

# Official Journal

## of the European Communities

English edition

### Legislation

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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.  
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## II

*(Acts whose publication is not obligatory)*

## COUNCIL

## COUNCIL DIRECTIVE 92/12/EEC

of 25 February 1992

on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 99 thereof,

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

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

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

Whereas the establishment and functioning of the internal market require the free movement of goods, including those subject to excise duties;

Whereas provision should be made to define the territory on which this Directive, as well as the Directive on the rates and structures of duty on products subject to excise duties, are to be applied;

Whereas the concept of products subject to excise duty should be defined; whereas only goods which are treated as such in all the Member States may be the subject of Community provisions; whereas such products may be

subject to other indirect taxes for specific purposes; whereas the maintenance or introduction of other indirect taxes must not give rise to border-crossing formalities;

Whereas, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States;

Whereas any delivery, holding with a view to delivery or supply for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, taking place in a Member State other than that in which the product is released for consumption gives rise to chargeability of the excise duty in that other Member State;

Whereas in the case of products subject to excise duty acquired by private individuals for their own use and transported by them, the duty must be charged in the country where they were acquired;

Whereas to establish that products subject to excise duty are not held for private but for commercial purposes, Member States must take account of a number of criteria;

Whereas products subject to excise duty purchased by persons who are not approved warehousekeepers or registered or non-registered traders and dispatched or transported directly or indirectly by the vendor or on his behalf must be subject to excise duty in the Member State of destination;

Whereas in order to ensure that the tax debt is eventually collected it should be possible for checks to be carried out

<sup>(1)</sup> OJ No C 322, 21. 12. 1990, p.1; and OJ No C 45, 20. 8. 1992, p. 10.

<sup>(2)</sup> OJ No C 183, 15. 7. 1991, p. 131.

<sup>(3)</sup> OJ No C 169, 18. 3. 1991, p. 25.

in production and storage facilities; whereas a system of warehouses, subject to authorization by the competent authorities, should make it possible to carry out such checks;

Whereas movement from the territory of one Member State to that of another may not give rise to checks liable to impede free movement within the Community; whereas for the purposes of chargeability it is nevertheless necessary to know of the movements of products subject to excise duty; whereas provision should therefore be made for an accompanying document for such products;

Whereas the requirements to be complied with by authorized warehousekeepers and traders without authorized warehousekeeper status should be laid down;

Whereas provision should be made, to ensure the collection of taxes at the rates laid down by Member States, for the establishment of a procedure for the movement of such goods under duty suspension;

Whereas in that respect provision should first be made for each consignment to be easily identified; whereas provision should be made for the tax status of the consignment to be immediately identifiable; whereas it is therefore necessary to provide for an accompanying document capable of meeting these needs, which may be either an administrative or commercial document; whereas the commercial document used must contain the essential elements which appear on the administrative document;

Whereas the procedure by which the tax authorities of the Member States are informed by traders of deliveries dispatched or received by means of an accompanying document should be explained;

Whereas there is no need for the accompanying document to be used when the products subject to excise duties are moved under a Community customs procedure other than release for free circulation or are placed in a free zone or a free warehouse;

Whereas in the context of national provisions, excise duty should, in the event of an offence or irregularity, be collected in principle by the Member State on whose territory the offence or irregularity has been committed, or by the Member State where the offence or irregularity was ascertained, or, in the event of non-presentation in the Member State of destination, by the Member State of departure;

Whereas the Member States may provide that products released for consumption should carry fiscal or national identification marks and whereas the use of these marks should not place any obstacle in the way of intra-Community trade;

Whereas payment of the excise duties in the Member State where the products were released for consumption must give rise to the reimbursement of those duties when the

products are not intended for consumption in that Member State;

Whereas, as a result of the abolition of the principle of taxes on imports in relations between Member States, the provisions on exemptions and allowances on imports cease to apply in respect of relations between Member States; whereas these provisions should therefore be abolished and the directives concerned adapted accordingly;

Whereas a Committee on Excise Duties should be set up to examine the Community measures necessary for the implementation of the provisions on excise duties;

Whereas Article 1 (2) of the Regulation concerning the elimination of controls and formalities applicable to the cabin and hold baggage of persons taking an intra-Community flight or making an intra-Community sea-crossing states that its enforcement is without prejudice to controls relating to bans or restrictions laid down by Member States, provided that they are compatible with the three Treaties establishing the European Community; whereas in that context the verifications necessary for the enforcement of the quantitative restrictions referred to in Article 26 must be considered to be such controls and, as such, to be compatible with Community legislation;

Whereas a certain period of time will be required to take the necessary measures to alleviate both the social repercussions in the sectors concerned and regional difficulties, particularly in border regions, which might arise as a result of the abolition of taxes on imports and exemptions on exports in trade between the Member States; whereas to that end the Member States should be authorized, for a period ending on 30 June 1999, to exempt products supplied, within the limits laid down, by tax-free shops in the context of passenger traffic by air or sea between the Member States;

Whereas small wine producers may be exempted from certain requirements under the general arrangements for excise duty;

Whereas, finally, Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and value added tax <sup>(1)</sup> should be amended in order to extend its provisions to cover excise duties,

(1) OJ No L 336, 27. 12. 1977, p. 15. Directive as last amended by Directive 79/1070/EEC (OJ No L 331, 27. 12. 1979, p. 8).

HAS ADOPTED THIS DIRECTIVE:

## TITLE I

### General Provisions

#### Article 1

1. This Directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community.

2. The particular provisions relating to the structures and rates of duty on products subject to excise duty shall be set out in specific Directives.

#### Article 2

1. This Directive and the Directives listed in Article 1 (2) shall apply in the territory of the Community as defined, for each Member State, by the Treaty establishing the European Economic Community, and in particular Article 227 thereof, except for the following national territories:

- in the case of the Federal Republic of Germany, the Island of Heligoland and the territory of Büsingen,
- in the case of the Italian Republic, Livigno, Campione d'Italia and the Italian waters of Lake Lugano,
- in the case of the Kingdom of Spain, Ceuta and Melilla.

2. Notwithstanding paragraph 1, this Directive and the Directives referred to in Article 1 (2) shall not apply to the Canary Islands. However, the Kingdom of Spain may give notice, by means of a declaration, that these Directives apply to those territories in respect of all or some of the products referred to in Article 3 (1) below, as from the first day of the second month following deposit of that declaration.

3. By way of derogation from paragraph 1, neither this Directive nor those referred to in Article 1 (2) shall apply to the overseas departments of the French Republic.

However, the French Republic may give notice, by means of a declaration, that these Directives apply to those territories — subject to measures to adjust to their extreme remoteness — from the first day of the second month following deposit of the declaration.

4. The Member States shall take the necessary measures to ensure that transactions originating in or intended for:

- the Principality of Monaco are treated as transactions originating in or intended for the French Republic,
- Jungholz and Mittelberg (Kleines Walsertal) are treated as transactions originating in or intended for the Federal Republic of Germany,
- the Isle of Man are treated as transactions originating in or intended for the United Kingdom of Great Britain and Northern Ireland,
- San Marino are treated as transactions originating in or intended for the Italian Republic.

5. The provisions of this Directive shall not prevent Greece from maintaining the specific status granted to Mount Athos as guaranteed by Article 105 of the Greek Constitution.

6. If the Commission considers that the exclusions provided for in paragraphs 1, 2, 3 and 4 are no longer justified, particularly in terms of fair competition, it shall submit appropriate proposals to the Council.

#### Article 3

1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

- mineral oils,
- alcohol and alcoholic beverages,
- manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.

3. Member States shall retain the right to introduce or maintain taxes which are levied on products other than those listed in paragraph 1 provided, however, that those taxes do not give rise to border-crossing formalities in trade between Member States.

