

English edition

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I

(Acts whose publication is obligatory)

**COUNCIL REGULATION (EC) No 876/2002
of 21 May 2002
setting up the Galileo Joint Undertaking**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 171 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas:

- (1) On 13 January 1999 the European Parliament adopted a Resolution on the Communication from the Commission to the Council and the European Parliament 'Towards a trans-European Positioning and Navigation Network: including a European Strategy for Global Navigation Satellite Systems (GNSS)' ⁽⁴⁾.
- (2) On 10 February 1999 the Commission adopted the Communication 'Galileo — Involving Europe in a new generation of satellite navigation services'.
- (3) The conclusions of the European Council in Cologne (3 and 4 June 1999), Feira (19 and 20 June 2000), Nice (7 to 11 December 2000), Stockholm (23 and 24 March 2001), Laeken (14 and 15 December 2001) and Barcelona (15 and 16 March 2002) make reference to Galileo.
- (4) On 19 July 1999 the Council adopted a Resolution on the involvement of Europe in a new generation of satellite navigation services — Galileo — Definition phase ⁽⁵⁾.
- (5) On 22 November 2000 the Commission adopted a Communication to the European Parliament and the Council on Galileo.
- (6) The Council adopted a Resolution on Galileo on 5 April 2001 ⁽⁶⁾.

(7) On 26 March 2002, the Council adopted conclusions on Galileo.

(8) The first research contracts and feasibility studies were funded under the fourth and fifth framework programmes for research and development.

(9) The technological development phase was funded from the appropriations assigned to the trans-European transport networks on the basis of Article 4(g) of Decision No 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport network ⁽⁷⁾, which provides for the possibility of funding for research and development, and Article 17 of Council Regulation (EC) No 2236/95 of 18 September 1995 laying down general rules for the granting of Community financial aid in the field of trans-European networks ⁽⁸⁾.

(10) At the beginning of 2001, the management of the Galileo satellite radio-navigation programme, hereinafter referred to as the 'Galileo programme', entered its development phase aimed at verifying and testing the assumptions made during the definition phase, in particular with regard to the various components of the architecture of the system.

(11) The development phase should be followed by the deployment phase consisting of the production of satellites and terrestrial components, satellite launching and the installation of terrestrial stations and equipment in order to enable the system to be operational in 2008.

(12) Taking into account the number of players who will need to be involved in this process, and the financial resources and technical expertise needed, it is vital to set up a legal entity capable of ensuring the coordinated management of the funds assigned to the Galileo programme during its development phase. For reasons of legal certainty, it should be specified that this entity, which is not designed to fulfil an economic purpose and is responsible for managing a public research

⁽¹⁾ OJ C 270 E, 25.9.2001, p. 119.

⁽²⁾ OJ C 48, 21.2.2002, p. 42.

⁽³⁾ Opinion delivered on 7 February 2002 (not yet published in the Official Journal).

⁽⁴⁾ OJ C 104, 14.4.1999, p. 73.

⁽⁵⁾ OJ C 221, 3.8.1999, p. 1.

⁽⁶⁾ OJ C 157, 30.5.2001, p. 1.

⁽⁷⁾ OJ L 228, 9.9.1996, p. 1. Decision as amended by Decision No 1346/2001/EC (OJ L 185, 6.7.2001, p. 1).

⁽⁸⁾ OJ L 228, 23.9.1995, p. 1. Regulation as amended by Regulation (EC) No 1655/1999 of the European Parliament and of the Council (OJ L 197, 29.7.1999, p. 1).

programme of European interest, must be considered as an international organisation within the meaning of the second indent of Article 15(10) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes ⁽¹⁾ and the second indent of Article 23(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products ⁽²⁾.

- (13) The Stockholm European Council noted that 'the private sector is ready to supplement the public budgets for the development phase'. The representatives of the main industries concerned signed a Memorandum of Understanding in March 2001 whereby they committed themselves to indicating their contribution to the total amount of EUR 200 million for the development phase of the Galileo programme by subscribing to the capital of the Joint Undertaking or contributing in some other form.
- (14) It is therefore necessary to set up a Joint Undertaking under Article 171 of the Treaty, since the Galileo programme involves a major research and development component which justifies and will continue to justify the use of funds assigned to the research and development framework programmes. In addition, this programme should make it possible to make considerable progress in the development of satellite navigation technologies.
- (15) The Joint Undertaking's main task should be, in accordance with Council decisions, successfully to complete the development of the Galileo programme during its development phase by combining public and private sector funding. In addition, it should make it possible to ensure the management of major demonstration projects.
- (16) The Joint Undertaking's financial regulations should respect the broad principles and rules as laid down in the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities ⁽³⁾.
- (17) In formulating its proposal for the nomination of the Director of the Joint Undertaking, the Commission should consider that he/she be appointed on the grounds of merit and managerial skills, as well as competence and relevant experience, and should be independent of any undertaking in the performance of his/her duties,

HAS ADOPTED THIS REGULATION:

Article 1

For the implementation of the development phase of the Galileo programme, a Joint Undertaking within the meaning of Article 171 of the Treaty is hereby set up for a period of four years.

The aim of the Joint Undertaking shall be to ensure the unity of the administration and the financial control of the project for the research, development and demonstration phase of the Galileo programme, and to this end mobilise the funds assigned to that programme.

The Joint Undertaking shall be considered as an international organisation within the meaning of the second indent of Article 15(10) of Directive 77/388/EEC and the second indent of Article 23(1) of Directive 92/12/EEC.

Its seat shall be located in Brussels.

Article 2

The Statutes of the Joint Undertaking, as set out in the Annex hereto, are hereby adopted.

Article 3

1. In order to ensure an adequate flow of information and effective political control by Member States of the implementation of the development phase of the Galileo programme, a Supervisory Board shall be established. It shall be composed of one representative of each Member State of the European Union, and of the representative of the Commission at the Administrative Board of the Joint Undertaking.

2. The Supervisory Board shall be chaired by the representative of the Member State which holds the Presidency of the Council of the European Union.

3. In due time, and at least 15 days before each meeting of the Administrative Board, the Commission shall convene the Supervisory Board and submit all documents to its members convening the issues on the agenda for that meeting.

The Supervisory Board shall take a decision on all issues that are on the agenda of the upcoming meeting of the Administrative Board and may put other items on that agenda. The Commission shall, when carrying out its functions on the Administrative Board, do everything possible to ensure that decisions taken by the Administrative Board reflect the decisions and views of the Supervisory Board.

4. The Supervisory Board shall take its decisions by qualified majority of the votes of the representatives of the Member States, these votes being weighted in accordance with Article 205(2) of the Treaty. The representative of the Commission shall not participate in the vote.

5. The Supervisory Board shall adopt its rules of procedure.

⁽¹⁾ OJ L 145, 13.6.1977, p. 1. Directive as last amended by Directive 2001/115/EC (OJ L 15, 17.1.2002, p. 24).

⁽²⁾ OJ L 76, 23.3.1992, p. 1. Directive as last amended by Directive 2000/47/EC (OJ L 193, 29.7.2000, p. 73).

⁽³⁾ OJ L 356, 31.12.1977, p. 1. Regulation as last amended by Regulation (EC) No 762/2001 (OJ L 111, 20.4.2001, p. 1).

Article 4

Every year, the Commission shall present to the Council the annual report on the progress of the Galileo programme as well as the programme development plan, including the financial aspects.

At the end of 2003, the Commission shall inform the Council of the results of the tendering procedure launched by the Joint Undertaking in accordance with Article 4 of its Statutes.

Article 5

The Commission shall report to the Council on the accession of new members.

Any participation of new members, including the participation of members from third countries, shall be submitted to the Council for approval.

Article 6

The Joint Undertaking shall be subject to the rules contained in Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations ⁽¹⁾.

Article 7

1. In order to deal with security matters regarding the Galileo system, a Security Board shall be established. It shall be composed of one representative of each Member State of the European Union and of a representative of the Commission.
2. The Security Board shall adopt its rules of procedure.

Article 8

This Regulation shall enter into force on the day of 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, 21 May 2002.

For the Council

The President

R. DE MIGUEL

⁽¹⁾ OJ L 101, 11.4.2001, p. 1.

ANNEX

STATUTES OF THE GALILEO JOINT UNDERTAKING

Article 1

1. The name of the Joint Undertaking shall be: 'Galileo Joint Undertaking'.
2. Its seat shall be located in Brussels.
3. (a) The following shall be founding members of the Joint Undertaking:
 - the European Community, represented by the Commission,
 - the European Space Agency.
- (b) The following may become members of the Joint Undertaking:
 - the European Investment Bank,
 - any undertaking, after the Commission has, under Article 4 of Council Regulation (EC) No 876/2002 of 21 May 2002 setting up the Galileo Joint Undertaking ⁽¹⁾, informed the Council of the outcome of the tendering procedure, and after approval in accordance with the procedure set out in Article 5 of that Regulation.
4. The capital of the Joint Undertaking shall be made up of assets brought in by its members. Assets in kind may be brought in. They shall be subject to an evaluation of their value and their utility to the carrying-out of the activities of the Joint Undertaking.

The founding members shall subscribe their shares of the capital to the extent of the amounts indicated in their respective commitments of EUR 520 million for the European Community and EUR 50 million for the European Space Agency.

