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Contents

I *Acts whose publication is obligatory*

- Commission Regulation (EC) No 393/96 of 4 March 1996 on the supply of cereals as food aid 1
- ★ Commission Regulation (EC) No 394/96 of 4 March 1996 imposing a provisional anti-dumping duty on imports of polyester staple fibre originating in Belarus 10
- ★ Commission Regulation (EC) No 395/96 of 4 March 1996 amending Regulation (EC) No 1667/95 establishing a forecast balance for the supply to the Canary Islands of live bovine animals and beef and veal products 20
- ★ Commission Regulation (EC) No 396/96 of 4 March 1996 amending Regulation (EC) No 2019/94 on imports of residues from the manufacture of starch from maize from the United States of America 22
- Commission Regulation (EC) No 397/96 of 4 March 1996 establishing the standard import values for determining the entry price of certain fruit and vegetables 24
- ★ Commission Regulation (EC) No 398/96 of 4 March 1996 amending Regulation (EC) No 1466/95 laying down special detailed rules of application for export refunds on milk and milk products 26

II *Acts whose publication is not obligatory*

Commission

96/180/EC:

- ★ Commission Decision of 16 January 1996 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/35.545 — LH/SAS) ⁽¹⁾ 28

⁽¹⁾ Text with EEA relevance

I

(Acts whose publication is obligatory)

**COMMISSION REGULATION (EC) No 393/96
of 4 March 1996
on the supply of cereals as food aid**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 3972/86 of 22 December 1986 on food-aid policy and food-aid management ⁽¹⁾, as last amended by Regulation (EEC) No 1930/90 ⁽²⁾, and in particular Article 6 (1) (c) thereof,

Whereas Council Regulation (EEC) No 1420/87 of 21 May 1987 laying down implementing rules for Regulation (EEC) No 3972/86 on food-aid policy and food-aid management ⁽³⁾ lays down the list of countries and organizations eligible for food-aid operations and specifies the general criteria on the transport of food aid beyond the fob stage;

Whereas, following the taking of a number of decisions on the allocation of food aid, the Commission has allocated to certain beneficiaries 24 951 tonnes of cereals;

Whereas it is necessary to make these supplies in accordance with the rules laid down by Commission Regulation (EEC) No 2200/87 of 8 July 1987 laying down general rules for the mobilization in the Community of products to be supplied as Community food aid ⁽⁴⁾, as amended by Regulation (EEC) No 790/91 ⁽⁵⁾; whereas it is necessary to specify the time limits and conditions of supply and the procedure to be followed to determine the resultant costs;

Whereas, for a given lot, given the small quantities to be supplied, the packaging methods and the large number of destinations of the supplies, provision should be made for the possibility for tenderers to indicate two ports of loading, where necessary not belonging to the same port area,

HAS ADOPTED THIS REGULATION:

Article 1

Cereals shall be mobilized in the Community, as Community food aid for supply to the recipient listed in the Annexes, in accordance with Regulation (EEC) No 2200/87 and under the conditions set out in the Annexes. Supplies shall be awarded by the tendering procedure.

For lot B, notwithstanding Article 7 (3) (d) of Regulation (EEC) No 2200/87, the tender may indicate two ports of shipment not necessarily belonging to the same port area.

The successful tenderer is deemed to have noted and accepted all the general and specific conditions applicable. Any other condition or reservation included in his tender is deemed unwritten.

Article 2

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

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

Done at Brussels, 4 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 370, 30. 12. 1986, p. 1.

⁽²⁾ OJ No L 174, 7. 7. 1990, p. 6.

⁽³⁾ OJ No L 136, 26. 5. 1987, p. 1.

⁽⁴⁾ OJ No L 204, 25. 7. 1987, p. 1.

⁽⁵⁾ OJ No L 81, 28. 3. 1991, p. 108.

ANNEX I

LOT A

1. **Operation Nos** ⁽¹⁾: see Annex II
2. **Programme**: 1995
3. **Recipient** ⁽²⁾: Euronaid PO Box 12, NL-2501 CA Den Haag (tel. (31 70) 330 57 57; fax 364 17 01; telex 30960 EURON NL)
4. **Representative of the recipient** ⁽³⁾: to be designated by the recipient
5. **Place or country of destination**: see Annex II
6. **Product to be mobilized**: milled rice (product code 1006 30 92 900, 1006 30 94 900, 1006 30 96 900, 1006 30 98 900)
7. **Characteristics and quality of the goods** ⁽³⁾ ⁽⁷⁾: see OJ No C 114, 29. 4. 1991, p. 1 (under IIA (1) (f))
8. **Total quantity**: 906 tonnes (1 631 tonnes of cereals)
9. **Number of lots**: 1; see Annex II
10. **Packaging and marking** ⁽⁶⁾ ⁽⁸⁾ ⁽¹²⁾: see OJ No C 114, 29. 4. 1991, p. 1 (under IIA (2) (c) and IIA (3))
Language to be used for the marking: see Annex II
11. **Method of mobilization**: the Community market
12. **Stage of supply**: free at port of shipment
13. **Port of shipment**: —
14. **Port of landing specified by the recipient**: —
15. **Port of landing**: —
16. **Address of the warehouse and, if appropriate, port of landing**: —
17. **Period for making the goods available at the port of shipment**: 15. 4 — 5. 5. 1996
18. **Deadline for the supply**: —
19. **Procedure for determining the costs of supply**: tendering
20. **Date of expiry of the period allowed for submission of tenders**: 12 noon (Brussels time) on 19. 3. 1996
21. **In the case of a second invitation to tender**:
 - (a) deadline for the submission of tenders: 12 noon (Brussels time) on 2. 4. 1996
 - (b) period for making the goods available at the port of shipment: 29. 4 — 19. 5. 1996
 - (c) deadline for the supply: —
22. **Amount of the tendering security**: ECU 5 per tonne
23. **Amount of the delivery security**: 10 % of the amount of the tender in ecus
24. **Address for submission of tenders and tendering securities** ⁽¹⁾: Bureau de l'aide alimentaire, à l'attention de Monsieur T. Vestergaard, bâtiment Loi 130, bureau 7/46, 200 rue de la Loi/Wetstraat, B-1049 Brussels (Attention! New numbers: tlx: 25670 AGREC B; fax: (32-2) 296 70 03 / 296 70 04)
25. **Refund payable on request by the successful tenderer** ⁽⁴⁾: refund applicable on 15. 3. 1996, fixed by Commission Regulation (EC) No 342/96 (OJ No L 48, 27. 2. 1996, p. 9)

LOT B

1. **Operation Nos** ⁽¹⁾: see Annex II
2. **Programme**: 1995
3. **Recipient** ⁽²⁾: Euronaid, postbus 12, NL-2501 CA Den Haag (tel. (31 70) 33 05 757; fax 36 41 701; telex 30960 EURON NL)
4. **Representative of the recipient** ⁽³⁾: to be designated by the recipient
5. **Place or country of destination**: see Annex II
6. **Product to be mobilized**: oat flakes
7. **Characteristics and quality of the goods** ⁽³⁾ ⁽⁷⁾: OJ No C 114, 29. 4. 1991, p. 1 (under II.B (1) (e))
8. **Total quantity**: 312 tonnes (538 tonnes of cereals)
9. **Number of lots**: 1 (see Annex II)
10. **Packaging and marking** ⁽⁶⁾ ⁽⁸⁾ ⁽⁹⁾ ⁽¹⁰⁾: OJ No C 114, 29. 4. 1991, p. 1 (II.B (2) (f) and II.B (3))
Language to be used for the marking: see Annex II
11. **Method of mobilization**: the Community market
12. **Stage of supply**: free at port of shipment ⁽¹¹⁾
13. **Port of shipment**: —
14. **Port of landing specified by the recipient**: —
15. **Port of landing**: —
16. **Address of the warehouse and, if appropriate, port of landing**: —
17. **Period for making the goods available at the port of shipment**: 15. 4 — 5. 5. 1996
18. **Deadline for the supply**: —
19. **Procedure for determining the costs of supply**: invitation to tender
20. **Date of expiry of the period allowed for submission of tenders**: 12 noon (Brussels time) on 19. 3. 1996
21. **In the case of a second invitation to tender**:
 - (a) deadline for the submission of tenders: 12 noon (Brussels time) on 2. 4. 1996
 - (b) period for making the goods available at the port of shipment: 29. 4 — 19. 5. 1996
 - (c) deadline for the supply: —
22. **Amount of the tendering security**: ECU 5 per tonne
23. **Amount of the delivery security**: 10 % of the amount of the tender in ecus
24. **Address for submission of tenders and tendering securities** ⁽¹⁾: Bureau de l'aide alimentaire, à l'attention de Monsieur T. Vestergaard, bâtiment Loi 130, bureau 7/46, 200 rue de la Loi/Wetstraat, B-1049 Brussels (Attention! New numbers: telex 25670 AGREC B; telefax (32 2) 296 70 03 / 296 70 04)
25. **Refund payable on request by the successful tenderer** ^(*): refund applicable on 15. 3. 1996, fixed by Commission Regulation (EC) No 342/96 (OJ No L 48, 27. 2. 1996, p. 9)

LOT C

1. **Operation Nos** ⁽¹⁾: see Annex II
2. **Programme**: 1995
3. **Recipient** ⁽²⁾: WFP (World Food Programme), via Cristoforo Colombo 426, I-00145 Roma (telex 626675 WFP I)
4. **Representative of the recipient**: to be designated by the recipient
5. **Place or country of destination**: see Annex II
6. **Product to be mobilized**: maize
7. **Characteristics and quality of the goods** ⁽³⁾ ⁽⁷⁾: OJ No C 114, 29. 4. 1991, p. 1 (under II.A.1 (d))
8. **Total quantity**: 10 000 tonnes
9. **Number of lots**: 1 (see Annex II)
10. **Packaging and marking** ⁽⁸⁾ ⁽¹²⁾: OJ No C 114, 29. 4. 1991, p. 1 (under II.A.2 (c) and II.A.3)
Language to be used for the marking: see Annex II
in bulk + sacks + needles and sufficient twine (2 m/bag) ⁽¹⁴⁾
11. **Method of mobilization**: the Community market
12. **Stage of supply**: free at port of shipment — fob stowed and trimmed ⁽¹³⁾
13. **Port of shipment**: —
14. **Port of landing specified by the recipient**: —
15. **Port of landing**: —
16. **Address of the warehouse and, if appropriate, port of landing**: —
17. **Period for making the goods available at the port of shipment**: 15. 4 — 5. 5. 1996
18. **Deadline for the supply**: —
19. **Procedure for determining the costs of supply**: tendering
20. **Date of expiry of the period allowed for submission of tenders**: 12 noon (Brussels time) on 19. 3. 1996
21. **In the case of a second invitation to tender**:
 - (a) deadline for the submission of tenders: 12 noon (Brussels time) on 2. 4. 1996
 - (b) period for making the goods available at the port of shipment: 29. 4 — 19. 5. 1996
 - (c) deadline for the supply: —
22. **Amount of the tendering security**: ECU 5 per tonne
23. **Amount of the delivery security**: 10 % of the amount of the tender in ecus
24. **Address for submission of tenders and tendering securities** ⁽¹⁾: Bureau de l'aide alimentaire, à l'attention de Monsieur T. Vestergaard, bâtiment Loi 130, bureau 7/46, rue de la Loi/Wetstraat 200, B-1049 Brussels (Attention! New numbers: tlx: 25670 AGREC B; fax: (32-2) 296 70 03 / 296 70 04)
25. **Refund payable on request by the successful tenderer** ⁽⁴⁾: refund applicable on 15. 3. 1996, fixed by Commission Regulation (EC) No 342/96 (OJ No L 48, 27. 2. 1996, p. 9)

LOT D

1. **Operation No** (1): 721/95
2. **Programme**: 1995
3. **Recipient** (2): WFP (World Food Programme), via Cristoforo Colombo 426, I-00145 Roma (telex 626675 WFP I)
4. **Representative of the recipient**: to be designated by the recipient
5. **Place or country of destination**: Iraq
6. **Product to be mobilized**: common wheat flour
7. **Characteristics and quality of the goods** (3) (7): OJ No C 114, 29. 4. 1991, p. 1 (under II.B (1) (a))
8. **Total quantity**: 9 000 tonnes (12 330 tonnes of cereals)
9. **Number of lots**: one
10. **Packaging and marking** (8) (9): see OJ No C 114, 29. 4. 1991, p. 1 (under II.B (2) (a) and II.B (3))
Markings in English; supplementary markings: 'Expiry date: ...'
11. **Method of mobilization**: the Community market
12. **Stage of supply**: free at port of shipment — fob stowed (13)
13. **Port of shipment**: —
14. **Port of landing specified by the recipient**: —
15. **Port of landing**: —
16. **Address of the warehouse and, if appropriate, port of landing**: —
17. **Period for making the goods available at the port of shipment**: 22. 4 — 12. 5. 1996
18. **Deadline for the supply**: —
19. **Procedure for determining the costs of supply**: tendering
20. **Date of expiry of the period allowed for submission of tenders**: 12 noon (Brussels time) on 19. 3. 1996
21. **In the case of a second invitation to tender**:
 - (a) deadline for the submission of tenders: 12 noon (Brussels time) on 2. 4. 1996
 - (b) period for making the goods available at the port of shipment: 6 — 26. 5. 1996
 - (c) deadline for the supply: —
22. **Amount of the tendering security**: ECU 5 per tonne
23. **Amount of the delivery security**: 10 % of the amount of the tender in ecus
24. **Address for submission of tenders and tendering securities** (1): Bureau de l'aide alimentaire, à l'attention de Monsieur T. Vestergaard, bâtiment Loi 130, bureau 7/46, rue de la Loi/Wetstraat 200, B-1049 Brussels (Attention! New numbers: tlx: 25670 AGREC B; fax: (32-2) 296 70 03 / 296 70 04)
25. **Refund payable on request by the successful tenderer** (*): refund applicable on 15. 3. 1996, fixed by Commission Regulation (EC) No 342/96 (OJ No L 48, 27. 2. 1996, p. 9)