Subject to the same proviso, Member States shall also retain the right to levy taxes on the supply of services which cannot be characterized as turnover taxes, including those relating to products subject to excise duty.

#### Article 4

For the purpose of this Directive, the following definitions shall apply:

- (a) *authorized warehousekeeper*: a natural or legal person authorized by the competent authorities of a Member

State to produce, process, hold, receive and dispatch products subject to excise duty in the course of his business, excise duty being suspended under tax-warehousing arrangement;

- (b) *tax warehouse*: a place where goods subject to excise duty are produced, processed, held, received or dispatched under duty-suspension arrangements by an authorized warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located;
- (c) *suspension arrangement*: a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended;
- (d) *registered trader*: a natural or legal person without authorized warehousekeeper status, authorized by the competent authorities of a Member State to receive, in the course of his business, products subject to excise duty from another Member State under duty-suspension arrangements. This type of trader may neither hold nor dispatch such products under excise duty-suspension arrangements;
- (e) *non-registered trader*: a natural or legal person without authorized warehousekeeper status, who is entitled, in the course of his business, to receive occasionally products subject to excise duty from another Member State under duty-suspension arrangements. This type of trader may neither hold nor dispatch products under excise duty suspension arrangements. A non-registered trader must guarantee payment of excise duty to the tax authorities of the Member States of destination prior to the dispatch of the goods.

#### Article 5

1. The products referred to in Article 3 (1) shall be subject to excise duty at the time of their production within the territory of the Community as defined in Article 2 or of their importation into that territory.

'Importation of a product subject to excise duty' shall mean the entry of that product into the territory of the Community, including the entry of such a product from a territory covered by Article 2 (1), (2) and (3) or from the Channel Islands.

However, where the product is placed under a Community customs procedure on entry into the territory of the Community, importation shall be deemed to take place when it leaves the Community customs procedure.

2. Without prejudice to national and Community provisions regarding customs matters, when products subject to excise duty coming from or going to third countries are under a Community customs procedure other than release for free circulation or are placed in a free zone

or a free warehouse, the excise duty on them shall be deemed to be suspended.

#### Article 6

1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14 (3).

Release for consumption of products subject to excise duty shall mean:

- (a) any departure, including irregular departure, from a suspension arrangement;
- (b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;
- (c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.

2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States.

#### Article 7

1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

2. To that end, without prejudice to Article 6, where products already released for consumption as defined in Article 6 in one Member State are delivered, intended for delivery or used in another Member State for the purposes of a trader carrying out an economic activity independently or for the purposes of a body governed by public law, excise duty shall become chargeable in that other Member State.

3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader or body governed by public law.

4. The products referred to in paragraph 1 shall move between the territories of the various Member States under

cover of an accompanying document listing the main data from the document referred to in Article 18 (1). The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.

5. The person, trader or body referred to in paragraph 3 must comply with the following requirements:

- (a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;
- (b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;
- (c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.

6. The excise duty paid in the first Member State referred to in paragraph 1 shall be reimbursed in accordance with Article 22 (3).

#### Article 8

As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.

#### Article 9

1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State.

In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products.

2. To establish that the products referred to in Article 8 are intended for commercial purposes, Member States must take account, *inter alia*, of the following:

- the commercial status of the holder of the products and his reasons for holding them,
- the place where the products are located or, if appropriate, the mode of transport used,
- any document relating to the products,
- the nature of the products,
- the quantity of the products.

For the purposes of applying the content of the fifth indent of the first subparagraph, Member States may lay down

guide levels, solely as a form of evidence. These guide levels may not be lower than:

- (a) *Tobacco products*

cigarettes	800 items
cigarillos (cigars weighing not more than 3 g each)	400 items
cigars	200 items
smoking tobacco	1,0 kg;
- (b) *Alcoholic beverages*

spirit drinks	10 l
intermediate products	20 l
wines (including a maximum of 60 l of sparkling wines)	90 l
beers	110 l.

Until 30 June 1977 Ireland shall be authorized to apply guide levels which may not be less than 45 litres for wine (including a maximum of 30 litres of sparkling wine) and 55 litres for beer.

3. Member States may also provide that excise duty shall become chargeable in the Member State of consumption on the acquisition of mineral oils already released for consumption in another Member State if such products are transported using atypical modes of transport by private individuals or on their behalf. Atypical transport shall mean the transport of fuels other than in the tanks of vehicles or in appropriate reserve fuel canisters and the transport of liquid heating products other than by means of tankers used on behalf of professional traders.

#### Article 10

1. Products subject to excise duty purchased by persons who are not authorized warehousekeepers or registered or non-registered traders and dispatched or transported directly or indirectly by the vendor or on his behalf shall be liable to excise duty in the Member State of destination. For the purposes of this Article, 'Member State of destination' shall mean the Member State of arrival of the dispatch or transport.

2. To that end, the delivery of products subject to excise duty already released for consumption in a Member State and giving rise to the dispatch or transport of those products to a person as referred to in paragraph 1, established in another Member State, and which are dispatched or transported directly or indirectly by the vendor or on his behalf shall cause excise duty to be chargeable on those products in the Member State of destination.

3. The duty of the Member State of destination shall be chargeable to the vendor at the time of delivery. However, Member States may adopt provisions stipulating that the excise duty shall be payable by a tax representative, other than the consignee of the products. Such tax representative

must be established in the Member State of destination and approved by the tax authorities of that Member State.

The Member State in which the vendor is established must ensure that he complies with the following requirements:

- guarantee payment of excise duty under the conditions set by the Member State of destination prior to dispatch of the products and ensure that the excise duty is paid following arrival of the products,
- keep accounts of deliveries of products.

4. In the case referred to in paragraph 2, the excise duty paid in the first Member State shall be reimbursed in accordance with Article 22 (4).

5. Subject to Community law, Member States may lay down specific rules for applying this provision to products subject to excise duty which are covered by special national distribution arrangements compatible with the Treaty.

## TITLE II

### Production, processing and holding

#### Article 11

1. Each Member State shall determine its rules concerning the production, processing and holding of products subject to excise duty, subject to the provisions of this Directive.
2. Production, processing and holding of products subject to excise duty, where the latter has not been paid, shall take place in a tax warehouse.

#### Article 12

The opening and operation of tax warehouses shall be subject to authorization from the competent authorities of the Member States.

#### Article 13

An authorized warehousekeeper shall be required to:

- (a) provide a guarantee, if necessary, to cover production, processing and holding and a compulsory guarantee to cover movement, the conditions for which shall be set by the tax authorities of the Member States where the tax warehouse is authorized;
- (b) comply with the requirements laid down by the Member State within whose territory the tax warehouse is situated;

- (c) keep, for each warehouse, accounts of stock and product movements;
- (d) produce the products whenever so required;
- (e) consent to all monitoring and stock checks.

The requirements must respect the principle of non-discrimination between national and intra-Community transactions.

#### Article 14

1. Authorized warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or *force majeure* and established by the authorized of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the traders referred to in Article 16 during the transport of products under excise duty suspension arrangements.

2. Losses referred to in paragraph 1 occurring during the intra-Community transport of products under excise duty suspension arrangements must be established according to the rules of the Member State of destination.

3. Without prejudice to Article 20, the duty on shortages other than the losses referred to in paragraph 1 and losses for which the exemptions referred to in paragraph 1 are not granted shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses, duly established by the competent authorities, occurred, or if necessary at the time the shortage was recorded.

## TITLE III

### Movement of goods

#### Article 15

1. Without prejudice to the provisions of Articles 5 (2), 16 and 19 (4), the movement of products subject to excise duty under suspension arrangements must take place between tax warehouses.

2. Warehousekeepers authorized by the competent authorities of a Member State in accordance with Article 13 shall be deemed to be authorized for both national and intra-Community movement.