Once the Commission has informed the Council of the outcome of the tendering procedure, the Administrative Board shall immediately invite the undertakings mentioned in the second indent of paragraph 3(b) to subscribe. Undertakings need to subscribe EUR 5 million within a period of one year. That amount shall be reduced to EUR 250 000 for undertakings, subscribing individually or collectively, which may be regarded as small or medium-sized enterprises within the meaning of the Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises ⁽²⁾.

The Administrative Board shall decide on the amounts of this capital which should be released in proportion to the share of the capital subscribed by each member. Any member of the

Joint Undertaking which fails to meet its commitments concerning the bringing-in of assets in kind or which does not release the amount due within the prescribed time-limits shall be, as a first step, disqualified from voting in the Administrative Board and, after six months, membership shall be repealed until such time as its obligations have been met.

Financial commitments of the Joint Undertaking shall not exceed the amount of capital at its disposal.

Article 2

The main tasks of the Joint Undertaking shall be the following:

1. to oversee the optimal integration of the European Geostationary Navigation Overlay Service (EGNOS) in the Galileo programme and the implementation of the Galileo development and validation phase and help prepare for the deployment and operational phase;
2. to launch, in cooperation with the European Space Agency in accordance with Article 3 and through contractual arrangements with private sector entities, the research and development activities needed successfully to complete the phase of development and coordination of national activities in this area; to launch, through the European Space Agency in accordance with Article 3, a first series of satellites to finalise the technological developments that have occurred and ensure the large-scale demonstration of the capabilities and reliability of the system;
3. in cooperation with the Commission, the European Space Agency and the private sector, to help to mobilise the public and private sector funds needed to make proposals to the Council for the management structures for the various successive phases of the programme, on the basis of the following activities:
 - it shall draw up a business plan covering all the phases of the Galileo programme, on the basis of data to be supplied by the Commission, concerning the services that can be offered by Galileo, the revenue that they may generate and the necessary accompanying measures,
 - it shall negotiate, by way of a competitive tendering process with the private sector, an overall agreement for the financing of the deployment and operational phases that sets out the responsibilities, roles and risks to be shared between the public and private sectors;
4. to supervise the carrying-out of all programmes, if necessary with the assistance of a consultant, and to make any necessary adjustments in the light of developments occurring during the development phase.

⁽¹⁾ OJ L 138, 28.5.2002, p. 1.

⁽²⁾ OJ L 107, 30.4.1996, p. 4.

Article 3

The Joint Undertaking shall conclude an agreement with the European Space Agency by which:

- it charges to it the carrying-out of the activities required during the development phase with regard to the space segment and the earth segment associated with the system, and to that end the Joint Undertaking shall make available the funds at its disposal for that phase. The European Space Agency shall be responsible for administering them in accordance with procedures to be set out in the agreement to be concluded with the Joint Undertaking and based on the principles of non-discrimination, transparency and fair distribution of work, taking into account the Community character of the programme. In this context, an adequate participation of small and medium enterprises shall be aimed at,
- the Commission shall have the right to ensure that the financial interests of the Community are protected by carrying out effective controls. Should the Commission discover any irregularities, it shall reserve the right to reduce or suspend any subsequent payment to the Joint Undertaking. The reduced or suspended amount shall be equivalent to the amount of the irregularities actually discovered by the Commission. Any disputes shall be settled on the basis of the provisions of the agreement,
- the procedures for carrying out the Galileo programme are defined, in particular, the activities launched by the European Space Agency relating to the programme and financed from funds not assigned to the Joint Undertaking.

Article 4

Without prejudice to Article 3, and following an invitation to tender, the Joint Undertaking may conclude a contract for the provision of services with undertakings or a consortium of undertakings, in particular to carry out the activities provided for in point 3 of Article 2.

The Joint Undertaking shall ensure that the contract provides for the right of the Commission to carry out, on behalf of the Joint Undertaking, controls in order to ensure that the financial interests of the Community are protected and, in the event of the detection of irregularities, to impose dissuasive and proportionate penalties.

Article 5

The Joint Undertaking shall have legal personality. In all the Member States of the European Community, it shall enjoy the most extensive legal capacity accorded to legal persons under the laws of those States. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.

Article 6

The Joint Undertaking shall own all the tangible and intangible assets created or transferred to it for the development phase of the Galileo programme. If applicable, the right of ownership of

governmental cryptography stays with the governmental authority that developed the cryptographic method.

Article 7

1. The bodies of the Joint Undertaking shall be the Administrative Board, the Executive Committee and the Director.
2. The Administrative Board may seek the advice of an Advisory Committee.

Article 8

1. Composition of the Administrative Board, voting rights:
 - (a) the Administrative Board shall be composed of the members of the Joint Undertaking;
 - (b) unless otherwise provided for in these Statutes, decisions of the Administrative Board shall be adopted by a simple majority of the votes cast. Each member of the Joint Undertaking shall have a number of votes in proportion to the share of the capital subscribed by them. The Commission and the European Space Agency shall have the same number of votes and, in any case, at least 40 % of the total of votes each.
2. Functions of the Administrative Board:
 - (a) the Administrative Board shall take the decisions necessary for implementing the programme and exercise overall supervision of the execution of the programme;
 - (b) the Administrative Board shall in particular:
 - appoint the Director and approve the organisation chart,
 - designate the members of the Advisory Committee,
 - adopt the financial regulations of the Joint Undertaking in accordance with Article 14(3),
 - in accordance with Article 13, approve the annual budget, including the staff establishment plan, the development plan for the programme development phase, and the programme cost estimates,
 - approve the annual accounts and balance-sheet,
 - decide on any acquisition, sale and mortgaging of land and other titles to real property, as well as on the giving of any sureties or guarantees, the taking-out of shares in other undertakings or institutions, and on any granting or taking of loans,
 - approve, by a majority of 75 % of the votes, any proposal involving a significant change in the implementation of the Galileo programme,
 - adopt the annual reports on the progress of the Galileo programme and its financial situation referred to in Article 16(2),
 - exercise such other powers and perform such other functions, including the establishment of subsidiary bodies, as may be necessary for the purposes of the Galileo programme,
 - adopt the terms of reference of the Executive Committee.

3. Meetings, rules of procedure of the Administrative Board:

- (a) the Administrative Board shall meet at least twice a year. Extraordinary meetings shall be convened at the request of either one-third of the members of the Administrative Board representing at least 40 % of the voting rights or its Chairman or the Director. The meetings shall normally take place at the seat of the Joint Undertaking. The Administrative Board shall elect its Chairman from among its members. Unless otherwise decided in particular cases, a representative of the Executive Committee and the Director shall participate in the meetings;
- (b) the Administrative Board shall adopt its rules of procedure.

Article 9

1. Composition of the Executive Committee, voting rights:

- (a) the Executive Committee shall be composed of a representative of the Commission, a representative of the European Space Agency and, as soon as undertakings are involved, a representative of industries designated by the Administrative Board;
- (b) the Executive Committee shall meet in the presence of the Director and of a representative of the Member State holding the Presidency of the Council of the European Union;
- (c) decisions of the Executive Committee shall be taken unanimously, unless these statutes state otherwise.

2. Functions of the Executive Committee:

- (a) the Executive Committee shall assist the Administrative Board in the preparation of its decisions;
- (b) the Executive Committee shall in particular:
 - advise the Administrative Board and the Director on the progress of the Galileo programme on the basis of regular reports,
 - comment and make recommendations to the Administrative Board on the programme cost estimates and the draft budget, including the staff establishment plan drawn up by the Director,
 - approve the tendering procedures and the procedures for the award of contracts in accordance with the rules on the award of contracts to be established by the Administrative Board, which may not influence the execution of decisions to be taken by the Executive Committee,
 - perform tasks entrusted or delegated to it by the Administrative Board,
 - approve the release of funds set out under the agreement concluded in accordance with Article 3.

3. Meetings, rules of procedure of the Executive Committee:

- (a) the Executive Committee shall meet at least once a month. The meetings shall normally take place at the seat of the Joint Undertaking;

- (b) subject to the approval of the Administrative Board, the Executive Committee shall draw up its rules of procedure.

4. Treatment of documents:

the Executive Committee shall adopt rules on the treatment of documents, in order to conciliate the purposes of security, commercial secret, and public access. These rules shall take into account, where appropriate, the principles and limits laid down in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents ⁽¹⁾.

Article 10

1. The Director shall be the chief executive responsible for the day-to-day management of the Joint Undertaking and be its legal representative. He/she shall be appointed by the Administrative Board on a proposal from the Commission. He/she shall perform his/her duties with complete independence.

2. He/she shall direct the execution of the programme within the guidelines established by the Administrative Board to which he/she shall be responsible. He/she shall supply the Administrative Board, the Executive Committee, the Advisory Committee and all other subsidiary bodies with all the information necessary for the performance of their functions.