LOT E

1. **Operation No⁽¹⁾:** 703/95
2. **Programme:** 1995
3. **Recipient⁽²⁾:** CICR, 19, avenue de la Paix, CH-1202 Genève (tel. (41 22) 734 60 01; telex 22269 CH CICR)
4. **Representative of the recipient:** ICRC Tbilisi, Dutu Megreli Road 1, 380003 Tbilisi. Tel.: (78832) 93 55 11, fax: 935520
5. **Place or country of destination:** Georgia
6. **Product to be mobilized:** common wheat flour
7. **Characteristics and quality of the goods⁽³⁾ (7):** OJ No C 114, 29. 4. 1991, p. 1 (under II.B (1) (a))
8. **Total quantity:** 330 tonnes (452 tonnes of cereals)
9. **Number of lots:** 1
10. **Packaging and marking⁽⁸⁾ (9) (12) (13):** see OJ No C 114, 29. 4. 1991, p. 1 (under II.B (2) (d) and II.B (3))
Markings in English
11. **Method of mobilization:** the Community market
12. **Stage of supply:** free at destination
13. **Port of shipment:** —
14. **Port of landing specified by the recipient:** —
15. **Port of landing:** —
16. **Address of the warehouse and, if appropriate, port of landing:**
ICRC Sochi (warehouse), Castello street 51, ADLER Sochi, Russia
17. **Period for making the goods available at the port of shipment where the supply is awarded at the port of shipment stage:** 8 — 21. 4. 1996
18. **Deadline for the supply:** 19. 5. 1996
19. **Procedure for determining the costs of supply:** tendering
20. **Date of expiry of the period allowed for submission of tenders:** 12 noon (Brussels time) on 19. 3. 1996
21. **In the case of a second invitation to tender:**
 - (a) deadline for the submission of tenders: 12 noon (Brussels time) on 2. 4. 1996
 - (b) period for making the goods available at the port of shipment where the supply is awarded at the port of shipment stage: 22. 4 — 5. 5. 1996
 - (c) deadline for the supply: 2. 6. 1996
22. **Amount of the tendering security:** ECU 5 per tonne
23. **Amount of the delivery security:** 10 % of the amount of the tender in ecus
24. **Address for submission of tenders and tendering securities⁽¹⁾:** Bureau de l'aide alimentaire, à l'attention de Monsieur T. Vestergaard, bâtiment Loi 130, bureau 7/46, rue de la Loi/Wetstraat 200, B-1049 Brussels (Attention! New numbers: telex: 25670 AGREC B; fax (32 2) 296 70 03 / 296 70 04)
25. **Refund payable on request by the successful tenderer⁽⁴⁾:** refund applicable on 15. 3. 1996; fixed by Commission Regulation (EC) No 342/96 (OJ No L 48, 27. 2. 1996, p. 9)

Notes:

- (¹) The operation number should be mentioned in all correspondence.
- (²) The successful tenderer shall contact the recipient as soon as possible to establish which consignment documents are required.
- (³) The successful tenderer shall deliver to the beneficiary a certificate from an official entity certifying that for the product to be delivered the standards applicable, relative to nuclear radiation, in the Member State concerned, have not been exceeded. The radioactivity certificate must indicate the caesium-134 and -137 and iodine-131 levels.
- (⁴) Commission Regulation (EEC) No 2330/87 (OJ No L 210, 1. 8. 1987, p. 56), as last amended by Regulation (EEC) No 2226/89 (OJ No L 214, 25. 7. 1989, p. 10), is applicable as regards the export refund. The date referred to in Article 2 of the said Regulation is that referred to in point 25 of this Annex.

The amount of the refund, shall be converted into national currency by applying the agricultural conversion rate applicable on the day of completion of the customs export formalities. The provisions of Articles 13 to 17 of Commission Regulation (EEC) No 1068/93 (OJ No L 108, 1. 5. 1993, p. 106), as last amended by Regulation (EC) No 2853/95 (OJ No L 299, 12. 12. 1995, p. 1), shall not apply to this amount.

- (⁵) The supplier should send a duplicate of the original invoice to Willis Corroon Scheuer, PO box 1315, NL-1000 Amsterdam.
- (⁶) Shipment to take place in 20-foot containers condition FCL/FCL (lot B: each containing 12 tonnes net). The supplier shall be responsible for the cost of making the containers available in the stack position at the container terminal at the port of shipment. The recipient shall be responsible for all subsequent loading costs, including the cost of moving the containers from the container terminal. The provisions of Article 13 (2), second paragraph, of Regulation (EEC) No 2200/87 shall not apply.

The successful tenderer has to submit to the recipient's agent a complete packing list of each container, specifying number of bags belonging to each shipping number as specified in the invitation to tender.

The successful tenderer has to seal each container with a numbered locktainer (SYSKO locktainer 180 seal), number of which to be provided to the beneficiary's forwarder.

- (⁷) The successful tenderer shall supply to the beneficiary or its representative, on delivery, the following documents:
 - phytosanitary certificate (lot A + B1: + expiry date),
 - lots A, B: fumigation certificate (Cereals/cereals derivatives are to be fumigated prior to shipment by way of Magnesium Phosphide (min. 2 g/m³) for a minimum period of five (5) days between the application of the fumigant and the venting process. The appropriate certification must be made available at the time of shipment.)

- (⁸) Notwithstanding OJ No C 114, point II.A (3)(c) or II.B (3)(c) is replaced by the following: 'the words "European Community".'

- (⁹) Since the goods may be rebagged, the successful tenderer must provide 2 % of empty bags of the same quality as those containing the goods, with the marking followed by a capital 'R'.

- (¹⁰) See fourth amendment to OJ No C 114 published in OJ No C 272, 21. 10. 1992, p. 6.

- (¹¹) For lot B, notwithstanding Article 7 (3) (d) of Regulation (EEC) No 2200/87, the tender may indicate two ports of shipment not necessarily belonging to the same port area.

- (¹²) See second amendment to OJ No C 114 published in OJ No C 135, 26. 5. 1992, p. 20.

- (¹³) Notwithstanding Articles (7) (3) (f) and 13 (2) of Regulation (EEC) No 2200/87, the price tendered must include all loading, handling, stowage (lot C: and trimming costs).

- (¹⁴) For the sacks: 21 sacks/tonne.

For the needles: 1/100 tonnes.

For the twine: 60 % polyester, 40 % cotton, 20/4, knotted free yarn, 5 000 m/kg, on spools of 3 kg.

(¹⁵) The bags shall be stacked, maximum 21 on wooden pallets (made of pine, fir, or poplar wood) measuring not more than 1 200 × 1 400 mm, and with the following features:

- four-way entry, non-reversible, with wings,
- a top deck consisting of a minimum of seven planks (width: 100 mm; thickness: 22 mm),
- a bottom deck consisting of three planks (width: 100 mm; thickness: 22 mm),
- three bearers (width: 100 mm; thickness: 22 mm),
- nine dowels: 100 × 100 × 78 mm minimum.

The palletized bags shall be covered by a shrink film of a thickness of at least 150 microns. The pallet shall be covered with a wooden structure to allow stacking. The whole of the above must be bound, in each direction, by two nylon straps of a width of not less than 15 mm with plastic buckles.

The bags are further protected by board of wood placed between the bags and straps.

ANEXO II — BILAG II — ANHANG II — ΠΑΡΑΡΤΗΜΑ II — ANNEX II — ANNEXE II — ALLEGATO II — BIJLAGE II —
ANEXO II — LIITE II — BILAGA II

Lote	Cantidad total (en toneladas)	Cantidades parciales (en toneladas)	Acción nº	Pais de destino	Lengua que se debe utilizar en la rotulación
Parti	Totalmængde (tons)	Delmængde (tons)	Aktion nr.	Bestemmelsesland	Mærkning på følgende sprog
Partie	Gesamtmenge (in Tonnen)	Teilmengen (in Tonnen)	Maßnahme Nr.	Bestimmungsland	Kennzeichnung in folgender Sprache
Παρτίδα	Συνολική ποσότητα (σε τόνους)	Μερικές ποσότητες (σε τόνους)	Δράση αριθ.	Χώρα προορισμού	Γλώσσα που πρέπει να χρησιμοποιηθεί για τη σήμανση
Lot	Total quantity (in tonnes)	Partial quantities (in tonnes)	Operation No	Country of destination	Language to be used for the marking
Lot	Quantité totale (en tonnes)	Quantités partielles (en tonnes)	Action nº	Pays de destination	Langue à utiliser pour le marquage
Lotto	Quantità totale (in tonnellate)	Quantitativi parziali (in tonnellate)	Azione n.	Paese di destinazione	Lingua da utilizzare per la marcatura
Partij	Totale hoeveelheid (in ton)	Deelhoeveelheden (in ton)	Maatregel nr.	Land van bestemming	Taal te gebruiken voor de opschriften
Lote	Quantidade total (em toneladas)	Quantidades parciais (em toneladas)	Ação nº	Pais de destino	Língua a utilizar na rotulagem
Erä	Kokonaismäärä (tonnia)	Osittaismäärä (tonnia)	Toimi N:o	Määrämaa	Merkinnässä käytettävä kieli
Parti	Total kvantitet (ton)	Delkvantitet (ton)	Aktion nr	Bestämmelsesland	Märkning på följande språk
A	906	A1: 198 A2: 708	197/95 201/95	Perú Perú	Español Español
B	312	B1: 48 B2: 60 B3: 96 B4: 96 B5: 12	585/95 586/95 587/95 588/95 589/95	Perú Madagascar Madagascar Madagascar Madagascar	Español Français Français Français Français
C	10 000	C1: 4 000 C2: 6 000	708/95 709/95	Lesotho Swaziland	English English

COMMISSION REGULATION (EC) No 394/96

of 4 March 1996

imposing a provisional anti-dumping duty on imports of polyester staple fibre
originating in Belarus

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community⁽¹⁾, as last amended by Regulation (EC) No 1251/95⁽²⁾, and in particular Article 23 thereof,Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community⁽³⁾, as last amended by Regulation (EC) No 522/94⁽⁴⁾, and in particular Article 11 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

- (1) In August 1994, the Commission announced by a notice published in the *Official Journal of the European Communities*⁽⁵⁾ the initiation of an anti-dumping proceeding concerning imports of polyester staple fibre originating in Belarus.
- (2) The proceeding was initiated as a result of a complaint lodged by the International Committee of Rayon and Synthetic Fibres (CIRFS), acting on behalf of Community producers allegedly representing a major proportion of the total production of polyester staple fibre in the Community.

The complaint contained evidence of dumping of the said product and of material injury resulting therefrom which was considered sufficient to justify the initiation of a proceeding.

- (3) The Commission officially advised the producers, exporters and importers known to be concerned, the representatives of the exporting country and the complainants. Interested parties directly concerned were given the opportunity to make their views known in writing and to request a hearing.
- (4) One producer in the country concerned, several importers and the complainant Community industry made their views known in writing. Parties who so requested were granted a hearing.
- (5) The Commission sent questionnaires to the parties known to be concerned and received information from the complaining Community producers, from one Belarussian exporter, and from two cooperating importers in the Community.
- (6) Submissions were also made by or on behalf of Community purchasers of processors of the product in question.
- (7) The Commission sought and verified all information it considered necessary for a preliminary determination of dumping and injury and carried out investigations at the premises of the following:

(a) *Complainant Community producers:*

- Hoechst AG, Frankfurt am Main, Germany,
- Du Pont de Nemours, Bad Homburg, Germany,
- Montefibre Spa Enichem, Milano, Italy,
- Akzo Fibres and Polymers Division, Arnhem, Netherlands,
- Wellman International Ltd, Co Meath, Ireland,
- La Seda de Barcelona SA, El Prat de Llobrega, Spain,
- Nurel SA, Hospitalet de Llobrega, Spain;

(b) *Three producers in two market-economy countries:*

- Shinkong Synthetic Fibers Cooperation, Taiwan,
- Tuntex Distinct Cooperation, Taiwan,
- Zakłady Włokien Chemicznych Elana SA, Poland.

⁽¹⁾ OJ No L 349, 31. 12. 1994, p. 1.

⁽²⁾ OJ No L 122, 2. 6. 1995, p. 1.

⁽³⁾ OJ No L 209, 2. 8. 1988, p. 1.

⁽⁴⁾ OJ No L 66, 10. 3. 1994, p. 10.

⁽⁵⁾ OJ No C 212, 3. 8. 1994, p. 5.

- (8) The investigation of dumping covered the period from 1 July 1993 to 30 June 1994 (hereinafter referred to as 'the investigation period').
- (9) The investigation exceeded the normal time period of one year laid down in Article 7 (9) of Council Regulation (EEC) No 2423/88 (hereinafter referred to as the 'basic Regulation'), due to the complexity of the investigation and in particular due to difficulties in obtaining reliable data in an appropriate market economy reference country (hereinafter referred to as 'analogue country').

In this respect the Commission contacted, as proposed by the complainant, a producer of polyester staple fibres in Poland, which provided some information and agreed to cooperate only at a very late stage of the proceeding. Subsequently the Commission contacted several Korean manufacturers, which declined to cooperate. Finally, two Taiwanese producers of polyester staple fibres responded to the Commission's request and agreed to cooperate in this proceeding (see recitals (24) to (28)).

B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

1. Description and use of the product concerned

- (10) The product under consideration is synthetic staple fibre of polyester (hereinafter referred to as 'PSF'), not carded, combed or otherwise processed for spinning. It is a raw material used in various stages of textile production, depending on the nature of the textiles to be produced.
- (11) The product can be split into two main categories: spinning- and non-spun application. Some 60 % of the PSF consumed in the Community is used for spinning yarn to make fabrics, mixed, where necessary, with other fibres such as wool or cotton. The rest is used as wadding for certain textile products (cushions, car seats, anoraks and the like), including other non-spun applications such as carpet manufacture. Within these two categories, different sizes or types of PSD, essentially determined by denier and cut length, exist.

- (12) However, there are no differences between the basic physical characteristics of the two main categories, nor in the various types within these categories. In these circumstances and in line with previous investigations, PSF has to be considered as one product for the purpose of this proceeding.