3. The risks inherent in intra-Community movement shall be covered by the guarantee provided by the authorized warehousekeeper of dispatch, as provided for in Article 13,

or if need be, by a guarantee jointly and severally binding both the consignor and the transporter. If appropriate, Member States may require the consignee to provide a guarantee.

The detailed rules for the guarantee shall be laid down by the Member States. The guarantee must be valid throughout the Community.

4. Without prejudice to the provision of Article 20, the liability of the authorized warehousekeeper of dispatch and, if the case arises, that of the transporter may only be discharged by proof that the consignee has taken delivery of the products, in particular by the accompanying document referred to in Article 18 under the conditions laid down in Article 19.

#### Article 16

1. Notwithstanding Article 15 (1), the consignee may be a professional trader without authorized warehousekeeper status. This trader may, in the course of his business, receive products subject to excise duty from other Member States under duty-suspension arrangements. However, he may neither hold nor dispatch such products under excise duty-suspension arrangements.

Subject to Community law, Member States may lay down specific rules for applying this provision to products subject to excise duty that are covered by special national distribution arrangements compatible with the Treaty.

2. The above trader may request, prior to the receipt of goods, to be registered by the tax authorities of his Member State.

A registered trader must comply with the following requirements:

- (a) guarantee payment of excise duty under the conditions set by the tax authorities of his Member State, without prejudice to Article 15 (4) laying down the liability of the authorized warehousekeeper of dispatch and, if the case arises, of the transporter;
- (b) keep accounts of deliveries of products;
- (c) produce the products whenever so required;
- (d) consent to all monitoring and stock checks.

For this type of trader excise duty shall be chargeable at the time of receipt of the goods and shall be paid in accordance with the procedure laid down by each Member State.

3. If the trader referred to in paragraph 1 above is not registered with the tax authorities of his Member State, he must comply with the following requirements:

- (a) before the goods are dispatched, make a declaration to the tax authorities of the Member States of destination

and guarantee the payment of excise duty, without prejudice to Article 15 (4) laying down the liability of the authorized warehousekeeper of dispatch and, if the case arises, of the transporter;

- (b) pay the excise duty of the Member State of destination at the time of receipt of the goods in accordance with the procedure laid down by that Member State;
- (c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.

4. Subject to the provisions set out in paragraphs 2 and 3, the provisions of this Directive relating to the movement of products subject to excise duty under duty-suspension arrangements shall apply.

#### Article 17

A tax representative may be appointed by the authorized warehousekeeper of dispatch. This tax representative must be established in the Member State of destination and authorized by the tax authorities of that State. He must, instead of and in the place of the consignee without authorized warehousekeeper status, comply with the following requirements:

- (a) guarantee the payment of excise duty under the conditions set by the tax authorities of the Member State of destination, without prejudice to Article 15 (4) laying down the liability of the authorized warehousekeeper of dispatch and, if the case arises, the transporter;
- (b) pay the excise duty of the Member State of destination at the time of receipt of the goods in accordance with the procedure laid down by the Member States of destination;
- (c) keep an account of deliveries of products and advise the tax authorities of the Member States of destination of the place where the goods are delivered.

#### Article 18

1. Notwithstanding the possible use of computerized procedures, all products subject to excise duty moving under duty-suspension arrangements between Member States shall be accompanied by a document drawn up by the consignor. This document may be either an administrative document or a commercial document. The form and content of this document shall be established in accordance with the procedure laid down in Article 24 of this Directive.

2. In order to identify the goods and conduct checks, the packages should be numbered and the products described using the document referred to in paragraph 1. If need be, each container should be sealed by the consignor when the means of transport is recognized as suitable for sealing by



the Member States of departure or the packages should be sealed by the consignor.

3. In cases where the consignee is not an authorized warehousekeeper or a registered trader and notwithstanding Article 17, the document referred to in paragraph 1 must be accompanied by a document certifying that excise duty has been paid in the Member State of destination or that any other procedure for collection of duty has been complied with in accordance with the conditions laid down by the competent authorities of the Member State of destination.

This document must give:

- the address of the office concerned of the tax authorities in the Member State of destination,
- the date and reference of payment or of the acceptance of the guarantee of payment by this office.

4. Paragraph 1 shall not apply when products subject to excise duty move under the conditions referred to in Article 5 (2).

5. Without prejudice to Article 3 (1), Member States may maintain their rules on movement and storage of raw materials used in the manufacture or preparation of products subject to excise duty.

#### Article 19

1. The tax authorities of the Member States shall be informed by traders of deliveries dispatched or received by means of the document or a reference to the document specified in Article 18. This document shall be drawn up in quadruplicate:

- one copy to be kept by the consignor,
- one copy for the consignee,
- one copy to be returned to the consignor for discharge,
- one copy for the competent authorities of the Member State of destination.

The competent authorities of each Member State of dispatch may provide for the use of an additional copy of the document for the competent authorities of the Member State of departure.

The Member States of destination may stipulate that the copy to be returned to the consignor for discharge should be certified or endorsed by its national authorities. Member States applying this provision must inform the Commission which shall in turn inform the other Member States thereof.

The procedure to be followed with respect to the copy for the competent authorities of the Member States of destination shall be adopted in accordance with the procedure provided for in Article 24.

2. When products subject to excise duty move under the duty-suspension arrangements to an authorized warehousekeeper or to a registered or non-registered trader, a copy of the accompanying administrative document or a copy of the commercial document, duly annotated, shall be returned by the consignee to the consignor for discharge, at the latest within 15 days following the month of receipt by the consignee.

The copy to be returned must contain the following details which are required for discharge:

- (a) the address of the office of the tax authority for the consignee;
- (b) the date and place of receipt of the goods;
- (c) a description of the goods received in order to check whether the consignment tallies with the details contained in the document. If it does, the note 'consignment checked' must be added;
- (d) the reference or registration number issued, where appropriate, by the competent authorities of the Member State of destination which use such numbering and/or the endorsement of the competent authorities of the Member State of destination if that Member State stipulates that the copy to be returned must be certified or endorsed by its authorities;
- (e) the authorized signature of the consignee.

3. The duty-suspension arrangements as defined in Article 4 (c) shall be discharged by the placing of the products subject to excise duty under one of the arrangements referred to in Article 5 (2) and subject to the conditions referred to therein, after the consignor has received the copy to be returned of the accompanying administrative document or a copy of the commercial document, duly annotated, in which it must be noted that the products have been placed under such an arrangement.

4. Where the products subject to excise duty which are moving under the duty-suspension arrangement as defined in Article 4 (c) are exported, this arrangement should be discharged by an attestation drawn up by the customs office of departure from the Community confirming that the product has indeed left the Community. That office must send back to the consignor the certified copy of the accompanying document intended for him.

5. If there is no discharge, the consignor shall inform the tax authorities of his Member State within a time limit to be fixed by those tax authorities. The time limit may not, however, exceed three months from the date of dispatch of the goods.

6. Member States shall cooperate to introduce spot checks which may be conducted, as necessary, by computerized procedures.

#### Article 20

1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15 (3), without prejudice to the bringing of criminal proceedings.

Where the excise duty is collected in a Member State other than that of departure, the Member State collecting the duty shall inform the competent authorities of the country of departure.

2. When, in the course of movement, an offence or irregularity has been detected without it being possible to determine where it was committed, it shall be deemed to have been committed in the Member State where it was detected.

3. Without prejudice to the provision of Article 6 (2), when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence of irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure, which shall collect the excise duties at the rate in force on the date when the products were dispatched unless within a period of four months of the competent authorities of the correctness of the transaction or of the place where the offence or irregularity was actually committed.

4. If, before the expiry of a period of three years from the date on which the accompanying document was drawn up, the Member State where the offence or irregularity was actually committed is ascertained, that Member States shall collect the excise duty at the rate in force on the date when the goods were dispatched. In this case, as soon as evidence of collection has been provided, the excise duty originally levied shall be refunded.