3. The Director shall in particular:

- organise, direct and supervise the staff of the Joint Undertaking,
- submit to the Administrative Board his/her proposals concerning the organisation chart,
- draw up and regularly update the programme development plan and the programme cost estimates, in accordance with the financial regulations, and submit them to the Administrative Board,
- draw up, in accordance with the financial regulations, the draft annual budget, including the staff establishment plan, and submit them to the Administrative Board,
- ensure that the obligations with regard to the Commission pursuant to the contract concluded between the latter and the Joint Undertaking are met, and in particular its provisions allowing representatives of the Commission to carry out effective controls and, in the event of the detection of irregularities, impose dissuasive and proportionate penalties,
- submit the annual accounts and balance-sheet to the Administrative Board,
- submit to the Administrative Board any proposal involving a significant change in the design of the Galileo programme,
- be responsible for security and take all the measures needed to meet security requirements,
- draw up the annual report on the progress of the Galileo programme and its financial situation, and such other reports as may be requested by the Administrative Board, and submit them to the latter.

⁽¹⁾ OJ L 145, 31.5.2001, p. 43.

Article 11

1. The staff complement shall be determined in the establishment plan that will be set out in the annual budget.
2. The members of the staff of the Joint Undertaking shall have a fixed-term contract based on the conditions of employment of other servants of the European Communities.
3. All staff costs shall be borne by the Joint Undertaking.
4. The Administrative Board shall adopt the necessary implementing arrangements.

Article 12

All the revenue of the Joint Undertaking shall be applied to promoting the tasks defined in Article 2. Subject to Article 21, no payment by way of division of any excess revenue over expenditure shall be paid to the members of the Joint Undertaking.

Article 13

1. The financial year shall correspond to the calendar year.
2. Before 31 March of each year, the Director shall transmit to the members the programme cost estimates as approved by the Administrative Board. The programme cost estimates shall include a forecast of annual expenditure for the following two years. Within this forecast, the estimates of revenue and expenditure for the first of those two financial years (preliminary draft budget) shall be drawn up in such detail as is necessary for the internal budgetary procedure of each member regarding its financial contributions to the Joint Undertaking. The Director shall supply the members with all supplementary information needed for this purpose.
3. The members shall forthwith communicate to the Director their comments on the programme cost estimates, and in particular on the estimates of revenue and expenditure for the following year.
4. Based on the approved programme cost estimates, and taking into account the comments received from members, the Director shall prepare the draft budget for the following year and submit it to the Administrative Board for adoption, by a majority of 75 % of the votes, before 30 September.

Article 14

1. Financial regulations shall be adopted by the Administrative Board by a majority of 75 % of the votes.
2. The purpose of the financial regulations is to ensure the sound and economic financial management of the Joint Undertaking.
3. The financial regulations shall in particular include the principal rules on:
 - the presentation and structure of the programme cost estimates and the annual budget,

- the implementation of the annual budget and internal financial control,
- the method of payment of contributions by the members of the Joint Undertaking,
- the keeping and presentation of accounts and inventory records as well as the drawing up and presentation of the annual balance-sheet,
- the procedure regarding calls for tender, based on non-discrimination between the countries of the members of the Joint Undertaking and the Community character of the project, the placing and the terms and conditions of contracts and orders on behalf of the Joint Undertaking.

4. The detailed implementing rules enabling the Commission to ensure compliance with its obligations pursuant to Article 274 of the Treaty establishing the European Community shall be set out in an agreement between the Joint Undertaking and the Commission.

Article 15

Within two months of the end of each financial year, the Director shall submit the annual accounts and balance-sheets for the preceding year to the Court of Auditors of the European Communities. The audit executed by the Court of Auditors shall be based on records and performed on the spot. The Director shall present the annual accounts and balance-sheet, together with the report of the Court of Auditors, to the Administrative Board for approval by a majority of 75 % of the votes. The Director is entitled and, if requested by the Administrative Board, obliged to comment on the report. The Court of Auditors shall send its report to the members of the Joint Undertaking.

Article 16

1. The programme development plan shall specify the plan for the execution of all elements of the programme. It shall cover the whole term of the Joint Undertaking and be updated regularly.
2. The annual report shall show the progress of the Galileo programme, in particular with regard to the timetable, costs and performance of the programme.

Article 17

1. The Joint Undertaking shall be solely responsible for meeting its obligations.
2. The contractual liability of the Joint Undertaking shall be governed by the relevant contractual provisions and by the law applicable to the contract in question.
3. Any payment by the Joint Undertaking for covering the liability referred to in paragraph 2 and the costs and expenses incurred in connection therewith shall be considered as expenditure of the Joint Undertaking.
4. The Director shall propose to the Administrative Board any necessary insurance, and the Joint Undertaking shall take out such insurance as the Administrative Board may direct.

Article 18

The Joint Undertaking shall ensure the protection of sensitive information whose non-authorised disclosure could damage the interests of the contracting parties. The Joint Undertaking shall apply the security principles and minimum standards set in force by Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations ⁽¹⁾.

The Joint Undertaking shall take into account the experience of the Galileo System Security Board (GSSB). It shall also follow the rules of the Security Board referred to in Article 7 of Regulation (EC) No 876/2002 for all questions relating to the security of the system.

Article 19

1. The Joint Undertaking is open for accession by members other than those referred to in Article 1(3)(a).

2. Any request for accession shall be addressed to the Director, who shall transmit it to the Administrative Board. The Administrative Board shall decide whether the Joint Undertaking shall start negotiations with the applicant on the conditions of accession, in particular taking into account security aspects. In the case of a positive decision, the Joint Undertaking shall negotiate the conditions of accession and submit them to the Administrative Board which shall act by a majority of 75 % of the votes expressed.

3. Membership of the Joint Undertaking may not be transferred to a third party unless the prior and unanimous agreement of the Administrative Board is given. Any unauthorised transfer shall entail the immediate termination of membership of the Joint Undertaking and liability for any damage caused to the Joint Undertaking.

Article 20

The Joint Undertaking shall be established for a period of four years as from the publication of these Statutes in the *Official Journal of the European Communities*.

According to the progress in achieving the tasks of the Joint Undertaking, as defined in Article 2, that period may be extended by amending these Statutes in accordance with the provisions of Article 23. The period shall, in any event, be extended until such time as the obligations arising from the agreement referred to in Article 3 are met.

Article 21

For the purpose of conducting the proceedings involved in winding up the Joint Undertaking, the Administrative Board shall appoint one or more liquidators, who shall comply with the decisions of the Administrative Board taken by a majority of 75 % of the votes.

Article 22

In any matter not covered by these Statutes, the law of the State where the seat of the Joint Undertaking is located shall apply.

Article 23

Any member of the Joint Undertaking may submit proposals for the amendment of these Statutes to the Administrative Board.

If the Administrative Board agrees to such proposals by a majority of 75 % of the votes, the Commission shall make a proposal to the Council for their approval in accordance with the procedure provided for in the first subparagraph of Article 172 of the Treaty establishing the European Community.

⁽¹⁾ OJ L 101, 11.4.2001, p. 1.

COMMISSION REGULATION (EC) No 877/2002**of 27 May 2002****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 1498/98 ⁽²⁾, and in particular Article 4(1) thereof,

Whereas:

- (1) Regulation (EC) No 3223/94 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in the Annex thereto.

- (2) 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 28 May 2002.

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

Done at Brussels, 27 May 2002.

For the Commission

J. M. SILVA RODRÍGUEZ

Agriculture Director-General

⁽¹⁾ OJ L 337, 24.12.1994, p. 66.

⁽²⁾ OJ L 198, 15.7.1998, p. 4.

ANNEX

to the Commission Regulation of 27 May 2002 establishing the standard import values for determining the entry price of certain fruit and vegetables

(EUR/100 kg)

CN code	Third country code ⁽¹⁾	Standard import value
0702 00 00	052	40,0
	204	35,8
	999	37,9
0707 00 05	052	101,4
	220	143,3
	999	122,4
0709 90 70	052	88,0
	999	88,0
0805 10 10, 0805 10 30, 0805 10 50	052	50,0
	204	48,4
	220	74,5
	388	75,0
	600	53,1
	624	81,1
	999	63,7
	388	61,4
0805 50 10	512	50,0
	528	61,2
	999	57,5
	57,5	
0808 10 20, 0808 10 50, 0808 10 90	060	16,2
	388	82,4
	400	142,9
	404	108,8
	508	83,8
	512	84,9
	524	68,2
	528	75,3
	720	145,2
	804	108,6
0809 20 95	999	91,6
	052	284,4
	400	338,9
	999	311,6

⁽¹⁾ Country nomenclature as fixed by Commission Regulation (EC) No 2020/2001 (OJ L 273, 16.10.2001, p. 6). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 878/2002**of 27 May 2002****fixing Community producer and import prices for carnations and roses with a view to the application of the arrangements governing imports of certain floricultural products originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the Gaza Strip**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4088/87 of 21 December 1987 fixing conditions for the application of preferential customs duties on imports of certain flowers originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the Gaza Strip ⁽¹⁾, as last amended by Regulation (EC) No 1300/97 ⁽²⁾, and in particular Article 5(2)(a) thereof,

Whereas:

Pursuant to Article 2(2) and Article 3 of abovementioned Regulation (EEC) No 4088/87, Community import and producer prices are fixed each fortnight for uniflorous (bloom) carnations, multiflorous (spray) carnations, large-flowered roses and small-flowered roses and apply for two-weekly periods. Pursuant to Article 1b of Commission Regulation (EEC) No 700/88 of 17 March 1988 laying down detailed rules for the application of the arrangements for the import into the Community of certain floricultural products originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the

Gaza Strip ⁽³⁾, as last amended by Regulation (EC) No 2062/97 ⁽⁴⁾, those prices are determined for fortnightly periods on the basis of weighted prices provided by the Member States. Those prices should be fixed immediately so the customs duties applicable can be determined. To that end, provision should be made for this Regulation to enter into force immediately,

HAS ADOPTED THIS REGULATION:

Article 1

The Community producer and import prices for uniflorous (bloom) carnations, multiflorous (spray) carnations, large-flowered roses and small-flowered roses as referred to in Article 1b of Regulation (EEC) No 700/88 for a fortnightly period shall be as set out in the Annex.