2. Like product

- (13) The Commission established that PSF exported to the Community from Belarus has basic characteristics and uses similar to those of the product produced and sold in the Community. PSF originating in Belarus also has basic characteristics and uses similar to the PSF produced and sold in the analogue country (see (24) to (28)).
- (14) Eurofibrefill, an association formed by a group of users of PSF, claimed that the product exported from Belarus is not comparable to the allegedly more sophisticated, upper grade material produced and sold by the Community manufacturers.
- (15) This argument cannot be accepted since the physical characteristics of the products are very similar and the use made of the alleged lower quality polyester staple fibres is not significantly different from the use made of those of supposedly better quality. It was found during the investigation that Belarussian products were described on customers' orders and invoices using identical classifications as compared to Community products, and were sold to end-users who also bought Community produced products for the same uses. Therefore, an alleged difference in quality, if any, is not sufficient to justify a distinction being made between these products.
- (16) Also in this regard, one Belarussian exporter and Eurofibrefill questioned whether the PSF sold in Taiwan, which was chosen as an analogue country, forms a like product when compared with the PSF exported from Belarus to the Community, claiming an alleged difference in tenacity as a decisive factor negating other considerations indicating that the products were like products.
- (17) The Commission reached the conclusion that, despite possible minor deviations in the appearance and characteristics, such as tenacity, resulting from a variation in the chemical composition or manu-

facturing process of the fibres sold on the two markets, these fluctuations are not material in relation to the product's basic characteristics, marketing, customer/consumer acceptance and use.

- (18) Consequently, it was considered that PSF exported from Belarus to the Community, that sold on the Taiwanese domestic market and that produced and sold in the Community, are like products within the meaning of Article 2 (12) of the basic Regulation.

C. DUMPING

1. Normal value — choice of analogue country

- (19) Since Belarus, with an annual PSF production of around 130 000 tonnes, is a non-market economy country, normal value had to be determined on the basis of information obtained for the domestic market of a market economy reference third country, in accordance with Article 2 (5) of the basic Regulation.
- (20) For this purpose, the complainant suggested that Poland should be used as the analogue country. The Commission obtained the cooperation of the sole producer of PSF on the Polish market.
- (21) After verification of the information provided and having analysed the general market conditions in Poland for the product concerned, the following conclusions were reached leading to the rejection of Poland as the analogue country.
- (22) In Poland, which has a relatively small domestic consumption of approximately 25 000 tonnes, the sole Polish producer, whose production volume is small, holds more than 90 % of the market. There is an absence of price competition, given the negligible imports from third countries (Belarus, Germany and Slovakia) due to high import duties of up to 26 %. The low domestic consumption entails also, that the number of consumers in the market is relatively limited.
- (23) In these circumstances it was concluded that an open, market-oriented environment for PSF did not exist in Poland during the investigation period. Indeed, after having verified the cost of production and domestic selling prices of the cooperating company, the Commission established that a 'normal value' established under these market conditions would not reflect normal market condi-

tions and lead to a result which would unreasonably affect the Belarussian exporter.

- (24) The Commission subsequently examined the appropriateness of Taiwan as analogue country, noting also that the two Taiwanese producers willing to cooperate had already participated in previous anti-dumping proceedings involving Taiwan as an analogue country. No objections to this proposal were raised by the Belarussian exporter except concerning the comparability of the product (see recital (34)) or Government authorities concerned. The following facts were taken into consideration when proposing Taiwan for the final decision:

— *openness and representativeness of the Taiwanese market:*

- (25) The two Taiwanese manufacturers, which agreed to cooperate, produce on an economical scale with high production volumes, and their product enters an open and competitive domestic market with nine local producers. Domestic consumption of PSF amounts to more than 400 000 tonnes, which, with import duties of around 1 %, includes import volumes from various countries.
- (26) There is therefore a competitive structure of supply and demand. Given the efficiency of the Taiwanese companies, the Commission verified that their costs and actual selling prices charged on the open domestic market represent a reliable base for normal value. Also, it was established that both Taiwanese producers, which sold on the Taiwanese market on a regular basis to a large number of independent customers in substantial quantities, had a representative domestic sales volume when compared to the total volume of the Belarussian exports to the Community during the investigation period.

— *access to basic raw materials*

- (27) The Taiwanese producers had unimpeded access to raw materials at world-market prices during the investigation period, and nothing was found to suggest that domestic selling prices were not governed by the economical forces of a non-regulated, free market economy.
- (28) On the basis of the above factors and in conformity with Article 2 (5) of the basic Regulation, Taiwan is therefore considered to be an appropriate and not unreasonable choice of analogue country for establishing normal value for the product under investigation.

2. Calculation of normal value

- (29) Given the impossibility of determining export prices according to PSF category and type (see recital (30)), normal value was established for the purpose of the provisional determination on the basis of the weighted average of all sales of PSF during the investigation period (irrespective of category and grade) by the two cooperating producers on the Taiwanese market. In view of the significant development in prices both on the Taiwanese market and with regard to Belarussian exports and a marked increase in export quantities during the second half of the investigation period, two normal values were established, one for the first half of the investigation period and the other for the second half. The weighted average prices thus determined were above the relevant weighted average costs and therefore Taiwanese sales were considered to be made in the normal course of trade within the meaning of Article 2 (3) of the basic Regulation. In the light of the information available concerning the categories and types sold in Taiwan and those sold for export by the Belarussian exporter, this approach was not considered unreasonable.

3. Export price

- (30) Since the usable information provided within a reasonable period of time by the sole cooperating Belarussian exporter covered only a fraction of total Belarussian exports of PSF towards the Community during the investigation period (700 tonnes of out 32 000 tonnes) and in view of the low level of cooperation from importers/distributors, which are understood to account for the vast majority of purchases from Belarus, the Commission established export prices, in accordance with Article 7 (7) (b) of the basic Regulation, on facts available.
- (31) In respect, Eurostat data were considered the most reasonable basis. However it was not possible to determine prices by category and type. The average export price thus obtained was comparable to that provided by the cooperating exporter. In the light of the development in prices and quantities during the investigation period (see recital (29)), a weighted average export price was calculated separately for the first and second half of that period.

4. Comparison

- (32) Normal value was compared with the export price on an ex-national frontier fob level.
- (33) Where appropriate (and where adequate information was available), normal value and export price

were adjusted to take account of certain selling expenses specified in Article 2 (9) of the basic Regulation. These adjustments for differences affecting price comprised costs for transport, insurance, handling and credit.

- (34) An adjustment for alleged quality differences resulting from differences in tenacity between the PSF exported by Belarus to the Community and the PSF sold on the domestic market in Taiwan was claimed by the Belarussian exporter. It was claimed that the Taiwanese product was of a higher quality due to its higher tenacity. Despite informing the Commission of its intention to corroborate this claim, the Belarussian exporter did not submit any evidence, and, in any event, no information was available to the Commission to suggest that such a claim was warranted. It had therefore to be rejected.

5. Dumping margin

- (35) The comparison of the normal value with the export price showed the existence of dumping, the dumping margin being equal to the amount by which the normal value exceeds the price for export to the Community.
- (36) Expressed as a percentage of the free-at-Community frontier price, duty unpaid, the weighted average dumping margin amounts to 43,5 %.

D. COMMUNITY INDUSTRY

- (37) The investigation showed that the share of the total Community production held by the complainant Community producers during the investigation period amounted to more than 90 % of the Community output of the like product. They can therefore, in accordance with Article 4 (5) of the basic Regulation, be considered as constituting 'the Community industry'.

E. INJURY

1. Community consumption of PSF

- (38) Apparent consumption of PSF in the Community followed overall a slight increasing tendency in the past four years: it went from 455 000 tonnes in

1991 to 475 000 tonnes in 1992 and, after a temporary fall back to 450 000 tonnes in 1993, with a half year consumption during the investigation period of 215 000 tonnes in the second half of 1993, to 250 000 tonnes in the first half of 1994.

2. Factors relating to the dumped imports

(a) Volume and market share of the dumped imports

- (39) Eurostat data prior to 1992 relate to the former Soviet Union. Separate figures for Belarus are available from 1992. The total volume of imports into the Community originating from the USSR was 1 524 tonnes in 1991. The reported figure for Belarus imports of PSF amounted to 5 863 tonnes in 1992, 22 101 tonnes in 1993, and 32 063 tonnes during the investigation period. Data available suggest that the imports originating in the former Soviet Union were in fact mostly of Belarussian origin and have been treated as such in the injury analysis. The import evolution represents thus an increase of 2 100 % between 1991 and the investigation period.

- (40) The market shares in the Community of imports of PSF originating in Belarus increased from 0,3 % in 1991, to 1,2 % in 1992, to 4,9 % in 1993, and to 6,9 % during the investigation period. The increasing trend also accelerated during that period: in the second half of 1993 the exports (11 788 tonnes) represented twice the volume exported in 1992, and during the first six months of 1994 the exports (20 275 tonnes) represented nearly four times the volume exported in 1992, constituting a market share of 8,0 % for that six month period.

(b) Prices of the dumped imports

- (41) A comparison between the weighted average ex-works prices of the Community industry and the weighted average Belarussian export prices at cif-Community frontier (customs cleared) obtained from Eurostat, showed undercutting margins throughout the investigation period. For the period June to December 1993, undercutting amounted to 37,4 %; for the second half of the investigation period — January to June 1994 — the undercutting margin was 34,7 %, always expressed as a percentage of the Community producers' prices. The weighted average undercutting margin for the entire investigation period amounted to 35,7 %. This result was corroborated by a specific comparison

based on the limited information available from the Belarussian exporter (see recital (30)).

3. Factors relating to the state of the Community industry

- (42) The state of the Community industry should be examined in the light of the undermentioned existing anti-dumping measures:

— On 22 October 1992, following a review of existing anti-dumping measures, imposed by Council Regulation (EEC) No 3946/88⁽¹⁾, the Council, by Regulation (EEC) No 3017/92⁽²⁾ modified the rates of anti-dumping duties applicable to imports of polyester staple fibres originating in Romania, Taiwan, Turkey, the Republics of Serbia and of Montenegro, the former Yugoslav Republic of Macedonia, and terminated the proceeding in respect of imports originating in Mexico and the United States of America.

— On 15 January 1993, the Council by Regulation (EEC) No 54/93⁽³⁾, imposed definitive anti-dumping duties on imports of polyester staple fibres originating in India and the Republic of Korea.

(a) Production

- (43) Community production of PSF remained relatively stable over the last four years: it went from 370 000 tonnes in 1991, to a temporary peak in 1992 of 390 000 tonnes, to 365 000 tonnes in 1993 and a total of 370 000 tonnes during the investigation period.

(b) Production capacity, capacity utilization

- (44) The PSF production capacity has overall decreased from 485 000 tonnes in 1991 to 478 000 tonnes during the investigation period. Over the same period, capacity utilization rates varied from 76 % in 1991 to 78 %. The negligible recovery of the utilization rate in the investigation period has to be seen in the light of the fall of the Community producers' production capacity.

(c) Stocks

- (45) The volume of stocks decreased from 33 000 tonnes in 1991 to 30 000 tonnes at the end of 1993, but remained, considering also the commodity type product, at a still significant level of around 6 to 8 % of annual Community production.

⁽¹⁾ OJ No L 348, 17. 12. 1988, p. 49.

⁽²⁾ OJ No L 306, 22. 10. 1992, p. 1.

⁽³⁾ OJ No L 9, 15. 1. 1993, p. 2.

(d) *Community industry's sales volume and market share*

- (46) While the volume of PSF imports originating in Belarus increased significantly and steadily over the past four years (see recitals (39) and (40)), the sales of the Community producers at the same time fell from 373 000 tonnes in 1991 to 355 000 tonnes in 1993 and 358 000 tonnes for the investigation period. The evolution of market share coincided with this trend and dropped from 82,1 % in 1991 to 80,2 % in 1992 and 1993, and to 78,3 % for the investigation period. During the first half of 1994, the Community industry's market share went down to 76,5 %, at a time when consumption was somewhat increasing.

(e) *Price evolution on the Community market*

- (47) Overall prices of PSF of the Community producers, in national currency and on their domestic markets, steadily weakened, on a weighted average basis, by some 15 % between 1991 and December 1993.
- (48) It should be noted that prices of PSF have been influenced for all operators on the market by the evolution of prices of the basic raw materials like Pure Terephthalic Acid (PTA), Dimethylterephthalate (DMT) and Glycol, representing about 60 to 70 % of the cost of production of the finished product. Indeed, essentially, due to a worldwide shortage of these raw materials, starting at the end of 1993 and continuing into 1994, prices increased, and so prices of PSF have followed this trend, as from early 1994, reflecting the corresponding increase in the cost of production.

(f) *Profitability situation of the Community industry*

- (49) There is a long dumping history for PSF products (see above recital (42)). This explains why the investigation showed that, overall, the Community industry has recorded poor financial results, a situation which already existed before 1991. This situation has deteriorated considerably since 1991 (loss of 7,9 %, on turnover). A slight recovery took place in 1992 (loss of 6,4 %, on turnover), a time at which anti-dumping measures were taken. However the losses increased again in 1993 (loss of 14,9 %, on turnover), with a particular worsening in the second half of 1993 (loss of 18,8 %, on turnover). The slight improvement of the financial situation during the first half of 1994 (loss of 13 %, on turnover) resulted partially from the fact that all operators on the Community market were forced to raise their prices due to the increase in cost of production (see recital (48)), and the Community industry could somewhat limit its losses in such a situation. Nevertheless, the financial situation clearly worsened over the period considered.

(g) *Employment*

- (50) Although the PSF industry is not labour intensive, there has been a steady erosion in employment totaling 25 % (corresponding to 1 200 people) between 1991 and June 1994, due to a certain degree of reduction in production capacity, but more significantly to the dismissal of personnel in non-manufacturing areas like selling, administration and other overhead sectors. Such steps were taken to counteract low selling prices and their resulting insufficient profitability.

4. Conclusion as to injury

- (51) In the light of the foregoing analysis and in particular the deterioration of the financial results, decline in sales and market share and employment cutbacks, the Commission has concluded, for the purpose of its preliminary findings, that the Community industry had suffered material injury within the meaning of Article 4 (1) of the basic Regulation.