#### Article 21

1. Without prejudice to Article 6 (1), Member States may require that products released for consumption in their territory shall carry tax markings or national identification marks used for fiscal purposes.

2. Any Member State which requires the use of tax marking or national identification marks as set out in

paragraph 1 shall be required to make them available to authorized warehousekeepers of the other Member States. However, each Member State may require that fiscal marks be made available to a tax representative authorized by the tax authority of that Member State.

Member States shall ensure that the procedure concerning these markings does not create obstacles to the free movement of products subject to excise duty.

3. Tax markings or identification marks within the meaning of paragraph 1 shall be valid in the Member State which issued them.

However, there may be mutual recognition of these markings between Member States.

4. Mineral oils may be held, transported or used in Ireland, other than in the running tanks of vehicles permitted to use rebated fuel, only where they comply with that State's control and marking requirements.

5. Intra-Community movement of products carrying a tax marking or national identification mark of a Member State within the meaning of paragraph 1 and intended for sale in that Member State, which are within the territory of another Member State, shall take place under cover of an accompanying document as provided for in Article 18 (1) and (3), or if the case arises, in accordance with Article 5 (2).

### TITLE IV

#### Reimbursement

#### Article 22

1. In appropriate cases, products subject to excise duty which have been released for consumption may, at the request of a trader in the course of his business, be eligible for reimbursement of excise duty by the tax authorities of the Member State where they were released for consumption when they are not indented for consumption in that Member State.

However, Member States may refuse request for reimbursement where it does not satisfy the correctness criteria they lay down.

2. In the application of paragraph 1, the following provisions shall apply:

(a) before dispatch of the goods, the consignor must make a request for reimbursement from the competent authorities of his Member State and provide proof that the excise duty has been paid. However, the competent

authorities may not refuse reimbursement on the sole grounds of non-presentation of the document prepared by the same authorities certifying that the initial payment had been made;

(b) movement of the goods referred to in (a) shall take place under cover of the document specified in Article 18 (1);

(c) the consignor shall submit to the competent authorities of his Member State the returned copy of the document referred to in (b) duly annotated by the consignee which must either be accompanied by a document certifying that the excise duty has been secured in the Member State of consumption or have the following details added:

- the address of the office concerned of the tax authorities in the Member State of destination,
- the date of acceptance of the declaration by this office together with the reference or registration number of that declaration;

(d) products subject to excise duty and released for consumption in a Member State and thus bearing a tax marking or an identification mark of that Member State may be eligible for reimbursement of the excise duty due from the tax authorities of the Member States which issued the tax markings or identification marks, provided that the tax authorities of the Member State which issued them has established that such markings or marks have been destroyed.

3. In the cases referred to in Article 7, the Member State of departure is required to reimburse the excise duty paid only where the excise duty was previously paid in the Member State of destination in accordance with the procedure laid down in Article 7 (5).

However, Member States may refuse this request for reimbursement where it does not satisfy the correctness criteria they lay down.

4. In the cases referred to in Article 8b the Member State of departure must, at the vendor's request, reimburse the excise duty paid where the vendor has followed the procedures laid down in Article 10 (3).

However, Member States may refuse this request for reimbursement where it does not satisfy the correctness criteria they lay down.

Where the vendor is an authorized warehousekeeper, Member States may stipulate that the reimbursement procedure be simplified.

5. The tax authorities of each Member State shall determine the monitoring procedures and methods applying to reimbursement made in their territory. Member

States shall ensure that the reimbursement of excise duty does not exceed the sum actually paid.

## TITLE V

### Exemptions

#### Article 23

1. Products subject to excise duty shall be exempted from payment of excise duty where they are intended:

- for delivery in the context of diplomatic or consular relations,
- for international organizations recognized as such by the public authorities of the host Member State, and by members of such organizations, within the limits and under the conditions laid down by the international conventions establishing such organizations or by headquarters agreements,
- for the armed forces of any State party to the North Atlantic Treaty other than the Member State within which the excise duty is chargeable as well as for the armed forces referred to in Article 1 of Decision 90/640/EEC <sup>(1)</sup>, for the use of those forces, for the civilian staff accompanying them or for supplying their messes or canteens,
- for consumption under an agreement concluded with non-member countries or international organizations provided that such an agreement is allowed or authorized with regard to exemption from VAT.

These exemptions shall be subject to conditions and limitations laid down by the host Member State until uniform tax rules are adopted. Eligibility for exemption may be granted in accordance with a procedure for reimbursing excise duties.

2. The Council, acting unanimously on a proposal from the Commission, may authorize any Member State to conclude with a non-member country or an international organization an agreement which may contain exemptions from excise duty.

A State wishing to conclude such an agreement shall bring the matter to the notice of the Commission and provide all the background information necessary. The Commission shall inform the other Member States within one month. The Council's decision shall be deemed to have been adopted if, within two months of other Member States being informed, the matter has not been raised before the Council.

<sup>(1)</sup> OJ No L 349, 13. 12. 1990, p. 19.

3. The provisions on excise duty laid down in the following Directives shall cease to apply on 31 December 1992:

- Directive 74/651/EEC <sup>(1)</sup>,
- Directive 83/183/EEC <sup>(2)</sup>,
- Directive 68/297/EEC <sup>(3)</sup>.

4. The provisions on excise duty laid down in Directive 69/169/EEC <sup>(4)</sup> shall cease to apply on 31 December 1992 in respect of relations between Member States.

5. Until the Council, acting unanimously on a proposal from the Commission, has adopted Community provisions on stores for boats and aircraft, Member States may maintain their national provisions on the subject.

## TITLE VI

### Committee on excise duties

#### Article 24

1. The Commission shall be assisted by a Committee on Excise Duties, hereinafter referred to as the 'Committee'. The Committee shall be composed of the representatives of the Member States and chaired by a Commission representative. The Committee shall draw up its rules of procedure.

2. The measures necessary for the application of Articles 7, 18 and 19 shall be adopted in accordance with the procedures laid down in paragraphs 3 and 4.

3. The Commission representative shall submit to the Commission a draft of the measures to be adopted. The Committee shall deliver its opinion on the draft within a time limit which the Chairman may lay down according to

<sup>(1)</sup> OJ No L 354, 30. 12. 1974, p. 6; Directive as last amended by Directive 88/663/EEC (OJ No 382, 31. 12. 1988, p. 40).

<sup>(2)</sup> OJ No L 105, 23. 4. 1983, p. 64; Directive amended by Directive 89/604/EEC (OJ No L 348, 29. 11. 1989, p. 28).

<sup>(3)</sup> OJ No L 175, 25. 7. 1968, p. 15; Directive as last amended by Directive 85/347/EEC (OJ No L 183, 16. 7. 1985, p. 22).

<sup>(4)</sup> OJ No L 135, 4. 6. 1969, p. 6. Directive as last amended by Directive 91/191/EEC (OJ No L 94, 16. 4. 1991, p. 24).

the urgency of the matter. The Committee shall take its decision by the majority laid down in Article 148 (2) of the Treaty. The Chairman shall not vote.

4. (a) The Commission shall adopt the intended measures where they are in accordance with the Committee's opinion.

(b) Where the intended measures are not in accordance with the opinion of the Committee, or in the absence of any opinion, the Commission shall forthwith, submit to the Council a proposal relating to the measures to be taken. The Council shall act on a qualified majority.

If, on the expiry of three months from the date on which the matter was referred to it, the Council has not adopted any measures, the Commission shall adopt the proposed measures, save where the Council has decided against the said measures on a simple majority.

5. In addition to the measures referred to in paragraph 2, the Committee shall examine the matters by its chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of Community provisions on excise duties, except for those referred to in Article 30 of this Directive.