Article 2

This Regulation shall enter into force on 28 May 2002.

It shall apply from 29 May to 11 June 2002.

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

Done at Brussels, 27 May 2002.

For the Commission

J. M. SILVA RODRÍGUEZ

Agriculture Director-General

⁽¹⁾ OJ L 382, 31.12.1987, p. 22.

⁽²⁾ OJ L 177, 5.7.1997, p. 1.

⁽³⁾ OJ L 72, 18.3.1988, p. 16.

⁽⁴⁾ OJ L 289, 22.10.1997, p. 1.

ANNEX

to the Commission Regulation of 27 May 2002 fixing Community producer and import prices for carnations and roses with a view to the application of the arrangements governing imports of certain floricultural products originating in Cyprus, Israel, Jordan, Morocco and the West Bank and the Gaza Strip

(EUR/100 pieces)

Period: from 29 May to 11 June 2002

Community producer price	Uniflorous (bloom) carnations	Multiflorous (spray) carnations	Large-flowered roses	Small-flowered roses
	16,61	11,39	29,91	20,94
Community import prices	Uniflorous (bloom) carnations	Multiflorous (spray) carnations	Large-flowered roses	Small-flowered roses
Israel	6,23	—	15,80	15,41
Morocco	15,81	14,81	—	—
Cyprus	—	—	—	—
Jordan	—	—	—	—
West Bank and Gaza Strip	—	—	—	—

COMMISSION REGULATION (EC) No 879/2002**of 27 May 2002****re-establishing the preferential customs duty on imports of uniflorous (standard) carnations originating in Morocco**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 4088/87 of 21 December 1987 fixing conditions for the application of preferential customs duties on imports of certain flowers originating in Cyprus, Israel, Jordan and Morocco and the West Bank and the Gaza Strip ⁽¹⁾, as last amended by Regulation (EC) No 1300/97 ⁽²⁾, and in particular Article 5(2)(b) thereof,

Whereas:

(1) Regulation (EEC) No 4088/87 fixes conditions for the application of a preferential customs duty on large-flowered roses, small-flowered roses, uniflorous (bloom) carnations and multiflorous (spray) carnations within the limit of tariff quotas opened annually for imports of fresh cut flowers into the Community.

(2) Council Regulation (EC) No 786/2002 ⁽³⁾ opens and provides for the administration of Community tariff quotas for certain products originating in Cyprus, Egypt, Israel, Malta, Morocco, the West Bank and the Gaza Strip, Tunisia and Turkey, and provides detailed rules for extending and adapting these tariff quotas.

(3) Commission Regulation (EC) No 878/2002 ⁽⁴⁾, fixed Community producer and import prices for carnations and roses for application of the arrangements for importation from the countries in question.

(4) Commission Regulation (EEC) No 700/88 ⁽⁵⁾, as last amended by Regulation (EC) No 2062/97 ⁽⁶⁾, laid down detailed rules for the application of these arrangements.

(5) The preferential customs duty fixed for uniflorous (standard) carnations originating in Morocco by Regulation (EC) No 786/2002 was suspended by Commission Regulation (EC) No 790/2002 ⁽⁷⁾.

(6) On the basis of price recordings made as specified in Regulations (EEC) No 4088/87 and (EEC) No 700/88 it must be concluded that the requirement for reintroduction of the preferential customs duty laid down in Article 2(4) of Regulation (EEC) No 4088/87 is met for uniflorous (standard) carnations originating in Morocco. The preferential customs duty should be reintroduced.

(7) In between meetings of the Management Committee for Live Plants and Floriculture Products, the Commission must adopt such measures,

HAS ADOPTED THIS REGULATION:

Article 1

1. For imports of uniflorous (standard) carnations (CN code ex 0603 10 20) originating in Morocco the preferential customs duty set by Regulation (EC) No 786/2002 is reintroduced.

2. Regulation (EC) No 790/2002 is hereby repealed.

Article 2

This Regulation shall enter into force on 28 May 2002.

It shall apply from 29 May 2002.

⁽¹⁾ OJ L 382, 31.12.1987, p. 22.

⁽²⁾ OJ L 177, 5.7.1997, p. 1.

⁽³⁾ OJ L 127, 14.5.2002, p. 3.

⁽⁴⁾ See page 11 of this Official Journal.

⁽⁵⁾ OJ L 72, 18.3.1988, p. 16.

⁽⁶⁾ OJ L 289, 22.10.1997, p. 1.

⁽⁷⁾ OJ L 127, 14.5.2002, p. 11.

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

Done at Brussels, 27 May 2002.

For the Commission
J. M. SILVA RODRÍGUEZ
Agriculture Director-General

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 24 May 2002

on the national provisions notified by the Republic of Finland under Article 95(4) of the EC Treaty concerning the maximum admissible content of cadmium in fertilisers

(notified under document number C(2002) 1931)

(Only the Finnish and the Swedish texts are authentic)

(Text with EEA relevance)

(2002/398/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, in particular Article 95(6) thereof,

Whereas:

I. FACTS

1. COMMUNITY LEGISLATION

- (1) Council Directive 76/116/EEC of 18 December 1975 on the approximation of the laws of the Member States relating to fertilisers ⁽¹⁾, as last amended by Directive 98/97/EC ⁽²⁾, lays down the requirements that fertilisers must fulfil in order to be placed on the market with the designation 'EC fertilisers' ⁽³⁾.
- (2) Annex I of the Directive 76/116/EEC sets out the type designation and the corresponding requirements, e.g. with respect to its composition, that each EC-designated fertiliser must fulfil. EC-designated fertilisers included in this list are grouped into categories, depending on the content of the primary nutrients, i.e. the elements nitrogen, phosphorus and potassium.
- (3) Directive 76/116/EEC has been amended and adapted to technical progress several times in order, *inter alia*, to include new fertiliser-types in Annex I.
- (4) The amendments to Directive 76/116/EEC have been introduced by the following Directives:
 - Directive 88/183/EEC ⁽⁴⁾ has extended the scope of Directive 76/116/EEC to include in Annex I straight and compound fluids fertilisers,
 - Directive 89/284/EEC ⁽⁵⁾ has extended the scope of Directive 76/116/EEC to include in Annex I fertilisers containing calcium, magnesium, sodium and sulphur;

⁽¹⁾ OJ L 24, 30.1.1976, p. 21.

⁽²⁾ OJ L 18, 23.1.1999, p. 60.

⁽³⁾ The term 'EEC fertilizer' provided for by Directive 76/116/EEC was replaced by the term 'EC fertiliser' by Directive 97/63/EC (OJ L 335, 6.12.1997, p. 15).

⁽⁴⁾ OJ L 83, 29.3.1988, p. 33.

⁽⁵⁾ OJ L 111, 22.4.1989, p. 34.

- Directive 89/530/EEC ⁽⁶⁾ has extended the scope of Directive 76/116/EEC to include in Annex I solid or liquid fertilisers:
 - containing one of the following trace elements: boron, cobalt, copper, iron, manganese, molybdenum and zinc,
 - mixtures of such fertilisers containing at least two of these trace elements,
 - a list of authorised organic chelating agents for trace elements.
- (5) The adaptations to technical progress to Directive 76/116/EEC have been introduced by Directive 93/69/EEC ⁽⁷⁾, Directive 96/28/EC ⁽⁸⁾ and Directive 98/3/EC ⁽⁹⁾. Under these Directives, new fertilisers are added to the Annexes of Directive 76/116/EEC.
- (6) For the purposes of this Decision, the term Directive 76/116/EEC shall be construed as referring to that Directive as amended by the Directives mentioned in recitals 4 and 5.
- (7) The rules governing the composition of fertilisers covered by Directive 76/116/EEC do not provide for a limit value for the cadmium content of EC-designated fertilisers.
- (8) According to Article 7 of Directive 76/116/EEC, Member States may not on grounds of composition, identification, labelling or packaging, prohibit, restrict or hinder the marketing of fertilisers marked 'EC fertiliser' which comply with the provisions of this Directive and the Annexes thereto.