F. CAUSATION OF INJURY

1. Effect of the dumped imports

- (52) In its examination as to whether the material injury suffered by the Community industry was caused by the effects of dumping, the Commission found that the rapid increase in dumped PSF imports originating in Belarus, which led simultaneously to the only significant increase in market share of an importing country on the Community market during the investigation period, coincided with loss of market share and reduced profitability for the Community industry, despite the increasing consumption on the Community market. The worsening financial situation of the Community industry is due to the price erosion on the Community market, which was evidently influenced by the significant undercutting of the Community industry's prices by the Belarussian imports.

- (53) It should be noted that due to the commodity type of this product, the market is transparent and highly price sensitive and therefore undercutting of prices by certain vendors with significant market share has a detrimental impact on prices in the whole market. Belarus has, since 1993, obtained the leading market share among all exporting countries, a fact which can only be explained by an aggressive pricing policy.
- (54) In this context, it is worthwhile mentioning that the situation on the Belarussian home market, with stagnant domestic consumption and negligible profitability, owing to economic difficulties following political changes and the considerable production capacity still available, incites the exporter to expand on other markets. This was also confirmed during the investigation by data available from the Belarussian exporter, already indicating during the investigation period a persistent decreasing trend in domestic sales and buoyant export figures. This latter development bears no relation to normal economic conditions, as shown by the size of the dumping and undercutting margins found, a behaviour which injures the Community industry.
- (57) Concerning imports from other countries not subject to anti-dumping measures, but which were originally subject to measures which have subsequently been repealed, and/or have significant import volumes, the market share of USA and Poland — each having 1,4 % market share during the investigation period — has slightly increased over the last four years, whereas their prices have remained stable on a significantly higher level than Belarussian export prices. Imports from Switzerland have on the contrary decreased over the same time, falling to 1,6 % market share during the investigation period, and were also at a high level of prices in comparison to the other exporting countries.
- (58) As for all other sources of imported PSF into the Community market, covering more than 15 countries, their combined market share evolved from 3,4 % in 1991 to almost 7 % in 1992 and dropped to 5,2 % during the investigation period, with an overall slight decrease in prices over the last four years, but still remaining on a level considerably above Belarussian export prices. Given also the small individual quantity of imports per country, the influence of each imports on the Community market appears to be negligible.
- (59) Consequently, imports from other countries cannot be considered to have had a measurable impact on the performance of the Community industry.

2. Effects of other factors

(a) Other imports

- (55) The Commission also considered whether imports from other countries might have contributed to the injury suffered by the Community industry, bearing in mind that imports from other countries — Taiwan, Romania, the Republics of Serbia and Montenegro and the former Yugoslav Republic of Macedonia, India and Korea — are already subject to anti-dumping measures.

- (56) In this context it could be observed that the volume of imports from the countries named above (representing around 5 % market share during the investigation period) remained relatively stable, with a decreasing trend since 1992. On the basis of Eurostat (see recital (31)), import prices for PSF originating in these countries subject to anti-dumping measures appeared to remain stable, with a level of prices significantly higher than Belarussian export prices to the Community.

(b) Economic recession

- (60) The association of European users of PSF, Eurofibrefill, alleged that the precarious situation of the Community industry was not caused by imports of PSF from Belarus, but is directly attributable to low demand due to an overall economic recession and the consequent reduction in Community production, consumption and prices during the investigation period.
- (61) While the weak economic situation reflecting low prices prevailing at the outset of 1993 could be expected to have an influence on the Community industry's performance, this recessionary environment cannot explain the increase in market share of the Belarussian imports (see recital (40)). Indeed, the loss in market share of the Community PSF industry is mirrored by the gain of market share of

the Belarussian exporter. Should the downturn of the Community industry have been caused exclusively by the unfavourable trend of the general economic conditions, the Belarussian imports should also have been affected by the unfavourable economic conditions, and could not have registered the increase in market share which was found.

(c) *Community PSF-producers' productivity*

- (62) According to Eurofibrefill, the situation of the Economic PSF industry was aggravated by its alleged inefficiency with inherent over-capacity and structural imbalance leading to losses.
- (63) Allegations of structural deficiencies and uncompetitiveness, which were never substantiated by Eurofibrefill, are unfounded, considering the Community-industry's modern equipment and its constant investments in new machinery showing its steady endeavour to cut costs. Moreover, it should be noted that PSF-manufacturers worldwide use European-produced equipment, which is regarded as being highly reliable. Furthermore, in the light of Community consumption, no structural overcapacity of the Community industry exists.

(d) *Conclusion on causation*

- (64) The Commission found no additional factors other than those mentioned above which could have contributed to the injury suffered by the Community PSF industry.
- (65) Although the economic recession may have, together with other imports, to some extent negatively affected the situation of the Community industry, this cannot explain the full extent of the weakening of its position in terms of loss of profitability and decline in market share. Clearly the Belarussian dumped imports have, taken in isolation, by reason of their low prices and significant as well as increasing volume, caused material injury to the Community industry.

G. COMMUNITY INTEREST

1. General considerations

- (66) A determination as to whether the Community interest calls for intervention in the form of anti-dumping measures should be based on an appreciation of all the various interests taken as a whole, including the interest of the domestic industry and

users and consumers. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition should be given special consideration.

2. Interest of the Community industry and impact on competition

- (67) In the framework of the investigation it has been established that the Community industry is facing injury in the form of a loss of sales and market shares, which together have led to substantial financial losses. In addition, it has had to reduce significantly the number of employees. Removing the unfair advantages gained by dumping practices should prevent the further deterioration of the situation of the Community industry which, unless a solution is found, cannot remain competitive. Competitiveness in this sector is for a large part dependent on regular modernization of production equipment, an investment which the Community industry might be unable to make in future in view of its very poor financial situation.
- (68) When examining the effect on competition of possible anti-dumping measures in the present case, account has to be taken of the fact the Community PSF industry still holds a significant market share (78 % during the investigation period). In this connection, the following considerations appear relevant:
- (69) It is the intended effect of the imposition of anti-dumping measures that the price levels of the Belarussian exporters in the Community increase. This may have subsequently some influence on the relative competitiveness of their products. Competition on the Community market is not, however, expected to be reduced as a consequence of such measures. Despite the high market share of the Community producers, they could not resist the price pressure exerted by the dumped imports. It is considered that anti-dumping measures would neither as a matter of general principle, nor in the particular case, necessarily lead to the exclusion from the Community market of imports from the country concerned. On the contrary, the removal of the unfair advantages gained by the dumping practices is designed to prevent the further decline of the Community industry and thus to help to maintain the availability of a wide choice of PSF producers and even to strengthen competition. Indeed, without such measures, there are convincing reasons that the situation of the Community industry would further deteriorate.

3. Other specific interests involved

- (70) The effects of imposing anti-dumping measures on imports of PSF from Belarus in relation to the specific interests of parties other than the Community industry, including the processing industry and the consumers, have also to be considered.
- (71) Eurofibrefill and the Belarussian exporter claimed that in the recent context of shortage of supply (1994), Community consumers are dependent on low priced imports.
- (72) The Commission confirms that in 1994 demand of PSF in the Community increased. The increase had led to certain difficulties in supply on the Community market. However, no structural supply deficit seems to exist. Annual consumption of PSF in the Community market is around 480 000 to 500 000 tonnes, while the Community industry has some 530 000 tonnes of annual production capacity available.
- (73) The Belarussian exporter alleged furthermore that the imposition of anti-dumping measures on its exports to the Community would be likely to weaken its position as a producer and could drive it out of production, thus reducing the variety of external sources of supply available for Community end-users and would therefore contribute to a higher dependence on other external suppliers.
- (74) Referring to the arguments already mentioned in recital (69), the Commission has to reaffirm that the purpose of the anti-dumping measures is the elimination of the effect of unfair commercial practices. The trade practices of the exporting country concerned have distorted the functioning of the market for PSF in the Community and have led to a loss in market share and to depressed pricing as regards the Community producers. The absence of measures to correct this distortion could lead to a further erosion of the Community industry, an erosion which would not take place in a situation of effective competition.
- (75) Furthermore, it is obvious from the information available, supplied by the exporter and obtained from Eurostat data, that the exporter has, since 1993, resolutely turned its sales to export markets, i.e. to the European Community and to other countries (see recital (54)). It is therefore extremely unlikely that this producer would be driven out of PSF production, as a result of anti-dumping measures imposed against its injuriously dumped exports to the Community.
- (76) It has also to be borne in mind that the Community industry has been affected by imports from other third countries, namely Romania, Taiwan, Turkey, the Republics of Serbia and Montenegro, the former Yugoslav Republic of Macedonia, India and the Republic of Korea, which are currently subject to anti-dumping measures. All these countries would be treated in a discriminatory manner and the effectiveness of these measures would be undermined, if no measures were taken against the low priced imports from Belarus.
- (77) Having examined the various interests involved, the Commission concludes that to leave the Community PSF industry without protection against this injurious dumping would not be in the interest of the Community. It is furthermore considered necessary to assure the non-discriminatory treatment of PSF originating in Belarus as compared to imports of PSF originating in other third countries, notably those currently subject to anti-dumping measures.
- (78) Therefore, the Commission finds that the Community interest calls for the imposition of anti-dumping measures in order to prevent further injury being caused by the dumped imports concerned during the investigation.
- ### H. IMPOSITION OF PROVISIONAL DUTIES
- (79) The Commission considers that the measures should take form of a provisional *ad-valorem* duty. For the purpose of establishing the level of this duty, the Commission took account of the dumping margin found and of the amount of duty necessary to eliminate the injury sustained by the Community industry.
- (80) Since the injury consists principally of price depression, loss of market share and in particular financial losses, the removal of such injury requires that the Community industry should be able to increase prices to profitable levels without loss of sales volume. In order to achieve this, the prices of the dumped imports concerned should be increased to eliminate injurious dumping.

- (81) Accordingly, the Commission calculated the level of prices at which the Community industry would be able to cover its costs and to obtain a reasonable return. To the weighted average costs of production of the Community PSF producers, on an ex-works basis, a profit margin of 6 % was added to reach the injury elimination level. The profit margin of 6 % on costs was considered, for the purpose of the preliminary determination, reasonable for guaranteeing the industry investment on a long term basis. The Commission compared, at the same level of trade, average cif prices of the dumped imports as obtained from Eurostat figures (see recital (31)) duty paid, with the corresponding injury elimination price level. The difference thus determined has been expressed as a percentage of the free-at-Community frontier price, duty unpaid, of the dumped imports. As the resulting percentage is higher than the dumping margin established, the level of the provisional anti-dumping duty to be imposed should be based, in this case on the lower level of dumping found, i.e. 43,5 %, in accordance with Article 13 (3) of the basic Regulation.

I. RIGHTS OF INTERESTED PARTIES

- (82) In the interest of sound administration, a period should be fixed within which the parties concerned may make their views known and request a hearing. Furthermore, it should be noted that all findings made for the purpose of this Regulation are provisional and may be reconsidered for the

purpose of any definitive duty which the Commission may propose,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty is hereby imposed on imports of synthetic staple fibre of polyester, falling within CN code 5503 20 00, and originating in Belarus.
2. The rate of the provisional anti-dumping duty applicable shall be 43,5 % of the net, free-at-Community frontier price, before duty.
3. The release for free circulation in the Community of the products referred to in paragraph 1 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.
4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

Without prejudice to Article 7 (4) (b) and (c) of Regulation (EEC) No 2423/88, the parties concerned may make known their views in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

Article 3

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

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

Done at Brussels, 4 March 1996.

For the Commission

Leon BRITTAN

Vice-President

COMMISSION REGULATION (EC) No 395/96

of 4 March 1996

amending Regulation (EC) No 1667/95 establishing a forecast balance for the supply to the Canary Islands of live bovine animals and beef and veal products

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1601/92 of 15 June 1992 concerning specific measures for the Canary Islands with regard to certain agricultural products ⁽¹⁾, as last amended by Regulation (EC) No 2537/95 ⁽²⁾, and in particular Article 3 (4) thereof,

Whereas Commission Regulation (EC) No 2790/94 ⁽³⁾, as amended by Regulation (EC) No 2883/94 ⁽⁴⁾, lays down the detailed rules for implementation of the specific arrangements for the supply of certain agricultural products to the Canary Islands;

Whereas Regulation (EC) No 1667/95 ⁽⁵⁾, establishes the supply balance for beef and veal products for the Canary Islands; whereas that balance may be revised where necessary, by means of adjustments during the year to the quantities, within the total laid down, on the basis of the region's requirements; whereas in order to satisfy the requirements of the Canary Islands for beef and veal

products, the quantities set down in the forecast supply balances for those products must be adjusted; whereas the corresponding Annex to Commission Regulation (EC) No 1667/95 should consequently be amended;

Whereas the measures provided for in this Regulation are in accordance with the opinion of the Management Committee for Beef and Veal,

HAS ADOPTED THIS REGULATION:

Article 1

The Annex to Regulation (EC) No 1667/95 is hereby replaced by the Annex hereto.

Article 2

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

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

Done at Brussels, 4 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 173, 27. 6. 1992, p. 13.

⁽²⁾ OJ No L 260, 31. 10. 1995, p. 10.

⁽³⁾ OJ No L 296, 17. 11. 1994, p. 23.

⁽⁴⁾ OJ No L 304, 29. 11. 1994, p. 18.

⁽⁵⁾ OJ No L 158, 8. 7. 1995, p. 26.

ANNEX

**FORECAST SUPPLY BALANCE FOR LIVE BOVINE ANIMALS AND BEEF AND VEAL FOR
THE CANARY ISLANDS FOR THE PERIOD 1 JULY 1995 TO 30 JUNE 1996**

CN code	Description of goods	Number(*) or quantity (in tonnes)
0102 10 00	Pure-bred breeding bovines (*)	4 300 (*)
ex 0102 90	Bovine animals for fattening	8 000 (*)
0201	Meat of bovine animals, fresh or chilled	15 500
0202	Meat of bovine animals, frozen	24 500
1602 50	Other prepared or preserved meat, meat offal or blood of bovine animals	2 500

(*) Entry under this heading is subject to the conditions laid down in the relevant Community provisions.

(*) Head.