#### Article 25

The Member States and the Commission shall examine and assess the application of Community provisions on excise duties.

## TITLE VII

### Final provisions

#### Article 26

1. Without prejudice to Article 8, until 31 December 1996 and subject to a review mechanism similar to that laid down in Article 28 (2) of Directive 77/388/EEC <sup>(5)</sup>, Denmark shall be authorized to apply the specific arrangements laid down in paragraphs 2 and 3 for spirit drinks and manufactured tobaccos within the general framework of the approximation of excise duty rates.

2. Denmark shall be authorized to apply the following quantitative restrictions:

<sup>(5)</sup> OJ No L 145, 13. 6. 1977, p. 1; Directive as last amended by Directive 90/640/EEC (OJ No L 349, 13. 12. 1990, p. 19).

- private travellers entering Denmark shall benefit from the allowance in force on 31 December 1992 for cigarettes, cigarillos or smoking tobacco and for spirit drinks,
- travellers resident in Denmark and having been outside Denmark for less than the period in force on 31 December 1992 shall benefit from the allowances in force in Denmark on 31 December 1992 for cigarettes and spirit drinks.

3. Denmark may collect excise duties and carry out the necessary checks with respect to spirit drinks, cigarettes, cigarillos and smoking tobacco.

4. The Council, acting unanimously on a proposal from the Commission, shall decide in conjunction with the approximation of excise duty rates and in the light of the risk of distortion of competition, to modify the provisions of this Article or, if appropriate, to limit the duration of those provisions.

#### Article 27

Before 1 January 1997 the Council, acting unanimously on the basis of a report from the Commission, shall re-examine the provisions of Articles 7, 8, 9 and 10 and, on the basis of a proposal from the Commission after consulting the European Parliament, adopt any necessary amendments.

#### Article 28

The following provisions shall apply for the period ending on 30 June 1999:

1. Member States may exempt products supplied by tax-free shops which are carried away in the personal luggage of travellers taking an intra-Community flight or sea-crossing to another Member State.

For the purposes of this provision:

- (a) 'tax-free shop' shall mean any establishment situated within an airport or port which fulfils the conditions laid down by the competent public authorities, pursuant in particular to paragraph 3 of this Article;
- (b) 'traveller to another Member State' shall mean any passenger holding a transport document, for air or sea travel, stating that the immediate destination is an airport or port situated in another Member State;

- (c) 'intra-Community flight or sea-crossing' shall mean any transport, by air or sea, commencing within a Member State, where the actual place of arrival is situated within another Member State.

Products supplied on board an aircraft or ship during the intra-Community passenger service shall be treated in the same way as products supplied by tax-free shops.

This exemption shall also apply to products supplied by tax-free shops situated within one of the two access terminals to the Channel Tunnel to passengers holding transport documents which are valid for the journey between those two terminals.

2. The exemption provided for in paragraph 1 shall apply only to products in quantities which do not exceed the limits, by person and by journey, laid down by Community provisions in force in the context of the movement of travellers between third countries and the Community.
3. Member States shall take the measures necessary to ensure that the exemption provided for in this Article are applied correctly and straightforwardly, and to prevent any possible evasion, avoidance or abuse.

#### Article 29

1. Member States may exempt small wine producers from the requirements of Titles II and III and from the other requirements relating to movement and monitoring. Where these small producers themselves carry out intra-Community transactions, they shall inform their relevant authorities and comply with the requirements laid down by Commission Regulation No 986/89<sup>(1)</sup> of 10 April 1989 particularly as regards the register of outgoing products and the accompanying document.

'Small wine producers' should be understood to mean persons producing on average less than 1 000 hl of wine per year.

2. The tax authorities of the Member State of destination shall be informed by the consignee of wine deliveries received by means of the document referred to in paragraph 1 or by making a reference to it.
3. Member States shall take the measures necessary on a bilateral basis to introduce spot checks, which may be conducted, as necessary, by computerized procedures.

<sup>(1)</sup> OJ No L 106, 18. 4. 1989, p. 1; Regulation as last modified by Regulation (EEC) No 592/91 (OJ No L 66, 13. 3. 1991, p. 13).

*Article 30*

Directive 77/799/EEC is amended as follows:

1. The title shall be replaced by the following:

'Council Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation'.

2. In Article 1:

(a) Paragraph 1 shall be replaced by the following:

'1. In accordance with this Directive the competent authorities of the Member State shall exchange any information that may enable them to effect a correct assessment of taxes on income and capital and any information relating to the assessment of the following indirect taxes:

- value added tax,
- excise duty on mineral oils,
- excise duty on alcohol and alcoholic beverages,
- excise duty on manufactured tobacco.'

(b) Paragraph 5 shall be replaced by the following in respect of Denmark, Greece, the United Kingdom and Portugal:

in Denmark:

- Skatteministeren or an authorized representative;

in Greece:

Υπουργός Οικονομικών or an authorized representative;

in the United Kingdom:

- The Commissioners of Customs and Excise or an authorized representative for information required concerning value added tax and excise duty,

- The Commissioners of Inland Revenue or an authorized representative for all other information;

in Portugal:

- O Ministro das Finanças or an authorized representative.'

*Article 31*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive on 1 January 1993.

However, with regard to Article 9 (3) the Kingdom of Denmark is authorized to introduce the laws, regulations and administrative provisions required for complying with this provisions by 1 January 1993 at the latest.

When Member States adopt these measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member State.

2. The Member States shall inform the Commission of the main provisions of national law which they adopt to comply with this Directive.

*Article 32*

This Directive is addressed to the Member States.

Done at Brussels, 25 February 1992.

*For the Council*

*The President*

Vitor MARTINS

## COUNCIL DIRECTIVE 92/13/EEC

of 25 February 1992

coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

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

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

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

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

Whereas Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors <sup>(4)</sup> lays down rules for procurement procedures to ensure that potential suppliers and contractors have a fair opportunity to secure the award of contracts, but does not contain any specific provisions ensuring its effective application;

Whereas the existing arrangements at both national and Community levels for ensuring its application are not always adequate;

Whereas the absence of effective remedies or the inadequacy of existing remedies could deter Community undertakings from submitting tenders; whereas, therefore, the Member States must remedy this situation;

Whereas Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts <sup>(5)</sup> is limited to contract award procedures

within the scope of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts <sup>(6)</sup>, as last amended by Directive 90/531/EEC, and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts <sup>(7)</sup>, as last amended by Directive 90/531/EEC;

Whereas the opening-up of procurement in the sectors concerned to Community competition implies that provisions must be adopted to ensure that appropriate review procedures are made available to suppliers or contractors in the event of infringement of the relevant Community law or national rules implementing that law;

Whereas it is necessary to provide for a substantial increase in the guarantees of transparency and non-discrimination and whereas, for it to have tangible effects, effective and rapid remedies must be available;

Whereas account must be taken of the specific nature of certain legal orders by authorizing the Member States to choose between the introduction of different powers for the review bodies which have equivalent effects;

Whereas one of these options includes the power to intervene directly in the contracting entities' procurement procedures such as by suspending them, or by setting aside decisions or discriminatory clauses in documents or publications;

Whereas the other option provides for the power to exert effective indirect pressure on the contracting entities in order to make them correct any infringements or prevent them from committing infringements, and to prevent injury from occurring;

Whereas claims for damages must always be possible;

Whereas, where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim is not be required, in order to obtain the reimbursement of his costs, to prove that the contract would have been awarded to him in the absence of such infringement;

<sup>(1)</sup> OJ No C 216, 31. 8. 1990, p. 8; and  
OJ No C 179, 10. 7. 1991, p. 18.

<sup>(2)</sup> OJ No C 106, 22. 4. 1991, p. 82 and  
OJ No C 39, 17. 2. 1992.