2. THE ACCESSION OF FINLAND

- (9) Finland acceded to the European Union on 1 January 1995. The Act of Accession ⁽¹⁰⁾ lays down transitional provisions concerning the use and marketing of cadmium in that State. Article 84(1) provides that during a period of four years from the date of accession, the provisions referred to in Annex X of the Act shall, in accordance with that Annex and subject to the conditions set out therein, not apply to Finland. Article 84 and point 2 of Annex X of the Act of Accession provide that Article 7 of Directive 76/116/EEC, in so far as it concerns the cadmium content of fertilisers, shall not apply to Finland before 1 January 1999 and that the provisions of Directive 76/116/EEC will be reviewed in accordance with Community procedures by 31 December 1998.
- (10) Article 2 of the Act of Accession provides that 'from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'. Article 168 of the Act of Accession stipulates that 'the new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 189 (now Article 249) of the EC Treaty [...], unless a time-limit is provided for in the list of Annex XIX or in any other provisions of this Act'.
- (11) Directive 98/97/EC of the European Parliament and of the Council ⁽¹¹⁾, subsequently amended Directive 76/116/EEC as regards the marketing in Austria, Finland and Sweden of fertilisers containing cadmium. Article 1 provides that, *inter alia*, Finland may prohibit the marketing on its territory of fertilisers containing cadmium at concentrations in excess of that which were fixed nationally at the date of accession and that this derogation applies for the period from 1 January 1999 until 31 December 2001.

3. NATIONAL PROVISIONS

- (12) The Decision of Finland's Ministry of Agriculture and Forestry on fertilisers ⁽¹²⁾ No 45/1994 of 21 January 1994, *inter alia*, lays down a limit value for the cadmium content in fertilisers, including EC-designated fertilisers. According to Section 3, it is prohibited to place on the Finnish market phosphorus mineral fertilisers with a cadmium content exceeding 50 mg for each kilogram of phosphorus.

⁽⁶⁾ OJ L 281, 30.9.1989, p. 116.

⁽⁷⁾ OJ L 185, 28.7.1993, p. 30.

⁽⁸⁾ OJ L 140, 13.6.1996, p. 30.

⁽⁹⁾ OJ L 18, 23.1.1998, p. 25.

⁽¹⁰⁾ OJ C 241, 29.8.1994, p. 37 and p. 308.

⁽¹¹⁾ OJ L 18, 23.1.1999, p. 60.

⁽¹²⁾ Statutes of Finland No 45/1994 of 26 January 1994, p. 117.

II. PROCEDURE

- (13) By letter of 7 December 2001, the Finnish authorities notified the Commission that Finland, in accordance with article 95(4) of the EC Treaty, intends to continue to apply from 1 January 2002 national provisions concerning the cadmium content in fertilisers.
- (14) By letter of 8 January 2002, the Commission informed the Finnish authorities that it had received the notification under Article 95(4) and that the six months period for its examination according to Article 95(6) started on 8 December 2001, the day following the one when the notification was received.
- (15) By letter of 23 January 2002, the Commission informed the other Member States about the request received from Finland. The Commission also published a notice regarding the request in the *Official Journal of the European Communities* ⁽¹³⁾ in order to inform other interested parties of the national measures that Finland intends to maintain.

III. ASSESSMENT

1. CONSIDERATION OF ADMISSIBILITY

- (16) Article 95(4) of the Treaty provides that, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
- (17) The notification submitted by the Finnish authorities on 7 December 2001 intends to obtain authorisation to maintain national provisions incompatible with those concerning the composition of EC-denominated fertilisers contained in Directive 76/116/EEC.
- (18) As already indicated, Article 7 of Directive 76/116/EEC prevents Member States from restricting the marketing of EC-denominated fertilisers because of their composition, but the rules governing composition do not set any limit value for cadmium content. This means that pursuant to Article 7 of Directive 76/116/EEC, EC-denominated fertilisers complying with the requirements of that Directive can be placed on the market regardless of their cadmium content.
- (19) In the light of the above mentioned, it is clear that the national provisions notified by Finland, in so far as they prohibit the placing on the market of EC-denominated phosphorus mineral fertilisers with a cadmium content exceeding 50 mg for each kilogram of phosphorus, are more restrictive than those contained in Directive 76/116/EEC.
- (20) The national provisions notified by the Finnish authorities were adopted before Finland acceded to the European Union. As indicated above, the Act of Accession lays down transitional provisions allowing Finland to continue to apply its national provisions concerning the cadmium content of fertilisers to products covered by Directive 76/116/EEC for a period of four years. By Directive 98/97/EC Finland was authorised to continue to apply the above national provisions until 31 December 2001.
- (21) As required by Article 95(4), as interpreted in the light of Articles 2 and 168 of the Act of Accession, Finland notified the Commission of the actual wording of the national provisions adopted before the accession to the European Union that it intends to maintain, accompanying the request by an explanation of the reasons which, in its opinion, justify the maintenance of those provisions.
- (22) The notification submitted by Finland on 7 December 2001 in order to obtain approval for maintaining national provisions derogating from the provisions of Directive 76/116/EEC is therefore to be considered admissible under Article 95(4) as interpreted in the light of Articles 2 and 168 of the Act of Accession.

⁽¹³⁾ OJ C 23, 25.1.2002, p. 5.

2. ASSESSMENT OF MERITS

- (23) In accordance with Article 95 of the Treaty, the Commission has to ensure that all the conditions enabling a Member State to avail itself of the possibilities of derogation provided for in this article are fulfilled.
- (24) In particular, the Commission has to assess whether the provisions notified by the Member State are justified on grounds of major needs referred to in Article 30 of the Treaty, or relating to the protection of the environment or the working environment.
- (25) In addition, pursuant to Article 95(6) of the Treaty, where it considers that the national provisions are justified, the Commission must check whether or not those national provisions are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.
- (26) Finland has based its request on the need of protection of human health and the environment. Cadmium in fertilisers is deemed to pose a threat to the environment and human health. In support of its request, Finland makes reference to the conclusions of a Finnish study published in April 2000 ⁽¹⁴⁾ which contains an assessment of the risks posed by cadmium-containing fertilisers.

2.1. JUSTIFICATION ON GROUNDS OF MAJOR NEEDS

2.1.1. *General information on cadmium*

- (27) Cadmium is a heavy metal naturally present in the environment, but most emissions of this metal are due to various human activities (production of non-ferrous metals, incineration of fossil fuels, application of fertiliser, etc.).
- (28) A general risk assessment on cadmium metal and cadmium oxide is currently being carried out under Council Regulation (EEC) No 793/93 of 23 March 1993 on the evaluation and control of the risks of existing substances ⁽¹⁵⁾ with Belgium acting as rapporteur. This risk assessment will address all important uses and emissions of cadmium. At present only a partial draft report is available for discussions at the technical level.
- (29) From the scientific data available up to now, it can be concluded that cadmium metal and cadmium oxide in general can be considered to pose serious risks to health. In particular, cadmium oxide has been classified as a carcinogen, mutagen or substance toxic for reproduction, category 2 ⁽¹⁶⁾. It is also generally agreed that cadmium in fertilisers is by far the most important source of cadmium input to soil and to the food chain.

2.1.2. *Cadmium in fertilisers*

- (30) Cadmium is present in the natural state in the phosphate mineral rocks which are mined for use as raw material to manufacture phosphatic mineral fertilisers. In the finished state, these fertilisers always contain certain amounts of cadmium, depending on the original content of the phosphate rocks.
- (31) Cadmium is regarded as harmful both to the environment and to human health. Phosphate fertilisers have been identified as a major source of cadmium on arable land, where it tends to accumulate over time. Crops tend to absorb cadmium from the soil, and the cadmium content of food, which is the main source of human intake of cadmium, has become an issue of concern for human health. When ingested in food, cadmium tends to accumulate in the kidneys and may eventually lead to kidney dysfunction in vulnerable groups.

⁽¹⁴⁾ Finnish Ministry of Agriculture and Forestry, Cadmium in fertilisers, risks to human health and the environment, April 2000.

⁽¹⁵⁾ OJ L 84, 5.4.1993, p. 1.

⁽¹⁶⁾ See Annex I to Directive 67/548/EEC and Annex I to Directive 76/769/EEC as amended.

- (32) The environmental concerns raised by cadmium in fertilisers were first raised at Community level during the negotiations for the Accession of Austria, Finland and Sweden to the European Union. As indicated above, those three Member States were granted temporary derogations from Community legislation on fertilisers in order to allow a careful evaluation of the risks from cadmium in fertilisers at Community level.
- (33) In this context, the Commission first gathered all available data and information on the exposure situation in the European Community from cadmium in fertilisers. As not enough data were available in all Member States, the Commission mandated two studies to elaborate a methodology and procedures with a view to assessing the risks to health and the environment from cadmium in fertilisers ⁽¹⁷⁾. Member States were subsequently invited to carry out nation-wide risk assessments by making use of the above methodology and procedures.
- (34) Nine Member States have completed risk assessments concerning cadmium in fertilisers. These risk assessments have been made available to the public since September 2001 on the Commission's web-site ⁽¹⁸⁾. In addition, a separate study which analyses these risk assessments has been published and various options for risk management of cadmium in fertilisers at a Community wide scale have been developed ⁽¹⁹⁾.
- (35) The above risk assessments have also been submitted to the SCTEE (Scientific Committee for Toxicity, Ecotoxicity and the Environment) and are currently under evaluation. In particular, the SCTEE has been asked to indicate what is the highest cadmium concentration in fertilisers that can be tolerated in order to avoid a significant increase in the cadmium content of cultivated soil due to the application of phosphate fertilisers.
- (36) The completion of the risk assessments took a relatively long time. Moreover, the SCTEE needs time in order to assess the scientific material thoroughly. It was therefore not possible to present a proposal for a Regulation on cadmium limits in fertilisers by 31 December 2001.