**COMMISSION REGULATION (EC) No 396/96
of 4 March 1996**

**amending Regulation (EC) No 2019/94 on imports of residues from the
manufacture of starch from maize from the United States of America**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European
Community,

Having regard to Council Regulation (EEC) No 1766/92
of 30 June 1992 on the common organization of the
market in cereals⁽¹⁾, as last amended by Regulation (EC)
No 1863/95⁽²⁾, and in particular Article 9 (2) thereof,

Whereas Commission Regulation (EC) No 344/96 of 26
February 1996 amending Council Regulation (EEC) No
2658/87 on the tariff and statistical nomenclature and on
the Common Customs Tariff⁽³⁾, inserts an additional note
in chapter 23 describing certain mixtures eligible for
import into the Community exempt from customs duties;
whereas a special subheading was created in heading 2309
for that purpose;

Whereas Commission Regulation (EC) No 2019/94⁽⁴⁾,
lays down special rules with a view to guaranteeing that
the product imported is in conformity with the agreed
customs code; whereas the product in question now falls
within the new subheading introduced by Regulation (EC)
No 344/96; whereas Regulation (EC) No 2019/94 should
therefore be amended; whereas the impact of this amend-
ment must not prejudice the effectiveness in full of
licences issued prior to the entry into force of this Regu-
lation with regard to the description of the product;

Whereas the measures provided for in this Regulation are
in accordance with the opinion of the Management
Committee for Cereals,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 2019/94 is hereby amended as
follows:

1. the CN code '2303 10 19' given in Article 1 (1) and in
Article 2 is replaced by '2309 90 20'.
2. in the Annex, the 'Certificate of Conformity' issued by
the American industry is replaced by the document
annexed hereto.

Article 2

This Regulation shall enter into force on the third day
following its publication in the *Official Journal of the
European Communities*.

It shall apply from 8 September 1994.

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

Done at Brussels, 4 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 181, 1. 7. 1992, p. 21.

⁽²⁾ OJ No L 179, 29. 7. 1995, p. 1.

⁽³⁾ OJ No L 49, 28. 2. 1996, p. 1.

⁽⁴⁾ OJ No L 203, 6. 8. 1994, p. 5.

ANNEX

'CORN REFINERS ASSOCIATION, INC.
Washington, D.C.

Certificate of Conformity

On behalf of the Corn Refiners Association, Inc., the undersigned confirms receipt of *Producer's Certificates* affirming that _____ of corn gluten feed (CN 2309 90 20:

Quantity (Metric Tons)

residues from the manufacture of starch from maize) aboard the vessel _____, departing the United

Name of Vessel

States on or about _____, (I) were obtained from

Date

the wet-mill maize-refining process, (II), contain not more than: (a) 28 percent starch content (dry basis), (b) 40 percent protein content (dry basis), (c) 4.5 percent fat (dry basis, as measured by test method A of the Directive 84/4/EEC of 20 December 1983), and (d) 15 percent by weight screenings/cleanings from corn subsequently used for the manufacture of starch and starch products, it being understood that, for the use of yellow number 2 corn, the figure is up to 10 percent, **AND (III)** may contain residues from steepwater derived from the wet milling process and used in the manufacture of alcohol or other starch derived products which utilize steep water as part of their manufacturing process and which were in existence in 1992, (the presence of which does not result in an increase in the feed value of the corn gluten feed).

Signature

Association Services Group, LLC
7500 Old Georgetown Road
Bethesda, MD 20814-6133

The Corn Refiners Association, Inc., 1701 Pennsylvania Ave., N.W., Washington, D.C. 20006, provides blank Producer's Certificates upon request to any corn wet milling company operating in the United States. The Corn Refiners Association Inc., provides these certificates as a service to facilitate the export of U.S. corn gluten feed to the European Union. The Corn Refiners Association Inc., has retained the independent accounting firm of Association Services Group, LLC, to verify the Associations receipt of these Producer's Certificates on a per vessel basis, as gathered and submitted by shipping companies conveying corn gluten feed to any Member State of the Union. This is neither a weight certificate for commercial trade purposes, nor an independent certification of product quality by either the Corn Refiners Association, Inc., or Association Services Group, LLC; it is intended solely to describe product that has been certified by producers and any commercial handlers for customs clearance purposes.

AUDIT CONTROL NO. 0001 NN'

COMMISSION REGULATION (EC) No 397/96
of 4 March 1996

**establishing the standard import values for determining the entry price of
certain fruit and vegetables**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,
Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 3223/94 of 21 December 1994 on detailed rules for the application of the import arrangements for fruit and vegetables⁽¹⁾, as last amended by Regulation (EC) No 2933/95⁽²⁾, and in particular Article 4 (1) thereof,

Having regard to Council Regulation (EEC) No 3813/92 of 28 December 1992 on the unit of account and the conversion rates to be applied for the purposes of the common agricultural policy⁽³⁾, as last amended by Regulation (EC) No 150/95⁽⁴⁾, and in particular Article 3 (3) thereof,

Whereas Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commis-

sion fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto;

Whereas, in compliance with the above criteria, the standard import values must be fixed at the levels set out in the Annex to this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

The standard import values referred to in Article 4 of Regulation (EC) No 3223/94 shall be fixed as indicated in the Annex hereto.

Article 2

This Regulation shall enter into force on 5 March 1996.

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

Done at Brussels, 4 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

⁽¹⁾ OJ No L 337, 24. 12. 1994, p. 66.

⁽²⁾ OJ No L 307, 20. 12. 1995, p. 21.

⁽³⁾ OJ No L 387, 31. 12. 1992, p. 1.

⁽⁴⁾ OJ No L 22, 31. 1. 1995, p. 1.

ANNEX

to the Commission Regulation of 4 March 1996 establishing the standard import values for determining the entry price of certain fruit and vegetables

(ECU/100 kg)			(ECU/100 kg)		
CN code	Third country code (1)	Standard import value	CN code	Third country code (1)	Standard import value
0702 00 15	052	43,7	0805 30 20	052	51,4
	060	80,2		204	88,8
	064	59,6		220	74,0
	066	41,7		388	67,5
	068	62,3		400	71,7
	204	80,8		512	54,8
	208	44,0		520	66,5
	212	83,1		524	100,8
	624	144,6		528	85,1
	999	71,1		600	83,6
				624	86,6
0707 00 15	052	125,6	0808 10 51, 0808 10 53, 0808 10 59	999	75,5
	053	156,2		052	64,0
	060	61,0		064	78,6
	066	53,8		388	105,8
	068	121,6		400	78,1
	204	144,3		404	79,6
	624	148,7		508	68,4
	999	115,9		512	98,3
0709 10 10	220	369,6		524	57,4
	999	369,6		528	144,3
0709 90 73	052	134,9		624	86,5
	204	77,5		728	107,3
	412	54,2		800	78,0
	624	241,6		804	21,0
	999	127,1		999	82,1
0805 10 01, 0805 10 05, 0805 10 09	052	45,7	0808 20 31	039	102,9
	204	41,4		052	86,3
	208	58,0		064	72,5
	212	52,3		388	81,5
	220	50,5		400	96,0
	388	40,5		512	65,0
	400	42,2		528	73,1
	436	41,6		624	79,0
	448	36,4		728	115,4
	600	42,6		800	55,8
	624	55,2		804	112,9
	999	46,0		999	85,5

(1) Country nomenclature as fixed by Commission Regulation (EC) No 3079/94 (OJ No L 325, 17. 12. 1994, p. 17). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 398/96

of 4 March 1996

amending Regulation (EC) No 1466/95 laying down special detailed rules of application for export refunds on milk and milk products

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products⁽¹⁾, as last amended by Commission Regulation (EC) No 2931/95⁽²⁾, and in particular Article 17 (14) thereof,

Whereas Commission Regulation (EC) No 1466/95⁽³⁾, as last amended by Regulation (EC) No 162/96⁽⁴⁾, lays down special detailed rules of application for export refunds on milk and milk products; whereas experience gained shows the need to clarify certain provisions and to make certain improvements, in particular as regards the date of advance fixing of refunds for provisional licences and national food-aid supplies; whereas, in order to avoid discrimination between operators, the amendment should apply retroactively to provisional licences;

Whereas, under the Agreement concluded between the European Community and Canada on 22 December 1995, export licences issued by the European Community must be presented for cheese qualifying for preferential terms on import into Canada; whereas the detailed rules for issuing such licences should be laid down;

Whereas, with a view to ensuring sound management of the system of export refunds, lesser likelihood of applications being submitted for speculative ends and more precise administration of the issuing of licences, provision must be made for a series of adjustments to the system, so that in particular securities covering licences for certain milk products must be increased;

Whereas the Management Committee for Milk and Milk Products has not delivered an opinion within the time-limit set by its chairman,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1466/95 is amended as follows:

1. the last sentence of Article 1 (1) is replaced by the following:

⁽¹⁾ OJ No L 148, 28. 6. 1968, p. 13.
⁽²⁾ OJ No L 307, 20. 12. 1995, p. 10.
⁽³⁾ OJ No L 144, 28. 6. 1995, p. 22.
⁽⁴⁾ OJ No L 24, 31. 1. 1996, p. 18.

'The refund to be paid shall be that applicable on the day the application for the export licence or, where applicable, the provisional licence, is lodged.'

2. the following Article is inserted:

'Article 1a

1. This Article lays down special detailed rules governing exports of cheese to Canada under the quota set referred to in the Agreement concluded on 22 December 1995 between the European Community and Canada.

2. An export licence shall be required for all exports covered by paragraph 1.

3. Section 20 of licence applications and of licences shall show a reference to this Article.

4. The following provisions shall apply to exports not covered by refund applications:

- (a) section 19 of licence applications and of licences shall show the words 'To be exported without a refund';
- (b) licences shall be issued immediately after applications are lodged;
- (c) licences shall be valid from their date of issue within the meaning of Article 21 (1) of Regulation (EEC) No 3719/88 to 30 June following that date;
- (d) the first subparagraph of Article 3 (1) but not the other provisions of this Regulation;
- (e) Regulation (EEC) No 3719/88.'

3. Article 7 is replaced by the following:

'Article 7

The security provided for in Article 14 (2) of Regulation (EEC) No 3719/88 shall, depending on the refund applicable on the day the export licence application is lodged, be:

- (a) 5 % of the refund for the product covered by CN code 0405;
- (b) 10 % of the refund for products covered by CN code 0402 10;

(c) 30 % of the refund for products covered by CN code 0406;

(d) 20 % of the refund for other products.'

4. Article 10 (1) is replaced by the following:

'1. Where the quantity exported exceeds that shown on the licence, no refund shall be payable on the overrun.'

5. The following Article is inserted:

Article 10a

1. Article 8 shall not apply for the issuing of export licences applied for with a view to food-aid supplies in

accordance with Article 10 (4) of the Agreement on Agriculture concluded under the Uruguay Round.

2. The rate of refund applicable to national food-aid supplies in accordance with Article 10 (4) of the Agreement on Agriculture concluded under the Uruguay Round shall be that applying on the day the Member State opens the invitation to tender for the supply of food aid.'

Article 2

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

Article 1 (1) shall apply from 1 July 1995.

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

Done at Brussels, 4 March 1996.

For the Commission

Franz FISCHLER

Member of the Commission

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 January 1996

relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the
EEA Agreement

(IV/35.545 — LH/SAS)

(Only the German and Swedish texts are authentic)

(Text with EEA relevance)

(96/180/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas:

Having regard to the Treaty establishing the European
Community,

I. THE FACTS

Having regard to the Agreement on the European
Economic Area,

Having regard to Council Regulation (EEC) No 3975/87
of 14 December 1987 laying down the procedure for the
application of the rules on competition to undertakings in
the air transport sector⁽¹⁾, as last amended by Regulation
(EEC) No 2410/92⁽²⁾, and in particular Article 5 thereof,

Having regard to the notice pursuant to Article 5 (2) of
Regulation (EEC) No 3975/87⁽³⁾,

Having regard to the notice pursuant to Article 16 (3) of
Regulation (EEC) No 3975/87⁽⁴⁾,

Having consulted the Advisory Committee on Agree-
ments and Dominant Positions in Air Transport,

A. The notification

- (1) On 11 May 1995 Deutsche Lufthansa AG (Lufthansa) and Scandinavian Airlines System (SAS) notified a general cooperation agreement concluded by them on that date and providing for the establishment of an integrated air transport system between the two airlines.
- (2) The parties requested the Commission to find that their agreement does not infringe Article 85 (1) of the EC Treaty or, in the alternative, that the conditions are met for granting exemption under Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement.
- (3) The Commission published a summary of the application in the *Official Journal of the European Communities* on 7 June 1995 pursuant to Article 5 (2) of Regulation (EEC) No 3975/87.
- (4) On 26 July 1995 the Commission sent Lufthansa and SAS a letter notifying them that there were serious doubts within the meaning of Article 5 (3) of Regulation (EEC) No 3975/87.
- (5) On 5 August 1995 the Commission published a notice in the *Official Journal of the European Communities* pursuant to Article 16 (3) of Regulation (EEC) No 3975/87 inviting interested third

⁽¹⁾ OJ No L 374, 31. 12. 1987, p. 1.

⁽²⁾ OJ No L 240, 24. 8. 1992, p. 18.

⁽³⁾ OJ No C 141, 7. 6. 1995, p. 9.

⁽⁴⁾ OJ No C 201, 5. 8. 1995, p. 2.

parties to submit their observations on the Commission's intention of authorizing the agreement subject to certain conditions.

