 April 1988 concerning the import, transit and export of animals and animal products (OITE), as last amended on 8 March 2002 (RS 916.443.11), and in particular Articles 64a, 76 and 77 (approval of export establishments, conditions for the exporting of animal waste) thereof For the purposes of this Appendix and in the light of the developments of Community legislation, the Swiss authorities undertake to amend their legislation with a view to adopting equivalent legislation for trade purposes. The Swiss authorities have drawn up and submitted a draft Ordonnance for consultation. This draft provides for a detailed review of the Ordonnance of 3 February 1993 on the elimination of animal waste.	Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ L 273, 10.10.2002, p. 1), as last amended by Commission Regulation (EC) No 808/2003 of 12 May 2003 amending Regulation (EC) No 1774/2002 of the European Parliament and of the Council laying down health rules concerning animal by-products not intended for human consumption (OJ L 117, 13.5.2003, p. 1)	Yes	Trade in high-risk material is prohibited. To be reconsidered by the Joint Veterinary Committee.

CHAPTER II

Sectors other than those covered by Chapter I

I. **Exports from the Community to Switzerland**

Exports from the Community to Switzerland shall be subject to the same conditions as intra-Community trade. However, in all cases, a certificate attesting compliance with those conditions shall be issued by the competent authorities to accompany consignments.

If necessary, models for certificates shall be discussed in the Joint Veterinary Committee.

II. **Exports from Switzerland to the Community**

Exports from Switzerland to the Community shall be subject to the relevant conditions laid down in the Community rules. Models for certificates shall be discussed in the Joint Veterinary Committee.

Pending a decision on these models, the present requirements for certificates shall apply.

CHAPTER III

Transfer of a sector from Chapter II to Chapter I

As soon as Switzerland adopts any legislation it regards as equivalent to Community legislation, the matter shall be brought before the Joint Veterinary Committee. Chapter I of this Appendix shall be adjusted as soon as possible to reflect the outcome of the Committee's deliberations.

Appendix 11

CONTACT POINTS

— **For the Community:**

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