2.1.3. *The risk assessment carried out by Finland*

- (37) The risk assessment submitted by the Finnish authorities is part of the above process of information-gathering based on common methodology and procedures. The framework used by Finland for conducting its risk assessment is built around three modules:

2.1.3.1. **The accumulation module**

- (38) According to this module, the net accumulation of cadmium in soil and soil solution (or pore water) ⁽²⁰⁾, resulting from the application of fertiliser, is computed over time and at steady state. The accumulation module allows for a range of inputs, for example average and extreme rates of application. The Finnish risk assessment shows that with this module, the following parameters have been considered:
- the total cadmium content in agricultural soil (due to mineral fertilisers, but also to atmospheric deposition, agrochemicals and wastes);
 - the cadmium uptake by plants as function of soil properties;
 - for a one hundred year period an estimate has been made of:
 - cadmium concentration in pore water/leachate,
 - cadmium leaching rate,

⁽¹⁷⁾ ERM, Study on data requirements and programme for data production and gathering to support a future evaluation of the risks to health and the environment from cadmium in fertilisers, March 1999, and A study to establish a programme of detailed procedures for the assessment of risks to health and the environment from cadmium in fertilisers, February 2000. (ERM (Environmental Resources Management) is the consultant who developed the methodology for the risk assessments.)

⁽¹⁸⁾ <http://europa.eu.int/comm/enterprise/chemicals/fertilizers/riskassess/reports.htm>

⁽¹⁹⁾ ERM, Analysis and conclusions from Member States' assessment of the risk to health and the environment from cadmium in fertilisers, October 2001.

⁽²⁰⁾ Pore water means that part of the water contained in the soil which is maintained by capillarity between the solid particles of the soil.

- cadmium content in soils,
- cadmium output via erosion,
- cadmium content of crops,
- cadmium uptake by plants.

2.1.3.2. The exposure module

- (39) According to this module, the uptake of cadmium from soil into cultivated plants and the subsequent intake of cadmium by humans are computed, using exposure parameters characterizing both average and extreme exposure scenarios. Environmental exposure is also characterised for vulnerable environments and is taken to be the predicted cadmium concentration in a particular environmental compartment.

2.1.3.3. The risk characterisation module

- (40) This module allows Finland to estimate the incidence and severity of the adverse effects likely to occur due to actual or predicted exposure to cadmium.

2.1.4. The results of the risk assessment

- (41) The application of the modules has produced the following results:
- concerning water, the Finnish risk assessment report states that 'risk characterisation reveals that there is risk for aquatic environment for all calculated scenarios, both at present time and in the future. In practice this means that no margin of safety can be established, and any increase to the natural background concentrations is likely to present a risk for the aquatic environment';
 - concerning the soil, the Finnish risk assessment states that 'based on the available data, the current cadmium concentrations in Finnish agricultural soils present a risk for the soil environment. This conclusion can be reached both by using mean extractable cadmium concentrations ⁽²¹⁾ and 90 percentile values in the five Finnish cultivation zones for the year 1987. Only in the most northern zone the PEC/PNEC ratio ⁽²²⁾ using the mean concentration is below 1. Risk ratios for the different cultivation zones vary from 1,2 to 2,8';
 - concerning human health, the Finnish risk assessment report states that 'in Finland, there is no margin of safety for the risk group (worst cases) between the estimated urinary levels and the critical levels that have been associated with adverse health effects caused by cadmium'. The Finnish risk assessment report also states that 'if phosphorus fertilisers containing average Community level of cadmium were to be used in Finland the dietary intake of cadmium would increase by more than 40 % over one hundred years, based on model calculations'.
- (42) It is clear that these conclusions refer to the specific situation of the Finnish soil as well as the climatic conditions prevailing in Finland.
- (43) In conclusion, the risk assessment carried out by Finland shows that present cadmium concentrations in Finnish agricultural soil pose a risk for soil organisms and that the leaching of cadmium from the agricultural soil is causing a risk for the aquatic environment. Finland maintains that the risk assessment concludes also that there is a risk of adverse health effects as a result of the present total cadmium exposure in the Finnish population. While the average cadmium intake from food alone does not pose a risk in Finland, some sectors of the population are at risk because of high dietary intake, increased absorption and/or smoking.

⁽²¹⁾ The concentration of cadmium that is available for uptake by plants.

⁽²²⁾ PEC = predicted environmental concentration, PNEC = predicted no effect concentration. A PEC/PNEC ratio greater than one indicates that there will be adverse effects.

2.1.5. *Evaluation of the position of Finland*

- (44) The risk assessment submitted by the Finnish authorities has been carried out according to the procedures and the methodology established at Community level, which are considered to ensure a high degree of reliability of the information obtained.
- (45) The Commission already examined the information contained in this risk assessment in the context of the preparatory work of the proposal for a new Regulation relating to fertilisers ⁽²³⁾. At that time, the Commission considered that the information available provided sufficient indication of a risk for the environment and human health arising from the application to the Finnish soil of cadmium-containing fertilisers. The Commission therefore proposed in Article 33 of its proposal an extension of the derogation already granted to Austria, Finland and Sweden in the Accession Treaty. As the proposed Regulation could not be adopted in time, Finland has applied for an individual Decision under Article 95(6).
- (46) After having re-examined the scientific evidence in the light of the Finnish request, the Commission considers that the Finnish authorities have shown that cadmium-containing fertilisers pose environmental and human health risks, and that the national provisions notified by the Finnish authorities aiming to limit to the minimum the exposure of the Finnish environment to cadmium-containing fertilisers are justified.

2.2. ABSENCE OF ARBITRARY DISCRIMINATION

- (47) Article 95(6) obliges the Commission to verify that the envisaged measures are not a means of arbitrary discrimination. According to the ruling of the Court of Justice, the absence of discrimination means that national restrictions on trade cannot be used in such a way as to create discrimination in respect of goods originating in other Member States.
- (48) The envisaged national provisions are general and apply to national and imported phosphorous-based EC-designated fertilisers alike. As a result, there is no evidence that they can be used as a means of arbitrary discrimination between economic operators in the Community.

2.3. ABSENCE OF A DISGUISED RESTRICTION ON TRADE

- (49) More restrictive national measures governing the composition of EC-designated fertilisers that derogate from the provisions of a Community Directive normally constitute a barrier to trade. Products that can be legally placed on the market in the rest of the Community cannot be placed on the market in the Member State concerned. The concept enshrined in paragraph 6 of Article 95 is intended to prevent the national provisions based on the criteria set out in paragraphs 4 and 5 being applied for inappropriate reasons, and in reality constituting economic measures to be introduced to impede the import of products from other Member States in order to indirectly protect national production.
- (50) As already established, there is concern with regard to the protection of the environment and human health due to the application on soil of cadmium-containing fertilisers. Therefore, the protection of the environment and human health appears to be the goal of maintaining the national provisions and not the creation of disguised barriers to trade.

2.4. ABSENCE OF OBSTACLES TO THE FUNCTIONING OF THE INTERNAL MARKET

- (51) This condition cannot be interpreted in such a way that it prohibits the approval of any national measure likely to affect the establishment of the Internal Market. In fact, any national measure derogating from a harmonisation measure aiming at the establishment and operation of the Internal Market, constitutes in substance a measure that is likely to affect the Internal Market. Consequently, to preserve the useful character of the procedure for derogation provided for by Article 95 of the EC Treaty, the Commission considers that, in the context of the Article 95(6), the concept of obstacle to the functioning of the Internal Market has to be understood as a disproportionate effect in relation to the pursued objective.

⁽²³⁾ Commission proposal for a European Parliament and Council Regulation relating to fertilizers (COM(2001)508 final, 14.9.2001).

- (52) In view of the risks for both the environment and human health resulting from the application of cadmium-containing fertilisers to the Finnish soil and taking into account that:
- as indicated above, the Act of Accession and Directive 98/97/EC allowed Finland to continue to apply its national provisions concerning the cadmium content in fertilisers awaiting the completion of the review of Directive 76/116/EEC as regards the issue of the cadmium content in fertilisers and;
 - the opinion of the SCTEE was not available in time to be considered for this Decision in order to provide a sufficient scientific basis for the Commission to propose an approximation of Community limit values for the cadmium content in fertilisers, or to determine whether there would be a less restrictive measure,

the Commission considers that, at this stage of the review, there is no evidence indicating that the national provisions do constitute a disproportionate obstacle to the functioning of the internal market in relation to the pursued objectives.