B. The undertakings

- (6) Lufthansa is the holding company of the Lufthansa group, which provides air transport for passengers and goods and is engaged in activities relating to air transport.
- (7) Lufthansa is controlled as follows:
- 59,35 % by the private sector,
 - 35,68 % by Germany,
 - 4,97 % by various public enterprises.
- (8) Lufthansa's main shareholdings are as follows:
- | | |
|------------------------|--------|
| — Condor Flugdienst: | 100 % |
| — Lufthansa Cargo: | 100 % |
| — Lufthansa City Line: | 100 % |
| — Euro Berlin: | 49 % |
| — Sun Express: | 40 % |
| — Lauda Air: | 39,7 % |
| — Business Air: | 38,4 % |
| — Cargolux: | 24,5 % |
| — Luxair: | 13,0 % |
- (9) In 1993 Lufthansa had a turnover in air transport of ECU 8 billion, of which ECU [...] billion ⁽¹⁾ was achieved within the Community. It made a loss of ECU 57 million in 1993, compared with a pre-tax profit of ECU 158 million in 1994.
- (10) In terms of passenger-kilometres in Europe ⁽²⁾ in 1994, Lufthansa ranks second with 10,8 billion passenger-kilometres, after British Airways with 13,7 billion.
- In terms of world traffic, Lufthansa is also the second-largest European airline with 56,5 billion passenger-kilometres as against 86,2 billion for British Airways.
- (11) In terms of the main world regions, Lufthansa ranks as follows among the European airlines:
- traffic between Europe and North Africa:
[...] position,
 - traffic between Europe and Central America:
[...] position,
 - traffic between Europe and South America:
[...] position,

- traffic between Europe and North Africa:
[...] position,
- traffic between Europe and South Africa:
[...] position,
- traffic between Europe and the Middle East:
[...] position,
- traffic between Europe and the Far East:
[...] position.

- (12) In Europe, Lufthansa operates 20 routes with more than 100 000 passengers, the main ones being Frankfurt-London ([...] passengers) and Frankfurt-Paris ([...] passengers).

- (13) In terms of scheduled cargo transport, however, Lufthansa is the leading European airline, both for intra-European traffic and for worldwide traffic.

At European level, Lufthansa carries 156 million tonne-kilometres and is well ahead of British Airways, which is in second place with 93 million tonne-kilometres. However, it should be stressed that cargo transport within Europe accounts for only 2,9 % of Lufthansa's total world cargo transport business.

- (14) In terms of fleet size as at the end of 1994, British Airways was in first place in Europe with 253 aircraft in service and 53 on order. Lufthansa was in second place with 220 aircraft in service and 16 on order.

- (15) (SAS) is controlled by the three national airlines of Denmark, Norway and Sweden:

- Det Danske Luftfartselskab: 28,57 %
- Det Norske Luftfartselskap: 28,57 %
- AB Aerotransport: 42,85 %

Each national airline is owned 50 % by the State and 50 % by private investors.

- (16) SAS's main shareholdings are:

- Spanair: 49 %
- Grønlandsfly: 37,5 %
- Airlines of Britain Holdings: 40 %

Airlines of Britain Holdings is the holding company of British Midland, Manx Airlines and Loganair.

- (17) In 1994, SAS had a turnover in air transport of ECU 2,8 billion worldwide, of which ECU [...] billion within the Community.

In 1993, SAS made a loss of ECU 54 million. In 1994, it made a pre-tax profit of ECU 165 million.

- (18) SAS is the eighth-largest European airline in terms of cargo transported within the Community and also at world level.

⁽¹⁾ In accordance with Article 17 of Regulation (EEC) No 3975/87 which deals with the non-disclosure of business secrets, certain figures have been omitted from the published version of this Decision.

⁽²⁾ All airlines belonging to the Association of European Airlines.

- (19) SAS has a substantial domestic network, but a relatively limited network outside Europe. As already indicated, it is in third position amongst the European Airlines in terms of passenger-kilometres within Europe, but only seventh in terms of passenger-kilometres at world level.

In terms of the major world regions, SAS is in:

- [...] position as regards traffic between Europe and North America,
- [...] position as regards traffic between Europe and the Middle East,
- [...] position as regards traffic between Europe and the Far East.

SAS has virtually no involvement in traffic between Europe and Central and South America and between Europe and Africa.

- (20) In Europe, SAS operates 154 routes, including 61 in Scandinavia, i.e. 40 % of the total. Of these 154 routes, 52 have traffic in excess of 100 000 passengers, including 36 Scandinavian routes. The main two routes are domestic routes:

- Bergen-Oslo: [...] passengers,
- Stockholm-Gothenburg: [...] passengers.

SAS uses two main hubs: Copenhagen and Stockholm.

- (21) In terms of fleet size as at the end of 1994, SAS ranked third ahead of Air France, with 155 aircraft in operation and 11 on order.

C. The agreement

- (22) The parties intend to create an enduring alliance by establishing an integrated air transport system based on a comprehensive set of long-term commercial, marketing and operational relationships and involving integration of their worldwide networks and other operations. The main features of the alliance are as follows:

- (23) *The setting-up of a joint venture for traffic between Germany and Scandinavia.*

The parties will set up a regional joint venture, owned jointly and equally by the parties, as their exclusive vehicle for offering scheduled air trans-

port services between Germany and Scandinavia. The management of the joint venture will decide on such matters as capacity, frequencies and fares. Each party will provide at least [...] % of the transportation requirements of the joint venture, which will not be an independent company. The parties will share the profits and losses of the joint venture.

Each party will retain its own commercial brand identity.

(24) *Worldwide cooperation*

Lufthansa and SAS intend to establish worldwide an integrated transport system involving joint network planning, a joint pricing policy and joint budgeting. This will include reciprocal access to frequent-flyer credits, code-sharing, harmonization of service levels, and integration of data-processing.

Maintenance and ground-handling operations will be provided by SAS in Scandinavia and by Lufthansa in Germany. Elsewhere, the parties will choose the most economic means available for their integrated system.

(25) *A single marketing strategy*

SAS and Lufthansa will work together in marketing and sales using their combined strengths and resources.

In Scandinavia, SAS will be responsible for marketing and sales, taking account of Lufthansa's marketing operations.

In Germany, Lufthansa will be responsible for marketing and sales, taking account of SAS's marketing operations.

Elsewhere, the parties will set up jointly-owned entities, or joint representations, which will be responsible for marketing and sales.

However, each party will remain free to operate any direct service it wishes between its domestic market and foreign destinations where this is economically possible.

- (26) In the case of transport within Scandinavia and Germany, each airline will carry out its activities independently.

(27) *Organization of the hub system*

The parties propose to base their hub system on five airports:

- Copenhagen: for internal traffic within Scandinavia, traffic to and from the Baltic Sea area and traffic between Europe and North-East Asia,
- Stockholm: for Swedish domestic traffic, traffic to and from Sweden, and traffic to and from the Baltic Sea area,
- Oslo: for Norwegian domestic traffic and traffic to and from Norway,
- Frankfurt: for German domestic traffic, traffic to and from Germany, intra-European traffic and traffic between Europe and other continents,
- Munich: for traffic to and from Germany, intra-European traffic and traffic between Europe and other continents.

- (28) The two airlines' cargo transport activities will be integrated as far as possible so as to improve their efficiency and customer service.

D. Comments from third parties

- (29) In response to the notices published in the *Official Journal of the European Communities* pursuant to Article 5 (2) and Article 16 (3) of Regulation (EEC) No 3975/87, the Commission received comments from third parties stressing the following points in particular:

- the agreement between Lufthansa and SAS will entail very substantial restrictions of competition on routes between Scandinavia and Germany,
- if the agreement is exempted, conditions must be imposed that would allow other airlines to have access to the abovementioned routes,
- in this respect, the shortage of slots at certain airports is an important aspect to be taken into consideration. The parties operate a large number of frequencies, and there must therefore be a freeze or indeed a reduction in the number of frequencies and a freeze in capacities,
- a further request made to the Commission was that certain cooperation agreements between the parties and other airlines, notably between

Lufthansa and Lauda Air, should be terminated because of the effects which the agreement could have on peripheral markets.

II. LEGAL ASSESSMENT**A. Relevant market**

- (30) The Commission considers that the relevant markets in this instance are, first, the market for the scheduled air transport of passengers and, secondly, the market for the scheduled air transport of goods for each of the routes linking Scandinavia and Germany, including any hubs that might be situated at the far end of such routes.
- (31) The Commission takes the view that, in this instance, chartered air transport does not constitute a genuine alternative to scheduled air transport since the clientele consists essentially of business travellers. Such travellers need to travel to the main European cities to attend working meetings at agreed times and cannot therefore accept the inconvenience of charter flights, unlike passengers travelling in their leisure time.
- (32) Theoretically, high-speed trains offer an alternative to air transport. Over medium distances, high-speed trains offer fast and regular services which mean that they are substitutable for air transport⁽¹⁾.
- (33) Similarly, in the case of cargo transport within Europe, road and rail may, in certain circumstances, be substitutable for air transport. The air transport of goods may also be preceded or followed by land transport, which accordingly constitutes transport that is separate from air transport⁽²⁾.

However, the fact of the matter is that these alternative modes of transport are not available to any significant extent in this instance.

- (34) Pursuant to the case-law of the Court of Justice and the Court of First Instance, an overall national or European market cannot be defined for transport, but alternative transport must be assessed for each route, or for substitutable routes.

⁽¹⁾ See the study on train/aircraft complementarities in Europe published by the Institut du Transport Aérien, Paris, December 1991.

⁽²⁾ See the Judgment of the Court of Justice of 5 October 1995 in Case C-96/94, *Centro Servizi Spediporto srl v. Spediziona Marittima del Golfo srl*, not yet reported.

- (35) This approach does not exclude the taking into account of the existence of networks controlled by the airlines⁽¹⁾, nor the fact that competition may exist between the hubs of large airlines.
- (36) In this instance, most of the cooperation between the two airlines relates to the routes as a whole between Scandinavia and Germany. Substitutability between such routes is limited, notably because the traffic mainly involves businessmen, as the parties have stated. Because of the short distances between Scandinavia and Germany, indirect flights are not real alternatives for passengers wishing to travel quickly to their place of work.
- (37) The Commission is not unaware of the fact that a proportion, sometimes substantial, of the passengers travelling between Scandinavia and Germany are transfer passengers travelling to a hub airport before continuing their journey to another European or intercontinental destination. The transport operation between Scandinavia and Germany is in such cases merely part of a journey which is geographically much more extensive.
- (38) In this instance, however, the agreement relates essentially to the routes between Scandinavia and Germany regardless of whether the passengers are transfer passengers or passengers travelling solely between Scandinavia and Germany.

B. Concept of agreement

- (39) The cooperation agreement concluded between the parties includes the setting-up of a joint venture owned jointly and equally by the parties and managed jointly by them. However, the joint venture is intended to cover only transport services between Scandinavia and Germany, and this represents only part of the cooperation between the parties.
- (40) The joint venture will not have the necessary resources to carry on its economic activity on a lasting basis. It will remain permanently fully dependent on Lufthansa and SAS, which will provide the transport services under their own

name. In this respect point 2.5 of the cooperation agreement provides that the parties will remain independent airlines and that each party will retain its own commercial identity. Moreover, the parties will remain autonomous and expressly reserve the right to take autonomous decisions.

The joint venture will thus operate on the market in a manner similar to that of a joint sales agency and will not operate on the market in a manner similar to an autonomous undertaking.

- (41) It should also be noted that the two parent companies are not permanently withdrawing from the relevant service market. They will still have the means to operate directly on the routes between Scandinavia and Germany.
- (42) Legally, the Commission therefore considers that the object and effect of the joint venture set up by the two airlines is to coordinate the competitive conduct of undertakings which remain independent. The joint venture is therefore a cooperative joint venture.
- (43) The joint venture forms part of a much wider cooperation agreement which falls within the scope of Article 85 of the EC Treaty.

C. Restrictions of competition

C.1 *Restrictions of competition in passenger transport on routes between Scandinavia and Germany*

- (44) The parties have stressed that a not inconsiderable proportion of the traffic between Scandinavia and Germany is transfer traffic. The percentages of transfer passengers on the main routes are as follows:

	Transfers %	Total number of passengers carried
Düsseldorf — Copenhagen	[...]	[...]
Düsseldorf — Stockholm	[...]	[...]
Frankfurt — Copenhagen	[...]	[...]
Frankfurt — Gothenborg	[...]	[...]
Frankfurt — Oslo	[...]	[...]
Frankfurt — Stockholm	[...]	[...]
Hamburg — Stockholm	[...]	[...]
Munich — Copenhagen	[...]	[...]

⁽¹⁾ See in particular the Judgment of the Court of Justice of 11 April 1989 in Case 66/86, *Ahmed Saeed Flugreisen*, [1989] ECR 803 and the Judgment of the Court of First Instance of 19 May 1994 in Case T-2/93, *Air France v. Commission*, [1994] ECR II-323.

- (45) The transfer passengers use a Lufthansa or SAS hub before departing on another flight, including flights to other parts of the world.

For some transfer passengers at least, the German and Scandinavian hub airports are in competition with other European hubs operated by other airlines, such as London, Amsterdam or Brussels airports. Such competition applies mainly to inter-continental flights.

- (46) However, the Commission considers that competition must be assessed not only in terms of the routes that feed the hubs, particularly on the routes between Scandinavia and Germany.

- (47) About 25 routes link Scandinavia and Germany, the main routes being the following:

Routes between Germany and Scandinavia

SAS/Lufthansa (LH) daily frequencies

	Summer 1995			Winter 1995/96		
	SAS	LH	Total	SAS	LH	Total
Düsseldorf — Copenhagen	3	2	5	3	2	5
Düsseldorf — Stockholm	2	2	4	2	2	4
Frankfurt — Copenhagen	3	4	7	3	4	7
Frankfurt — Gothenburg	1	1	2	1	1	2
Frankfurt — Oslo	2	2	4	2	3	5
Frankfurt — Stockholm	2	3	5	2	3	5
Hamburg — Stockholm	1	2	3	1	2	3
Munich — Copenhagen	2	1	3	3	1	4
Copenhagen — Munich	2	1	3	2	1	3

On these eight routes, Lufthansa and SAS are the only airlines operating, except for one frequency per day between Frankfurt and Copenhagen operated by Singapore Airlines.

In terms of the number of passengers carried, these eight routes account for 66 % of all traffic between Scandinavia and Germany.

- (49) Furthermore, at least one of the two airlines is operating on 12 routes between Scandinavia and Germany. The new entity being set up will thus operate on 20 of the 25 routes between Scandinavia and Germany.