<sup>(3)</sup> OJ No C 60, 8. 3. 1991, p. 16.

<sup>(4)</sup> OJ No L 297, 29. 10. 1990, p. 1.

<sup>(5)</sup> OJ No L 395, 30. 12. 1989, p. 33.

<sup>(6)</sup> OJ No L 185, 16. 8. 1971, p. 5.

<sup>(7)</sup> OJ No L 13, 15. 1. 1977, p. 1.

Whereas the contracting entities which comply with the procurement rules may make this known through appropriate means; whereas this requires an examination, by independent persons, of procurement procedures and practices applied by those entities;

Whereas for this purpose an attestation system, allowing for a declaration on the correct application of the procurement rules, to be made in notices published in the *Official Journal of the European Communities*, is appropriate;

Whereas the contracting entities should have the opportunity of having recourse to the attestation system if they so wish; whereas the Member States must offer them the possibility of doing so; whereas they can do so either by setting up the system themselves or by allowing the contracting entities to have recourse to the attestation system established by another Member State; whereas they may confer the task of carrying out the examination under the attestation system to persons, professions or staff of institutions;

Whereas the necessary flexibility in the introduction of such a system is guaranteed by laying down the essential requirements for it in this Directive; whereas operational details should be provided in European Standards to which this Directive refers;

Whereas the Member States may need to determine operational details prior to, or in addition to, the rules contained in European Standards;

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

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

Whereas it is necessary to provide for the possibility of conciliation at Community level to enable disputes to be settled amicably;

Whereas the application in practice of this Directive should be reviewed at the same time as that of Directive 90/531/EEC on the basis of information to be supplied by the Member States concerning the functioning of the national review procedures;

Whereas this Directive must be brought into effect at the same time as Directive 90/531/EEC;

Whereas it is appropriate that the Kingdom of Spain, the Hellenic Republic and the Portuguese Republic are granted adequate additional periods to transpose this Directive, taking account of the dates of application of Directive 90/531/EEC in those countries,

HAS ADOPTED THIS DIRECTIVE:

## CHAPTER I

### Remedies at national level

#### Article 1

1. The Member States shall take the measures necessary to ensure that decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in the following Articles and, in particular, Article 2 (8), on the grounds that such decisions have infringed Community law in the field of procurement or national rules implementing that law as regards:

- (a) contract award procedures falling within the scope of Council Directive 90/531/EEC; and
- (b) compliance with Article 3 (2) (a) of that Directive in the case of the contracting entities to which that provision applies.

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

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

#### Article 2

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

either



- (a) to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and
- (b) to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

- (c) to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

- (d) and, in both the above cases, to award damages to persons injured by the infringement.

Where damages are claimed on the grounds that a decision has been taken unlawfully, Member States may, where their system of internal law so requires and provides bodies having the necessary powers for that purpose, provide that the contested decision must first be set aside or declared illegal.

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

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

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

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

5. The sum to be paid in accordance with paragraph 1 (c) must be set at a level high enough to dissuade the contracting entity from committing or persisting in an infringement. The payment of that sum may be made to depend upon a final decision that the infringement has in fact taken place.

6. The effects of the exercise of the powers referred to in paragraph 1 on a contract concluded subsequent to its award shall be determined by national law. Furthermore, except where a decision must be set aside prior to the award of damages, a Member State may provide that, after the conclusion of a contract following its award, the powers of the body responsible for the review procedures shall be limited to awarding damages to any person harmed by an infringement.

7. Where a claim is made for damages representing the costs of preparing a bid or of participating in an award procedure, the person making the claim shall be required only to prove an infringement of Community law in the field of procurement or national rules implementing that law and that he would have had a real chance of winning the contract and that, as a consequence of that infringement, that chance was adversely affected.

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

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

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

## CHAPTER 2

## Attestation

## Article 3

The Member States shall give contracting entities the possibility of having recourse to an attestation system in accordance with Articles 4 to 7.

## Article 4

Contracting entities may have their contract award procedures and practices which fall within the scope of Directive 90/531/EEC examined periodically with a view to obtaining an attestation that, at that time, those procedures and practices are in conformity with Community law concerning the award of contracts and the national rules implementing the law.

## Article 5

1. Attestors shall report to the contracting entity, in writing, on the results of their examination. They shall satisfy themselves, before delivering to the contracting entity the attestation referred to in Article 4, that any irregularities identified in the contracting entity's award procedures and practices have been corrected and measures have been taken to ensure that those irregularities are not repeated.

2. Contracting entities having obtained that attestation may include the following statement in notice published in the *Official Journal of the European Communities* pursuant to Articles 16 to 18 of Directive 90/531/EEC:

'The contracting entity has obtained an attestation in accordance with Council Directive 92/13/EEC that, on ....., its contract award procedures and practices were in conformity with Community law and the national rules implementing that law.'

## Article 6

1. Attestors shall be independent of the contracting entities and must be completely objective in carrying out their duties. They shall offer appropriate guarantees of relevant professional qualifications and experience.

2. Member States may identify any persons, professions or institutions whose staff, called upon the act as attestors, they regard as fulfilling the requirements of paragraph 1. For these purposes, Member States may require

professional qualifications, at least at the level of a higher education diploma within the meaning of Directive 89/48/EEC<sup>(1)</sup>, which they regard as relevant, or provide that particular examinations of professional competence organized or recognized by the State offer such guarantees.

## Article 7

The provisions of Articles 4, 5 and 6 shall be considered as essential requirements for the development of European standards on attestation.

## CHAPTER 3

## Corrective mechanism

## Article 8

1. The Commission may invoke the procedures for which this Article provides when, prior to a contract being concluded, it considers that a clear and manifest infringement of Community provisions in the field of procurement has been committed during a contract award procedure falling within the scope of Directive 90/531/EEC or in relation to Article 3 (2) (a) of that Directive in the case of the contracting entities to which that provision applies.

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

3. Within 30 days of receipt of the notification referred to in paragraph 2, the Member States concerned shall communicate to the Commission:

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

4. A reasoned submission in accordance with paragraph 3 (b) may rely among other matters on the fact that the alleged infringement is already the subject of judicial review proceedings or of a review as referred to in Article 2 (9). In such a case, the Member State shall inform the Commission of the result of those proceedings as soon as it becomes known.

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

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

#### CHAPTER 4

#### Conciliation

##### Article 9

1. Any person having or having had an interest in obtaining a particular contract falling within the scope of Directive 90/531/EEC and who, in relation to the procedure for the award of that contract, considers that he has been or risks being harmed by an alleged infringement of Community law in the field of procurement or national rules implementing that law may request the application of the conciliation procedure provided for in Articles 10 and 11.

2. The request referred to in paragraph 1 shall be addressed in writing to the Commission or to the national authorities listed in the Annex. These authorities shall forward requests to the Commission as quickly as possible.

##### Article 10

1. Where the Commission considers, on the basis of the request referred to in Article 9, that the dispute concerns the correct application of Community law, it shall ask the contracting entity to state whether it is willing to take part in the conciliation procedure. If the contracting entity declines to take part, the Commission shall inform the person who made the request that the procedure cannot be initiated. If the contracting entity agrees, paragraphs 2 to 7 shall apply.

2. The Commission shall propose, as quickly as possible, a conciliator drawn from a list of independent persons accredited for this purpose. This list shall be drawn up by the Commission, following consultation of the Advisory Committee for Public Contracts or, in the case of contracting entities the activities of which are defined in Article 2 (2) (d) of Directive 90/531/EEC, following consultation of the Advisory Committee on Telecommunications Procurement.

Each party to the conciliation procedure shall declare whether it accepts the conciliator, and shall designate an additional conciliator. The conciliators may invite not

more than two other persons as experts to advise them in their work. The parties to the conciliation procedure and the Commission may reject any expert invited by the conciliators.