2.5. LIMITATION IN TIME

- (53) Finland asked the Commission to take a decision under Article 95(6) of the Treaty before 31 December 2001. Should the Commission approve the request for a derogation, Finland asked that the Decision shall take effect from 1 January 2002.
- (54) It should first be noted that given the procedural framework established in Article 95 of the Treaty and in particular the six-month deadline for a Decision to be adopted, it is incumbent on Member States to submit a notification to the Commission in time so that the Commission is able to adopt a decision on the notification before the relevant Community harmonisation measure becomes enforceable ⁽²⁴⁾.
- (55) It should be recalled that the principle of legal certainty, which is a general principle of Community law, excludes, for the most part, retroactive application of Community legislation, except where the objective to be achieved requires it and then only on condition that the legitimate expectations of the parties concerned are respected ⁽²⁵⁾.
- (56) In the light of the foregoing, the Commission does not consider that in the present case the conditions exist for giving a retroactive effect to the Decision approving the national provisions. In fact, although there is a need to protect human health and the environment from the risks posed by cadmium in fertilisers, to render the more stringent national measures applicable retroactively would, in effect, be tantamount to undermining the legitimate expectations of those economic operators who acted in the belief that the rules in force after 31 December 2001 were the more liberal ones deriving from Directive 76/116/EEC.
- (57) The period for which the derogation is granted should allow sufficient time for the Commission to propose and for the Council and the European Parliament to adopt a legislation concerning cadmium in fertilisers at Community level. It is estimated that such a Legislation could enter into force in 2005. The derogation of Finland should therefore expire on 31 December 2005.

IV. CONCLUSION

- (58) In the light of the foregoing, it can be concluded that the request by Finland for maintaining national provisions that are more restrictive than the provisions of Directive 76/116/EEC with regard to the cadmium content of fertilisers, as submitted on 7 December 2001, is admissible.

⁽²⁴⁾ In this connection, it is pointed out that the European Court of Justice, in paragraph 35 of its judgement of 1 June 1999 delivered in case C-319/97, states that 'it is incumbent on Member States under Article 10 EC (ex Article 5) to notify as soon as possible the provisions of national law which are incompatible with a harmonisation measure and which they intend to maintain in force'.

⁽²⁵⁾ European Court of Justice's judgement of 25 January 1979 delivered in case C-98/78 Racke [1979] ECR 69, paragraph 20. See also the judgements delivered in the following cases: C-110/97 the Netherlands v Council, [2001] ECR 000, paragraph 151; C-99/78 Decker [1979] ECR 101, paragraph 8; C-258/80 Rummy v Commission [1982] ECR 487, paragraph 11; and C-337/88 SAFA [1990] ECR I-1, paragraph 13.

Moreover, the Commission finds that the national provisions:

- meet needs on grounds of the protection of human health and the environment,
- are proportionate to the objectives pursued,
- are not a means of arbitrary discrimination, and
- do not constitute a disguised restriction on trade between Member States.

The Commission therefore considers that they can be approved,

HAS ADOPTED THIS DECISION:

Article 1

In derogation from Directive 76/116/EEC, the Finnish provisions which prohibit the placing on the Finnish market of phosphorous mineral fertilisers with a cadmium content exceeding 50 mg for each kilogram of phosphorus are approved.

The derogation shall apply until 31 December 2005.

Article 2

This Decision is addressed to the Republic of Finland.

Done at Brussels, 24 May 2002.

For the Commission

Erkki LIIKANEN

Member of the Commission

COMMISSION DECISION
of 24 May 2002
on the national provisions notified by the Kingdom of Sweden under Article 95(4) of the EC
Treaty concerning the maximum admissible content of cadmium in fertilisers

(notified under document number C(2002) 1932)

(Only the Swedish text is authentic)

(Text with EEA relevance)

(2002/399/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, in particular Article 95(6) thereof,

Whereas:

I. FACTS

1. COMMUNITY LEGISLATION

- (1) Council Directive 76/116/EEC of 18 December 1975 on the approximation of the laws of the Member States relating to fertilisers ⁽¹⁾, as last amended by Directive 98/97/EC ⁽²⁾, lays down the requirements that fertilisers must fulfil in order to be placed on the market with the designation 'EC fertilisers' ⁽³⁾.
- (2) Annex I of the Directive 76/116/EEC sets out the type designation and the corresponding requirements, e.g. with respect to its composition, that each EC-designated fertiliser must fulfil. EC-designated fertilisers included in this list are grouped into categories, depending on the content of the primary nutrients, i.e. the elements nitrogen, phosphorus and potassium.
- (3) Directive 76/116/EEC has been amended and adapted to technical progress several times in order, *inter alia*, to include new fertiliser-types in Annex I.
- (4) The amendments to Directive 76/116/EEC have been introduced by the following Directives:
 - Directive 88/183/EEC ⁽⁴⁾ has extended the scope of Directive 76/116/EEC to include in Annex I straight and compound fluids fertilisers,
 - Directive 89/284/EEC ⁽⁵⁾ has extended the scope of Directive 76/116/EEC to include in Annex I fertilisers containing calcium, magnesium, sodium and sulphur,
 - Directive 89/530/EEC ⁽⁶⁾ has extended the scope of Directive 76/116/EEC to include in Annex I solid or liquid fertilisers containing:
 - one of the following trace elements: boron, cobalt, copper, iron, manganese, molybdenum and zinc,
 - mixtures of such fertilisers containing at least two of these trace elements,
 - a list of authorised organic chelating agents for trace elements.

⁽¹⁾ OJ L 24, 30.1.1976, p. 21.

⁽²⁾ OJ L 18, 23.1.1999, p. 60.

⁽³⁾ The term 'EEC fertilizer' provided for by Directive 76/116/EEC was replaced by the term 'EC fertiliser' by Directive 97/63/EC (OJ L 335, 6.12.1997, p. 15)

⁽⁴⁾ OJ L 83, 29.3.1988, p. 33.

⁽⁵⁾ OJ L 111, 22.4.1989, p. 34.

⁽⁶⁾ OJ L 281, 30.9.1989, p. 116.

- (5) The adaptations to technical progress to Directive 76/116/EEC have been introduced by Directive 93/69/EEC ⁽⁷⁾, Directive 96/28/EC ⁽⁸⁾ and Directive 98/3/EC ⁽⁹⁾. Under these Directives, new fertilisers are added to the Annexes of Directive 76/116/EEC.
- (6) For the purposes of this Decision, the term Directive 76/116/EEC shall be construed as referring to that Directive as amended by the Directives mentioned in recitals 4 and 5 above.
- (7) The rules governing the composition of fertilisers covered by Directive 76/116/EEC do not provide for a limit value for the cadmium content of EC-designated fertilisers.
- (8) According to Article 7 of Directive 76/116/EEC, Member States may not on grounds of composition, identification, labelling or packaging, prohibit, restrict or hinder the marketing of fertilisers marked 'EC fertiliser' which comply with the provisions of this Directive and the Annexes thereto.

2. THE ACCESSION OF SWEDEN

- (9) Sweden acceded to the European Union on 1 January 1995. The Act of Accession ⁽¹⁰⁾ lays down transitional provisions concerning the use and marketing of cadmium in that State. Article 112(1) provides that during a period of four years from the date of accession, the provisions referred to in Annex XII of the Act shall, in accordance with that Annex and subject to the conditions set out therein, not apply to Sweden. Article 112 and point 4 of Annex XII of the Act of Accession provide that Article 7 of Directive 76/116/EEC, in so far as it concerns the cadmium content of fertilisers, shall not apply to Sweden before 1 January 1999 and that the provisions of Directive 76/116/EEC will be reviewed in accordance with Community procedures by 31 December 1998.
- (10) Article 2 of the Act of Accession provides that 'from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'. Article 168 of the Act of Accession stipulates that 'the new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 189 (now Article 249) of the EC Treaty [...], unless a time limit is provided for in the list of Annex XIX or in any other provisions of this Act'.
- (11) Directive 98/97/EC of the European Parliament and of the Council ⁽¹¹⁾ subsequently amended Directive 76/116/EEC as regards the marketing in Austria, Finland and Sweden of fertilisers containing cadmium. Article 1 provides that, *inter alia*, Sweden may prohibit the marketing on its territory of fertilisers containing cadmium at concentrations in excess of that which was fixed nationally at the date of accession and that this derogation applies for the period from 1 January 1999 until 31 December 2001.

3. NATIONAL PROVISIONS

- (12) 'The Chemicals Products (Handling, Import and Export Prohibitions) Ordinance' (1998:944) ⁽¹²⁾ contains provisions relating, *inter alia*, to the maximum permissible cadmium content in fertilisers, including EC-designated fertilisers. Section 3, paragraph 3, of the Ordinance, provides that fertilisers covered by customs tariffs numbers 25.10, 28.09, 28.35, 31.03 and 31.05 containing in excess of 100 grams of cadmium per tonne of phosphorous may not be offered for sale or transferred.
- (13) The provisions relating to the maximum permissible cadmium content in fertilisers have been in force since 1985 following the adoption of 'The Cadmium Ordinance' (1985:839). 'The Chemicals Products Ordinance' (1998:944) codifies different provisions relating to the protection of the environment, including those contained in 'The Cadmium Ordinance' (1985:839).

⁽⁷⁾ OJ L 185, 28.7.1993, p. 30.

⁽⁸⁾ OJ L 140, 13.6.1996, p. 30.

⁽⁹⁾ OJ L 18, 23.1.1998, p. 25.

⁽¹⁰⁾ OJ C 241, 29.8.1994, p. 41 and p. 316.

⁽¹¹⁾ OJ L 18, 23.1.1999, p. 60.

⁽¹²⁾ Swedish Code of Statutes (SFS Svensk Författningssamling) of 14 July 1998.