(Passengers)

Frankfurt — Copenhagen	291 266
Frankfurt — Stockholm	192 361
Düsseldorf — Copenhagen	150 955
Munich — Copenhagen	112 344
Hamburg — Copenhagen	97 470
Frankfurt — Oslo	87 750
Berlin — Copenhagen	84 360
Düsseldorf — Stockholm	71 140
Hamburg — Stockholm	65 755
Hanover — Copenhagen	50 381
Hamburg — Oslo	50 235
Frankfurt — Gothenburg	47 658

- (48) When the agreement was signed, Lufthansa and SAS were both operating eight routes on which they had the following daily frequencies:

- (50) On all these routes, Lufthansa and SAS propose to coordinate their activity through the joint venture, as regards capacities, frequencies, fares and marketing policy.

In so doing, the parent companies will appreciably restrict actual and potential competition with one another on all such routes.

- (51) The agreement between Lufthansa and SAS will also substantially restrict competition *vis-à-vis* third parties by setting up entry barriers on the relevant routes.

- (52) The cooperation between Lufthansa and SAS is likely to increase the two airlines' economic power substantially. In economic terms, this increase in power will result in particular from the coordination of resources, the availability of the largest European fleet, the scope for interlining, the coordination of networks and the coordination of frequencies.

Number of frequencies from Düsseldorf to 30 major cities in Europe

SAS	LH	KLM	AF	BA	Other airlines
13	105	35	13	20	52

- (53) The pooling of frequent-flyer programmes is also an aspect that must be taken into account in assessing the economic power of the undertakings. Most of the customers are businessmen, and they will clearly prefer airlines that have a joint frequent-flyer programme, allowing them to earn points whatever the airline used. A common system is thus likely to constitute a not inconsiderable entry barrier to other airlines that do not have comparable programmes⁽¹⁾.

Accordingly, under their cooperation agreement, Lufthansa and SAS will provide more than 50 % of the frequencies from these airports.

- (54) This economic power is enhanced by the fact that the two airlines control a substantial proportion of the slots at the main German and Scandinavian airports, where available capacities are saturated at peak periods.

The two airlines control about:

- [...] % of slots at Frankfurt,
- [...] % of slots at Oslo,
- [...] % of slots at Stockholm,
- [...] % of slots at Düsseldorf.

- (55) The economic power of Lufthansa and SAS also stems from the large number of frequencies which they operate from the main airports in question.

The situation is as follows at three major airports⁽²⁾:

Number of frequencies from Copenhagen to 30 major cities in Europe

SAS	LH	KLM	AF	BA	Other airlines
138	20	49	22	21	26

Number of frequencies from Frankfurt to 30 major cities in Europe

SAS	LH	KLM	AF	BA	Other airlines
17	137	24	10	24	53

- (56) In general, Lufthansa and SAS will thus, as a result of their cooperation agreement, have an economic strength which will act as a substantial barrier to entry on all the routes between Scandinavia and Germany.

C.2 Restrictions of competition in passenger transport on other routes

- (57) On routes other than those linking Scandinavia and Germany, Lufthansa and SAS will also develop their cooperation in joint network planning, pricing policy, harmonization of service levels, code-sharing and reciprocal access to frequent-flyer programmes.
- (58) This part of the cooperation agreement will thus also have the object and effect of restricting competition between the parties.

The effects of these restrictions of competition on the market are not, however, comparable to the effects which the cooperation agreement will have on the routes between Scandinavia and Germany.

On other European routes, Lufthansa and SAS are in direct competition with other major airlines.

- (59) On these routes, having regard in particular to the limited market shares held by Lufthansa and SAS, the cooperation agreement between them is not likely as such to create any significant entry barrier.

C.3 Restrictions of competition in intra-European cargo transport

- (60) The parties propose to integrate their cargo transport activities as far as possible.

- (61) The cooperation agreement between Lufthansa and SAS will also have the object and effect of restricting competition appreciably between the parties in cargo transport in Europe.

⁽¹⁾ See the study entitled *Concurrence et Coopération dans le transport aérien en Europe*; David Encaoua and Anne Perrot, 1991.

⁽²⁾ Source: ABC, February 1993.

- (62) Consequently, in view of the aspects referred to in recitals (44) to (61), the cooperation agreement concluded between Lufthansa and SAS has as its object and effect the restriction of competition, in breach of the provisions of Article 85 (1) of the Treaty.

D. Effect on trade between Member States

- (63) The cooperation agreement between Lufthansa and SAS covers international passenger and cargo transport between Member States. The agreement therefore affects trade between Member States.

E. Article 85 (3)

(a) Contribution to economic progress

- (64) The agreement's contribution to economic progress may be assessed at various levels.

a.1 The establishment of a European network

The airlines consider that their agreement will enable them to establish a more extensive European network which will be comparable to the networks of other major airlines and which will involve in particular the routes between Scandinavia and Germany. Such a network will make it possible to provide consumers with a better-quality service, notably in terms of the number of direct and indirect flights, and a larger number of potential connections between different routes.

- (65) The differences in configuration between the Lufthansa and SAS networks have already been outlined in recitals (10), (11), (12), (19) and (20).

The differences compared with the other large European airlines can be seen from the table below:

Number of scheduled services operated at the end of 1994

	Domestic market	Rest of Europe	Outside Europe	Total	National/total (%)	Europe/total (%)	Outside Europe/total (%)
BA	20	58	87	165	12	35	52
AF	8	58	104	170	5	34	61
LH	17	78	95	190	8	36	50
KLM	4	58	86	148	3	39	58
SAS	39	54	9	102	38	53	9

Source: AEA.

- (66) While the structure of the networks of British Airways and Air France is fairly similar, Lufthansa differs in that it has a higher proportion of intra-European routes and a correspondingly weaker presence on extra-European routes.

SAS, for its part, is in a very strong position at national and European level but is virtually absent at the extra-European level. What is more, the proportion of 'European' routes served by SAS includes, in fact, a large number of 'intra-Scandinavian' routes. Although, in terms of the number of passengers carried in Europe, SAS ranks

third, its operations are confined mainly to Scandinavia.

- (67) The networks' characteristics can also be seen from a comparison of the average length of each airline's flights:

	LH	SAS	All AEA airlines
Average length of flights on the world network (km)	1 036	686	1 084
Average length of flights on the European network (km)	686	621	—

Similarly, the difference in the networks' configuration can be seen from the ratio between total income and tonne-kms offered for sale.

	LH	SAS	All AEA airlines
Total income (in millions of dollars)	4,17	7,1	4,59
Tonne-kms offered for sale (in thousands of dollars)			

Whereas Lufthansa's figure is near to the European average, SAS's network is clearly much more regionally biased.

- (68) In the light of these factors, the Commission is of the opinion that the complementarity of the two networks of Lufthansa and SAS is established and that the pooling of those networks will make it possible to improve the services rendered to consumers, particularly on intra-European routes and especially on those to and from Scandinavia.

a.2 The reduction of costs

- (69) The Commission is of the opinion that the reduction of European airlines' costs is an important factor to be taken into account. Comparisons between US and European airlines reveal that the costs borne by European airlines are up to 48 % higher than those borne by US airlines ⁽¹⁾.
- (70) According to the parties, the agreement would make it possible, through cost reductions and better synergy, to save some DM [...] million a year over a period of [...] years.

These savings would be made primarily in the following four areas:

- traffic management, making it possible to improve services and hence attract more passengers,
- an integrated marketing system, which should make it possible to reduce costs in particular by eliminating duplication in the marketing field in certain countries,
- better organization of ground-handling services,
- the establishment of an integrated system of data exchange and of integrated reservation and

distribution systems, from which substantial savings are expected.

- (71) In the air transport field, experts consider that the return on changes in scale are generally constant; in other words, an X % increase in network size increases costs by the same proportion. By contrast, the return on increases in density is progressive, i.e. a 1 % increase in traffic with an unchanged network increases costs by only 0,82 %. Similarly, a 1 % increase in the average distance between two touch-downs generally reduces costs.

Lastly, a 1 % increase in the load factor reduces costs by 0,26 % ⁽²⁾.

- (72) An increase in the airlines' size is, therefore, not necessarily going to reduce their costs. Such a reduction calls for a deliberate cost-cutting plan covering several years. In the present case, the two airlines have apparently drawn up such a plan. The close cooperation between the two airlines can also reasonably be expected to lead to an appreciable increase in traffic throughout the network and thus help to reduce costs.

In addition, the establishment of a world-wide network common to the two airlines is likely to rationalize services and increase the average distance between touch-downs, thereby helping to further reduce costs.

- (73) In the light of the factors referred to in recitals (64) to (72), the Commission is of the opinion that the agreement is likely to contribute to economic progress within the meaning of Article 85 (3) of the Treaty.

(b) Benefit to consumers

- (74) Air transport users will benefit directly from the creation of a network common to the two airlines in that they will have access to a range of higher-quality services that are geographically more extensive at both European and world level.
- (75) The reduction in their costs will also enable the airlines to lower their fares which will be of benefit to users. The Commission must, however, impose conditions and obligations to ensure that these benefits to consumers last for as long as this Decision is in force.

⁽¹⁾ See the report of the *Comité des Sages* entitled: 'Expanding Horizons. Civil Aviation in Europe, an action programme for the future', 1993.

⁽²⁾ See the study entitled 'Concurrence et Coopération dans le transport aérien en Europe', David Encaoua and Anne Perrot, 1991.

(c) *Indispensable nature of the restrictions*

(76) The establishment of a large European network covering Scandinavia and Germany is scarcely conceivable without an extensive cooperation agreement between the two airlines.

(77) A question mark hangs over Lufthansa's ability to operate independently on all the Scandinavian routes with a view to carrying passengers to its hubs in Germany. For this to be possible, it would have to have a sufficient number of aircraft suited to the services in question, including regional services in Scandinavia.

(78) A comparison of the two airlines' fleets shows that, on 31 December 1993, SAS had 80 aircraft, out of a total of 160, with no more than 100 seats, whereas on that date Lufthansa had no such aircraft.

Lufthansa would therefore be unable to serve direct a large number of Scandinavian routes for want of a suitable fleet.

(79) While it is possible to reduce costs without concluding a cooperation agreement, the agreement in question is likely, thanks to the pooling of substantial material, human and financial resources, to make for a larger reduction.

(80) The Commission is therefore of the opinion that the restrictions of competition are necessary as the market now stands.

(81) It must nevertheless impose conditions to ensure that the restrictions of competition remain within the bounds of what is necessary and to safeguard the presence on the market of competing airlines.

(d) *No elimination of competition*

(82) The question of whether or not competition is eliminated must be assessed in the light of the following factors and of any conditions which the Commission may impose. Other airlines already operate services on some routes between Scandinavia and Germany and can extend their operations also to new routes in competition with Lufthansa and SAS. What is more, following the liberalization of European air transport, regulatory barriers to market entry have been removed.

(83) Consequently, the agreement between Lufthansa and SAS does not eliminate all potential and/or actual competition in the relevant markets.

(84) It must be borne in mind, however, that, by virtue of their cooperation agreement, Lufthansa and SAS

will be the only airlines present on certain routes, and that the contestability of the relevant markets is not fully assured unless conditions are imposed.

(85) The Commission accordingly considers that a number of conditions must be imposed in order to safeguard market access for new entrants and to resolve in particular the problem of entry barriers being erected.

F. *Conditions of exemption*

(86) Pursuant to Article 6 of Regulation (EEC) No 3975/87, any decision applying the exemption in Article 85 (3) must indicate the period for which it is to be valid, and conditions and obligations may be attached to such decision.

(87) According to Article 6 of Regulation (EEC) No 3975/87, such period of validity is normally not less than six years. Account must nevertheless be taken of the fact that the cooperation agreement in question is a major undertaking for the two airlines involving restructuring measures which will bear fruit only in the long term.

(88) Consequently, the Commission considers that in the present case a period of ten years is justified, i.e. until 31 December 2005. This Decision should take effect from the date on which the notification was made, i.e. 11 May 1995.

(89) The grant of exemption must, however, be subject to certain conditions and obligations to avoid a situation where the restrictions of competition exceed that which is indispensable and where competition is eliminated in the relevant passenger transport market.

(90) The Commission considers that the conditions do not have to be applicable to all routes, but only to those routes between Scandinavia and Germany where the two airlines operated competing services before the agreement was concluded and where the capacity exceeds 30 000 seats per year. This number of 30 000 seats was considered by the Council in Article 6 of Regulation (EEC) No 2408/92⁽¹⁾ as a threshold beyond which competition must necessarily be assured.

⁽¹⁾ OJ No L 240, 24. 8. 1992, p. 8.

The following routes satisfy these two criteria:

- Düsseldorf-Copenhagen,
- Düsseldorf-Stockholm,
- Frankfurt-Copenhagen,
- Frankfurt-Gothenburg,
- Frankfurt-Oslo,
- Frankfurt-Stockholm,
- Munich-Copenhagen,
- Hamburg-Stockholm.

(91) The purpose of the conditions is to ensure that competition is not eliminated and that opportunities for market entry are available to new entrants. In determining the period of applicability of the conditions, the following factors should be taken into account:

- Lufthansa and SAS are respectively the second and third largest passenger-carrying airlines in Europe in terms of passenger-kilometres,
- their cooperation involves 25 routes between Scandinavia and Germany, including 12 that have traffic of more than 45 000 passengers a year,
- the cooperation is designed to establish a dense service network that will make two major networks complementary,
- the main routes link airports some of which are saturated at certain times of the day.

This means that entry barriers on these routes will be considerable and may well continue for a long period.

The Commission therefore considers that a period of seven years during which the conditions would be applicable is necessary to ensure that other airlines establish a lasting foothold on the routes in question.

(92) In view of the economic strength of the two airlines and their joint presence on these routes, the Commission considers that they must freeze the number of daily frequencies they operate on a route when a new entrant decides to serve that route. This condition is designed to prevent the airlines already present from increasing substantially their number of frequencies with a view to squeezing the new entrant from the market. This freezing of the number of frequencies shall remain in force until such time as the new entrant actually operates services on the route or routes in question, but cannot exceed the period of validity of this Decision.

(93) Lufthansa and SAS nevertheless be allowed to exercise the necessary degree of flexibility in operating their services; in the event of a new competitor starting up on a route, they should be able to

increase the number of daily frequencies by one frequency on the relevant route.