3. The conciliators shall give the person requesting the application of the conciliation procedure, the contracting entity and any other candidate or tenderer participating in the relevant contract award procedure the opportunity to make representations on the matter either orally or in writing.

4. The conciliators shall endeavour as quickly as possible to reach an agreement between the parties which is in accordance with Community law.

5. The conciliators shall report to the Commission on their findings and on any result achieved.

6. The person requesting the application of the conciliation procedure and the contracting entity shall have the right to terminate the procedure at any time.

7. Unless the parties decide otherwise, the person requesting the application of the conciliation procedure and the contracting entity shall be responsible for their own costs. In addition, they shall each bear half of the costs of the procedure, excluding the costs of intervening parties.

##### Article 11

1. Where, in relation to a particular contract award procedure, an interested person within the meaning of Article 9, other than the person requesting the conciliation procedure, is pursuing judicial review proceedings or other proceedings for review within the meaning of this Directive, the contracting entity shall inform the conciliators. These shall inform that person that a request has been made to apply the conciliation procedure and shall invite that person to indicate within a given time limit whether he agrees to participate in that procedure. If that person refuses to participate, the conciliators may decide, acting if necessary by a majority, to terminate the conciliation procedure if they consider that the participation of this person is necessary to resolve the dispute. They shall notify their decision to the Committee and give the reasons for it.

2. Action taken pursuant to this Chapter shall be without prejudice to:

- (a) any action that the Commission or any Member State might take pursuant to Articles 169 or 170 of the Treaty or pursuant to Chapter 3 of this Directive;
- (b) the rights of the persons requesting the conciliation procedure, of the contracting entity or of any other person.

## CHAPTER 5

## Final provisions

*Article 12*

1. Not later than four years after the application of this Directive, the Commission, in consultation with the Advisory Committee for Public Contracts, shall review the manner in which the provisions of this Directive have been implemented and, in particular, the use of the European Standards and, if necessary, make proposals for amendments.

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

3. In the case of matters relating to contracting entities the activities of which are defined in Article 2 (2) (d) of Directive 90/531/EEC, the Commission shall also consult the Advisory Committee on Telecommunications Procurement.

*Article 13*

1. Member States shall take, before 1 January 1993, the measures necessary to comply with this Directive. The

Kingdom of Spain shall take these measures not later than 30 June 1995. The Hellenic Republic and the Portuguese Republic shall take these measures not later than 30 June 1997. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain an reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall bring into force the measures referred to in paragraph 1 on the same dates as those (laid down in Directive 90/531/EEC).

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

*Article 14*

This Directive is addressed to the Member States.

Done at Brussels, 25 February 1992.

*For the Council*

*The President*

Vitor MARTINS

## ANNEX

National authorities to which requests for application of the conciliation procedure referred to in Article 9 may be addressed

*Belgium*

Services du Premier Ministre  
Diensten Van de Eerste Minister

Ministère des Affaires économiques  
Ministerie van Economische Zaken

*Denmark*

Industri- og Handelsstyrelsen (supply contracts)  
Boligsministeriet (works contracts)

*Germany*

Bundesministerium für Wirtschaft

*Greece*

Υπουργείο Βιομηχανίας, Ενέργειας και Τεχνολογίας  
Υπουργείο Εμπορίου Υπουργείο Περιβάλλοντος, Χωροταξίας και Δημοσίων Έργων

*Spain*

Ministerio de Economía y Hacienda

*France*

Commission centrale des marchés

*Ireland*

Department of Finance

*Italy*

Presidenza del Consiglio dei Ministri Politiche Comunitarie

*Luxembourg*

Ministère des travaux publics

*Netherlands*

Ministerie van Economische Zaken

*Portugal*

Conselho de mercados de obras publicas e particulares

*United Kingdom*

HM Treasury

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## COUNCIL DIRECTIVE 92/14/EEC

of 2 March 1992

on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 84 (2) thereof,

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

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

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

Whereas the application of noise emission standards to civil subsonic jet aeroplanes has significant consequences for the provision of air transport services, in particular where such standards limit the useful life of aeroplanes operated by airlines; whereas Council Directive 80/51/EEC <sup>(4)</sup>, fixes limits on emission of such noise;

Whereas Council Directive 89/629/EEC <sup>(5)</sup> limits the addition to the civil air registers of Member States of aeroplanes that only comply with the standards specified in Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988); whereas that Directive specifies that the limitation on addition is only a first stage;

Whereas the programme of action of the European Communities on the environment <sup>(6)</sup> shows clearly the importance of the problem of noise and, in particular, the need to take action against noise due to air traffic;

Whereas, owing to the problem of growing congestion at Community airports, it is essential to ensure that the best

use is made of existing facilities; whereas this will only be possible if environmentally acceptable aeroplanes are used;

Whereas the work undertaken by the Community in cooperation with other international bodies indicates that measures to limit the operation of aeroplanes which do not comply with the standards of Chapter 3 of Annex 16 must follow any non-addition rule in order for this to be of environmental benefit;

Whereas common rules for this purpose should be introduced on a reasonable time-scale to ensure a harmonized approach throughout the Community, supplementing existing rules; whereas this is particularly important in view of the recent trend towards progressive liberalization of European air traffic;

Whereas aeroplane noise should be further reduced, taking into account environmental factors, technical feasibility and economic consequences;

Whereas it is appropriate to restrict the operation of civil subsonic jet aeroplanes on Member States' registers to those which comply with the standards of Chapter 3 of Annex 16; whereas a timetable for the gradual withdrawal from Member States' registers of those aeroplanes which do not meet Chapter 3 standards would represent a facility both for airlines and for manufacturers;

Whereas special consideration should be given to the problems of developing nations;

Whereas in cases of technical or economic difficulty, it would be reasonable to grant limited exemptions,

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

1. The objective of this Directive is to restrict the operation of civil subsonic jet aeroplanes as specified in Article 2.

<sup>(1)</sup> OJ No C 111, 26. 4. 1991, p. 5.

<sup>(2)</sup> OJ No C 13, 20. 1. 1992.

<sup>(3)</sup> OJ No C 339, 31. 12. 1991, p. 89.

<sup>(4)</sup> OJ No L 18, 24. 1. 1990, p. 26. Directive amended by Directive 83/206/EEC (OJ No L 117, 4. 5. 1983, p. 15).

<sup>(5)</sup> OJ No L 363, 13. 12. 1989, p. 27.

<sup>(6)</sup> OJ No C 328, 7. 12. 1987, p. 1.

2. This Directive shall apply to aeroplanes with a maximum take-off mass of 34 000 kg or more with a certified maximum internal accommodation for the aeroplane type in question consisting of more than nineteen passenger seats, excluding any seats for crew only.

#### Article 2

1. Member States shall ensure that, as from 1 April 1995, civil subsonic jet aeroplanes fitted with engines having a by-pass ratio of less than two cannot operate at airports situated in their territory unless granted noise certification either:

- (a) to the standards specified in Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988); or
- (b) to the standards specified in Part II, Chapter 2, Volume 1 of Annex 16 to the aforesaid Convention, provided that they were first issued an individual certificate of airworthiness less than 25 years previously.

2. Member States shall ensure that, as from 1 April 2002, all civil subsonic jet aeroplanes operating from airports situated in their territory comply with the provisions of paragraph 1 (a).

3. The territory referred to in paragraphs 1 and 2 shall not include the overseas departments referred to in Article 227 (2) of the Treaty.

#### Article 3

Aeroplanes listed in the Annex shall be exempt from the provisions of Article 2 (1) (a) and (b) in so far as:

- (a) such subsonic civil jet aeroplanes, granted noise certification to the standards specified in Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, second edition (1988), operated into Community airports in a 12-month reference period between 1986 and 1990 selected in conjunction with the States concerned; and
- (b) these aeroplanes were on the register of the developing nations shown in the Annex in the reference year and continue to be operated by natural or legal persons established in those countries.

#### Article 4

Member States may grant exemptions to the 25-year term specified in Article 2 (1) (b), for not more than three years

in total, for aeroplanes in respect of which an airline demonstrates that the pursuit of its operations would otherwise be adversely affected to an unreasonable extent.

#### Article 5

1. Member States shall exempt from Article 2 (1) aeroplanes which do not meet the standards of Chapter 3 of Annex 16 but which can be altered to meet those standards, provided that:

- (a) suitable conversion equipment exists and is actually available for the aeroplane type in question;
- (b) aeroplanes fitted with such equipment meet the standards of Chapter 3 of Annex 16, as determined in accordance with the technical standards and procedures accepted by the Member States until such time as common standards and procedures are established at Community level;
- (c) the airline has ordered the equipment by 1 April 1994;
- (d) the airline has accepted the earliest delivery date for such alterations.

2. Member States may grant exemptions from Article 2 for aeroplanes of historical interest.

#### Article 6

Member States may grant, on the basis of the principle of one exemption for each aeroplane ordered, exemptions from the provisions of Article 2 (1) for aeroplanes where an order has been placed before 1 April 1994 for a replacement aeroplane that meets the standards of Chapter 3 of Annex 16, provided that the airline accepted the earliest delivery date.

#### Article 7

Subject to the approval of the competent authority of a Member State, airlines may not be required under Article 2 (1) to delete from the registers aeroplanes which do not meet the standards of Chapter 3 of Annex 16 at an annual rate equivalent to more than 10 % of their total civil subsonic jet fleet.

#### Article 8

In individual cases, Member States may permit the temporary use at airports situated in their territory of aeroplanes which cannot be operated on the basis of the other provisions of this Directive. This exemption should be limited to:

- (a) aeroplanes whose operations are of such an exceptional nature that it would be unreasonable to withhold a temporary exemption;
- (b) aeroplanes on non-revenue flights for the purposes of alterations, repair or maintenance.

#### *Article 9*

1. Any Member State granting exemptions under Article 4 to 7 shall inform the competent authorities of the other Member States and the Commission of the fact and of the grounds for its decision.

2. Any Member State shall recognize the exemptions granted by another Member State in respect of aeroplanes on the registers of the latter.

#### *Article 10*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 July 1992.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by Member States.

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

#### *Article 11*

This Directive is addressed to the Member States.

Done at Brussels, 2 March 1992.

*For the Council*  
*The President*  
João PINHEIRO



## ANNEX

## LIST OF AIRCRAFT EXEMPTED IN ACCORDANCE WITH ARTICLE 3

## ALGERIA

Aeroplane		Operator
Type	Registration	
B-727-2D6	7T-VEH	AIR ALGERIE
B-727-2D6	7T-VEI	AIR ALGERIE
B-727-2D6	7T-VEM	AIR ALGERIE
B-727-2D6	7T-VEP	AIR ALGERIE
B-737-2D6	7T-VEE	AIR ALGERIE
B-737-2D6	7T-VEG	AIR ALGERIE
B-737-2D6	7T-VEJ	AIR ALGERIE
B-737-2D6	7T-VEK	AIR ALGERIE
B-737-2D6	7T-VEL	AIR ALGERIE
B-737-2D6	7T-VEN	AIR ALGERIE
B-737-2D6	7T-VED	AIR ALGERIE
B-737-2D6	7T-VEQ	AIR ALGERIE

## BURKINA FASO

Aeroplane		Operator
Type	Registration	
B-707-336C	XT-ABX	NAGANGANNI

## CHILE

Aeroplane		Operator
Type	Registration	
B-707-331C	CC-CUE	FAST AIR CARRIER SF

## DOMINICAN REPUBLIC

Aeroplane		Operator
Type	Registration	
B-707-399C	HI-422CT	DOMINICANA DE AVIACIÓN

EGYPT

Aeroplane		Operator
Type	Registration	
B-707-328C	SU-DAA	ZAS AIRLINE
B-707-336C	SU-DAC	ZAS AIRLINE
B-737-266	SU-BBX	EGYPT AIR
B-737-266	SU-AYL	EGYPT AIR
B-737-266	SU-AYK	EGYPT AIR
B-737-266	SU-AYI	EGYPT AIR
B-737-266	SU-BBW	EGYPT AIR
B-737-266	SU-AYO	EGYPT AIR

GHANA

Aeroplane		Operator
Type	Registration	
F-28-2000	9G-ABZ	GHANA AIRWAYS CORPORATION

KENYA

Aeroplane		Operator
Type	Registration	
DC-8-63	5Y-ZEB	AFRICAN SAFARI AIRWAYS Ltd

LIBYA

Aeroplane		Operator
Type	Registration	
B 727-2L5	5A-DIC	LYBYAN ARAB AIRLINES
B 727-2L5	5A-DIB	LYBYAN ARAB AIRLINES
B 727-2L5	5A-DIA	LYBYAN ARAB AIRLINES
B 727-2L5	5A-DID	LYBYAN ARAB AIRLINES
B 727-2L5	5A-DIE	LYBYAN ARAB AIRLINES

MAURITANIA

Aeroplane		Operator
Type	Registration	
F 28-4000	5T-CLF	AIR MAURITANIE
F 28-4000	5T-CLG	AIR MAURITANIE

## MOROCCO

Aeroplane		Operator
Type	Registration	
B 727-2B6	CN-RMO	ROYAL AIR MAROC
B 727-2B6	CN-CCF	ROYAL AIR MAROC
B 727-2B6	CN-CCG	ROYAL AIR MAROC
B 727-2B6	CN-CCH	ROYAL AIR MAROC
B 727-2B6	CN-CCW	ROYAL AIR MAROC
B 737-2B6	CN-RMI	ROYAL AIR MAROC
B 737-2B6	CN-RMJ	ROYAL AIR MAROC
B 737-2B6	CN-RMK	ROYAL AIR MAROC
B 707-351C	CN-RMB	ROYAL AIR MAROC
B 707-351C	CN-RMC	ROYAL AIR MAROC

## NIGERIA

Aeroplane		Operator
Type	Registration	
B 707-351C	5N-ASY	EAS CARGO AIRLINES
B 707-338C	5N-ARQ	DAS AIR CARGO
B 707-3F9C	5N-ABK	NIGERIA AIRWAYS Ltd

## RWANDA

Aeroplane		Operator
Type	Registration	
B 707-328C	9XR-JA	AIR RWANDA

## SUDAN

Aeroplane		Operator
Type	Registration	
B 707-338C	ST-ALP	TRANS ARABIAN AIR TRANSPORT

## PARAGUAY

Aeroplane		Operator
Type	Registration	
DC-8-63	ZP-CCH	LÍNEAS AÉREAS PARAGUAYAS (AIR PARAGUAY)

URUGUAY

Aeroplane		Operator
Type	Registration	
B-707-387B	CX-BNU	PRIMERAS LÍNEAS URUGUAYAS DE NAVEGACIÓN AÉREA (PLUNA)

SWAZILAND

Aeroplane		Operator
Type	Registration	
DC-8F-54	3D-ADV	AFRICAN INTERNATIONAL AIRWAYS (PTY) Ltd

TUNISIA

Aeroplane		Operator
Type	Registration	
B-727-2H3	TS-JHT	TUNIS AIR

ZAIRE

Aeroplane		Operator
Type	Registration	
B-707-329C	90-CBS	SCIBE AIRLIFT

ZIMBABWE

Aeroplane		Operator
Type	Registration	
B-707-330B B-707-330B	Z-WKU Z-WKV	AIR ZIMBABWE AFRICAN AIRLINES INTERNATIONAL