(94) In the event of new entrants operating more frequencies than Lufthansa and SAS, the latter must be afforded the opportunity of matching the number of frequencies of their competitors, without, however, exceeding that number.

(95) The possibility for a new entrant to conclude an interlining agreement with Lufthansa and SAS is also an important factor when it comes to its being able to penetrate the relevant market effectively.

(96) It has been emphasized that the pooling by Lufthansa and SAS of their frequent-flyer credit systems is likely to constitute a not inconsiderable barrier to market entry. Any other airline which provides or wishes to provide services on the routes in question and which does not have a frequent-flyer programme applicable at international level must therefore be afforded the opportunity of participating in the programme operated by Lufthansa and SAS.

(97) Lufthansa and SAS have entered into cooperation agreements with other European airlines which are actual or potential competitors. It must be determined, in the light of the alliance between Lufthansa and SAS, whether these agreements can be allowed to remain in force.

(98) SAS is party to the European Quality Alliance (EQA), which was originally concluded between Swissair, Austrian Airlines and SAS. The EQA consists of bilateral agreements between SAS and Swissair, between SAS and Austrian Airlines and between Swissair and Austrian Airlines. The agreements, which entered into force in 1990, map out a strategy for coordinating the airlines' traffic systems with a view to developing long-range services from Scandinavian, Swiss and Austrian airports.

(99) The EQA introduces coordination of transport systems from the respective hub airports as follows:

- under the SAS-Swissair agreement: Zurich and Geneva will act as hub airports for traffic between Scandinavia, on the one hand, and Africa, the Middle East, India, Pakistan, South America and southern Europe, on the other. Similarly, Copenhagen, Oslo and Stockholm will serve as hub airports between Switzerland, on the one hand, and Asia, North America and northern Europe, on the other;
- under the SAS-Austrian Airlines agreement: Vienna will act as hub airport between Scandinavia, on the one hand, and Africa, the Middle East and eastern and southern Europe, on the other. Similarly, Copenhagen and Stockholm will serve as hub airports between Austria, on the one hand, and Asia, North America and northern Europe, on the other.

In both cases, the operation by one party of services via the hub airports of the other party is subject to the latter's agreement.

- Salzburg-Frankfurt,
- Salzburg-Berlin.

(100) The three airlines have concluded supplementary agreements on interlining facilities and participation by Swissair and Austrian Airlines in SAS's frequent-flyer programme.

(101) Following its agreement with Sabena, Swissair has undertaken to terminate its cooperation agreement with SAS within the EQA by 1 January 1996.

(102) The Commission considers that, within the framework of this Decision, SAS should also be asked to terminate its agreements with Swissair and Austrian Airlines, because as a result of the cooperation agreements concluded in 1995, two new entities have been created in Europe, namely:

- an entity consisting of Lufthansa and SAS, and
- an entity consisting of Sabena and Swissair.

The Commission considers that the agreements establishing these entities may under certain conditions be exempted from the ban on restrictive agreements. Since there must be effective competition between the two entities, however, the agreements between SAS and Swissair and between SAS and Austrian Airlines must be terminated.

(103) For its part, Lufthansa has concluded cooperation agreements with Transwede and Finnair for the operation of routes between Scandinavia and Germany. Inasmuch as these two carriers are competitors on the routes between Scandinavia and Germany, these agreements must also be terminated.

(104) Lufthansa has also concluded a cooperation agreement with Lauda Air, in which it has a 39,7 % shareholding.

Lauda Air mainly operates the following routes:

- Vienna-London,
- Vienna-Paris,
- Vienna-Manchester,
- Vienna-Barcelona,
- Vienna-Madrid,
- Vienna-Frankfurt,
- Vienna-Munich,
- Vienna-Düsseldorf,
- Salzburg-Paris,
- Salzburg-London,

(105) Apart from Vienna-London, all these routes give rise to cooperation with Lufthansa in the form of code-sharing agreements. However, none of these routes is in the markets defined in recital 30. Consequently, the agreement between Lufthansa and Lauda Air is not capable of having a significant effect on routes between Scandinavia and Germany. Moreover, the existence of the agreement between Lufthansa and Lauda Air has no direct effect on relations between the two entities referred to in recital 102.

(106) Consequently, without prejudging the lawfulness of the agreements between Lufthansa and Lauda Air, the Commission is of the opinion that the safeguarding of competition on routes between Scandinavia and Germany does not require the imposition of a condition obliging Lufthansa to put an end to all cooperation with Lauda Air.

(107) Access to routes between Scandinavia and Germany by new entrants is conditional on the availability of slots at Scandinavian and German airports. Frankfurt, Düsseldorf, Stockholm and Oslo airports are, however, saturated at certain hours of the day, and obtaining slots there by the normal allocation procedures is virtually impossible.

(108) Lufthansa and SAS must therefore give up, as the need arises, a sufficient number of slots at each of the abovementioned airports to enable other airlines to operate competing services on the routes referred to in recital (90).

(109) This will be called for only where the new entrant has been unable to obtain slots by the normal allocation procedure in force at each airport. Precise conditions must also be laid down to ensure that the slots given up by the Lufthansa and SAS are in fact used only to ensure continued competition on the routes between Scandinavia and Germany.

(110) Steps must also be taken to ensure that this condition is not circumvented by the slots in question being given up to a carrier which has links with Lufthansa or SAS.

(111) Where Lufthansa or SAS give up a slot, a contract will be signed between them and the airline taking over the slot. The contract may stipulate only provisions that are contained in this Decision.

(112) In view of the length of the exemption and the conditions attached to this Decision, the parties must send the Commission at regular intervals information enabling it to ascertain whether the

conditions are being complied with. Information on fares must also be sent to enable the Commission to assess the agreement's impact on their level and establish whether the agreement is still of benefit to consumers.

- (113) For the purposes of this Decision, Scandinavia should be taken to mean Denmark, Norway and Sweden.
- (114) This Decision is without prejudice to the applicability of Article 86 of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA, the provisions of Article 85 (1) of the Treaty and of Article 53 (1) of the EEA Agreement are declared inapplicable for the period from 11 May 1995 to 31 December 2005 to the cooperation agreement concluded on 11 May 1995 between Deutsche Lufthansa AG and Scandinavian Airlines System.

Article 2

1. The exemption referred to in Article 1 shall be subject to the conditions and obligations set out in Articles 3, 4 and 5.
2. The conditions and obligations referred to in paragraph 1 are applicable on the following routes:
 - Düsseldorf-Copenhagen,
 - Düsseldorf-Stockholm,
 - Frankfurt-Copenhagen,
 - Frankfurt-Gothenburg,
 - Frankfurt-Oslo,
 - Frankfurt-Stockholm,
 - Hamburg-Stockholm,
 - Munich-Copenhagen.
3. For the purposes of this Decision, 'Lufthansa/SAS entity' means:
 - the airlines Lufthansa and SAS and any airline in which SAS or Lufthansa holds more than 10 % of the shares,
 - any airline with which Lufthansa and SAS have concluded a structural agreement, and
 - any airline with which Lufthansa and SAS have concluded a code-sharing agreement applicable on routes between Scandinavia and Germany.

Article 3

Until 31 October 2002 the following conditions shall be applicable to the carriage of passengers:

1. (a) where an airline established in the EEA and not belonging to the Lufthansa/SAS entity informs the latter at least three months before the beginning of the following transport season of its intention to operate services on one or more of the routes referred to in Article 2 (2), Lufthansa and SAS shall freeze their aggregate number of daily frequencies on the routes in question at the level attained:

- on 31 October 1995 for forthcoming summer seasons,
- on 1 November 1995 for forthcoming winter seasons.

This freezing of the number of frequencies shall remain in force until such time as the new entrant actually operates services on the route or routes in question, but cannot exceed the period of validity of this Decision.

- (b) notwithstanding point (a), Lufthansa and SAS may, where a new entrant appears on one of the routes referred to in Article 2 (2), increase by one frequency the total number of daily frequencies on the route in question.
- (c) Lufthansa and SAS may also, on each of the eight routes referred to in Article 2 (2), increase their aggregate number of daily frequencies so that it is equal to but not more than the aggregate number of frequencies operated by other airlines on each of these routes;
2. an airline established in a Member State of the EEA and operating services on one or more of the routes referred to in Article 2 (2) may ask to sign an interlining agreement with Lufthansa and SAS on the route or routes in question. Lufthansa and SAS shall sign an agreement in accordance with the conditions that are normal in the industry. Such agreements shall apply for seven years from the date of their signature, without, however, remaining in force beyond 31 December 2005;
3. SAS and Lufthansa shall afford any airline established in a Member State of the EEA operating services on one or more of the routes referred to in Article 2 (2) and not participating in a frequent-flyer programme applicable in more than one Member State the opportunity of participating in the SAS or Lufthansa programme or in the corresponding joint programme once it has been established for the sale of services on the abovementioned routes. Such participation shall take place under non-discriminatory financial conditions;

4. SAS shall terminate its cooperation agreement with Swissair within the European Quality Alliance by 31 January 1996;
5. SAS shall terminate its cooperation agreement with Austrian Airlines within the European Quality Alliance by 1 January 1997;
6. Lufthansa shall terminate its cooperation agreement with Transwede within the Marketing Alliance in Scandinavia by 1 January 1997;
7. Lufthansa shall terminate its cooperation agreement with Finnair in respect of routes between Scandinavia and Germany by 1 January 1997;
8. where an airline established in a Member State of the European Economic Area and not belonging to the Lufthansa/SAS entity wishes to commence or increase services on one or more of the routes referred to in Article 2 (2) but cannot obtain the necessary slots by the normal allocation procedure, Lufthansa and SAS shall place slots at the applicant's disposal at Frankfurt, Düsseldorf, Stockholm and Oslo airports under the following conditions:
 - (a) the number of slots per day made available at each of the airports may not be more than eight;
 - (b) Lufthansa and SAS shall make the slots available to the applicant within a period of 60 minutes before or after the time requested, it being understood that slots requested at peak times must also be granted within this time interval;
 - (c) Lufthansa and SAS shall not be required to make available to the same applicant more than four slots at each airport per two-hour period;
 - (d) Lufthansa and SAS shall not be required to give up more than six slots at each airport at peak times;
 - (e) for the purposes of this Decision, peak times shall be between 7 a.m. and 9 a.m., and between 5 p.m. and 7 p.m., local time;
 - (f) slots be made available by Lufthansa and SAS on condition that the new entrant has taken the steps necessary to obtain the slots in question in accordance with the normal allocation procedure and has not obtained the slots within a period of 60 minutes before or after the time requested or during a peak period if the request concerns that period;
 - (g) slots given up by Lufthansa and SAS may be used only to provide services on the routes referred to in Article 2 (2) during the period of validity of this Decision. A slot made available in accordance with this procedure for relinquishing slots may be exchanged by the new entrant for a slot used by him on another route or for a slot used by another airline, provided both that such slot is closer to the time initially requested and that the obligations and conditions attached to the original slot apply to the new slot;
 - (h) a new entrant who holds slots given up by Lufthansa and SAS shall inform the latter immediately and return the slots to them by the end of the IATA season in course in the following circumstances:
 - (i) if the new entrant no longer uses the slot or slots in question to operate services on the routes referred to in Article 2 (2), or
 - (ii) if the new entrant does not make at least 80 % use of the slot or slots in question, save where such under-utilization is justified on one of the grounds referred to in Article 10 (5) of Council Regulation (EEC) No 95/93⁽¹⁾, or
 - (iii) if this Decision providing for an exemption is annulled or if Lufthansa and SAS terminate their agreement, or
 - (iv) if the holder of the slots infringes any important provision of an agreement with Lufthansa and/or SAS on making slots available, or
 - (v) if the holder of the slots ceases to enjoy the status of airline established in a Member State of the European Economic Area;
 - (i) Lufthansa and SAS shall transfer slots to any new entrant in accordance with the procedure for relinquishing slots, following signature of an agreement containing the conditions set out in points (g) and (h). Such agreements shall be notified within one week of their signature to the Commission and to the authority responsible for allocating slots at the airport concerned;
 - (j) Lufthansa and SAS shall make the slots available to the new entrant on condition that a request is made to one of them within a maximum period of one month from the end of the meeting devoted to allocating slots for an IATA season;
9. for the 1995/96 winter season, the request may be made within a maximum period of one month from the date of publication of this Decision in the *Official Journal of the European Communities*. In all cases, Lufthansa and SAS shall send a reply to the applicant within a maximum period of two weeks from the date of the request.

⁽¹⁾ OJ No L 14, 22. 1. 1993, p. 1.

Article 4

Until 31 October 2002 the following obligations shall be applicable to the carriage of passengers:

At the end of each summer season, Lufthansa and SAS shall furnish the following information to the Commission for the preceding two seasons:

- the number of daily frequencies operated by Lufthansa and SAS on the routes referred to in Article 2 (2),
- a list of any interlining agreements concluded by Lufthansa and SAS in accordance with Article 3 (2),
- a list of any agreements relating to frequent-flyer programmes concluded by Lufthansa and SAS in accordance with Article 3 (3), and
- a list of slots made available to other airlines in accordance with Article 3 (8).

Article 5

Until 31 December 2005 the following obligations shall be applicable to the carriage of passengers:

At the end of each summer season, Lufthansa and SAS shall furnish the following information to the Commission for the preceding two seasons:

- the average price of a business-class return ticket on each of the routes referred to in Article 2 (2) and any difference compared with the prices resulting from

consultations on tariffs between airlines held in accordance with Commission Regulation (EEC) No 1617/93 ⁽¹⁾;

- the total monthly capacity supplied by Lufthansa and SAS on each of the routes referred to in Article 2 (2), and
- the stage reached in the implementation of the cost-reduction plan envisaged by the parties.

Article 6

This Decision is addressed to:

Deutsche Lufthansa AG,
Von-Gablenz-Straße, 2-6
D-50769, Cologne;
Scandinavian Airlines System,
Frösundaviks Allé, 1,
Solna,
S-195 87, Stockholm.

Done at Brussels, 16 January 1996.

For the Commission

Karel VAN MIERT

Member of the Commission

⁽¹⁾ OJ No L 155, 26. 6. 1993, p. 18.