II. PROCEDURE

- (14) By letter of 7 December 2001, the Swedish authorities notified the Commission that Sweden, in accordance with article 95(4) of the EC Treaty, intends to continue to apply from 1 January 2002 national provisions concerning the cadmium content in fertilisers.
- (15) By letter of 8 January 2002, the Commission informed the Swedish authorities that it had received the notification under Article 95(4) and that the six months period for its examination according to Article 95(6) started on 8 December 2001, the day following the one when the notification was received.
- (16) By letter of 23 January 2002, the Commission informed the other Member States about the request received from Sweden. The Commission also published a notice regarding the request in the *Official Journal of the European Communities* ⁽¹³⁾ in order to inform other interested parties of the national measures that Sweden intends to maintain.

III. ASSESSMENT

1. CONSIDERATION OF ADMISSIBILITY

- (17) Article 95(4) of the Treaty provides that, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
- (18) The notification submitted by the Swedish authorities on 7 December 2001 intends to obtain authorisation to maintain national provisions incompatible with those concerning the composition of EC-denominated fertilisers contained in Directive 76/116/EEC.
- (19) As already indicated, Article 7 of Directive 76/116/EEC prevents Member States from restricting the marketing of EC-denominated fertilisers because of their composition, but the rules governing composition do not set any limit value for cadmium content. This means that pursuant to Article 7 of Directive 76/116/EEC, EC-denominated fertilisers complying with the requirements of that Directive can be placed on the market regardless of their cadmium content.
- (20) In the light of the abovementioned, it is clear that the national provisions notified by Sweden, in so far as they prohibit the placing on the market of phosphorus-based EC-denominated fertilisers with a cadmium content exceeding 100 grams per tonne of phosphorus, are more restrictive than those contained in Directive 76/116/EEC.
- (21) The national provisions notified by the Swedish authorities were adopted in 1985, therefore before Sweden acceded to the European Union. As indicated above, the Act of Accession lays down transitional provisions allowing Sweden to continue to apply its national provisions concerning the cadmium content of fertilisers to products covered by Directive 76/116/EEC for a period of four years. By Directive 98/97/EC, Sweden was authorised to continue to apply the above national provisions until 31 December 2001.
- (22) As required by Article 95(4), as interpreted in the light of Articles 2 and 168 of the Act of Accession, Sweden notified the Commission of the actual wording of the provisions adopted before the accession to the European Union that it intends to maintain, accompanying the request by an explanation of the reasons which, in its opinion, justify the maintenance of those provisions.

⁽¹³⁾ OJ C 23, 25.1.2002, p. 6.

- (23) The notification submitted by Sweden on 7 December 2001 in order to obtain approval for maintaining national provisions derogating from the provisions of Directive 76/116/EEC, is therefore to be considered admissible under Article 95(4) as interpreted in the light of Articles 2 and 168 of the Act of Accession.

2. ASSESSMENT OF MERITS

- (24) In accordance with Article 95 of the Treaty, the Commission has to ensure that all the conditions enabling a Member State to avail itself of the possibilities of derogation provided for in this article are fulfilled.
- (25) In particular, the Commission has to assess whether the provisions notified by the Member State are justified on grounds of major needs referred to in Article 30 of the Treaty, or relating to the protection of the environment or the working environment.
- (26) In addition, pursuant to Article 95(6) of the Treaty, where it considers that the national provisions are justified, the Commission must check whether or not those national provisions are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they constitute an obstacle to the functioning of the internal market.
- (27) Sweden has based its request on the need of protection of human health and the environment. Cadmium in fertilisers is deemed to pose a threat to the environment and human health. In support of its request, Sweden makes reference to the conclusions of a Swedish study published on 4 October 2000 ⁽¹⁴⁾, which contains an assessment of the environmental risks posed by cadmium-containing fertilisers.

2.1. JUSTIFICATION ON GROUNDS OF MAJOR NEEDS

2.1.1. *General information on cadmium*

- (28) Cadmium is a heavy metal naturally present in the environment, but most emissions of this metal are due to various human activities (production of non-ferrous metals, incineration of fossil fuels, application of fertiliser, etc.).
- (29) A general risk assessment on cadmium metal and cadmium oxide is currently being carried out under Council Regulation 793/93/EEC of 23 March 1993 on the evaluation and control of the risks of existing substances ⁽¹⁵⁾ with Belgium acting as rapporteur. This risk assessment will address all important uses and emissions of cadmium. At present only an incomplete draft report is available for discussions at the technical level.
- (30) From the scientific data available up to now, it can be concluded that cadmium metal and cadmium oxide in general can be considered to pose serious risks to health. In particular, cadmium oxide has been classified as a carcinogen, mutagen or substance toxic for reproduction, category 2 ⁽¹⁶⁾. It is also generally agreed that cadmium in fertilisers is by far the most important source of cadmium input to soil and to the food chain.

2.1.2. *Cadmium in fertilisers*

- (31) Cadmium is present in the natural state in the phosphate mineral rocks which are mined for use as raw material to manufacture phosphatic mineral fertilisers. In the finished state, these fertilisers always contain certain amounts of cadmium, depending on the original content of the phosphate rocks.
- (32) Cadmium is regarded as harmful both to the environment and to human health. Phosphate fertilisers have been identified as a major source of cadmium on arable land, where it tends to accumulate over time. Crops tend to absorb cadmium from the soil, and the cadmium content of food, which is the main source of human intake of cadmium, has become an issue of concern for human health. When ingested in food, cadmium tends to accumulate in the kidneys and may eventually lead to kidney dysfunction in vulnerable groups.

⁽¹⁴⁾ Swedish National Chemical Inspectorate, Assessment of risks to health and the environment in Sweden from cadmium in fertilisers, 4 October 2000.

⁽¹⁵⁾ OJ L 84, 5.4.1993, p. 1.

⁽¹⁶⁾ See Annex I to Directive 67/548/EEC and Annex I to Directive 76/769/EEC as amended.

- (33) The environmental concerns raised by cadmium in fertilisers were first raised at Community level during the negotiations for the Accession of Austria, Finland and Sweden to the European Union. As indicated above, those three Member States were granted temporary derogations from Community legislation on fertilisers in order to allow a careful evaluation of the risks from cadmium in fertilisers at Community level.
- (34) In this context, the Commission first gathered all available data and information on the exposure situation in the European Community from cadmium in fertilisers. As not enough data were available in all Member States, the Commission mandated two studies to elaborate a methodology and procedures with a view to assessing the risks to health and the environment from cadmium in fertilisers ⁽¹⁷⁾. Member States were subsequently invited to carry out nation-wide risk assessments by making use of the above methodology and procedures.
- (35) Nine Member States have completed risk assessments concerning cadmium in fertilisers. These risk assessments have been made available to the public since September 2001 on the Commission's web-site ⁽¹⁸⁾. In addition, a separate study which analyses these risk assessments has been published and various options for risk management of cadmium in fertilisers at a Community wide scale have been developed ⁽¹⁹⁾.
- (36) The above risk assessments have also been submitted to the SCTEE (Scientific Committee for Toxicity, Ecotoxicity and the Environment) and are currently under evaluation. In particular, the SCTEE has been asked to indicate what is the highest cadmium concentration in fertilisers that can be tolerated in order to avoid a significant increase in the cadmium content of cultivated soil due to the application of phosphate fertilisers.
- (37) The completion of the risk assessments took a relatively long time. Moreover, the SCTEE needs time in order to assess the scientific material thoroughly. It was therefore not possible to present a proposal for a Regulation on cadmium limits in fertilisers by 31 December 2001.

2.1.3. The risk assessment carried out by Sweden

- (38) The risk assessment submitted by the Swedish authorities is part of the above process of information-gathering based on common methodology and procedures. The framework used by Sweden for conducting its risk assessment is built around three modules:

2.1.3.1. The accumulation module

- (39) According to this module, the net accumulation of cadmium in soil and soil solution (or pore water) ⁽²⁰⁾, resulting from the application of fertiliser, is computed over time and at steady state. The accumulation module allows for a range of inputs, for example average and extreme rates of application. The Swedish risk assessment shows that with this module, the following parameters have been considered:
- the present day cadmium concentration,
 - the input of cadmium to agricultural soil through atmospheric deposition, manure and fertiliser applications,
 - the cadmium offtake rate by plants,
 - the cadmium leaching rate from the plough layer depending on the cadmium concentration in the soil pore water and the water flux,
 - the concentration of cadmium in the soil and leaching rates at zero and one hundred years.

⁽¹⁷⁾ ERM, Study on data requirements and programme for data production and gathering to support a future evaluation of the risks to health and the environment from cadmium in fertilisers, March 1999, and A study to establish a programme of detailed procedures for the assessment of risks to health and the environment from cadmium in fertilisers, February 2000. (ERM (Environmental Resources Management) is the consultant who developed the methodology for the risk assessments).

⁽¹⁸⁾ <http://europa.eu.int/comm/enterprise/chemicals/fertilizers/riskassess/reports.htm>

⁽¹⁹⁾ ERM, Analysis and conclusions from Member States' assessment of the risk to health and the environment from cadmium in fertilisers, October 2001.

⁽²⁰⁾ Pore water means that part of the water contained in the soil which is maintained by capillarity between the solid particles of the soil.

2.1.3.2. The exposure module

- (40) According to this module, the uptake of cadmium from soil into cultivated plants and the subsequent intake of cadmium by humans are computed, using exposure parameters characterising both average and extreme exposure scenarios. Environmental exposure is also characterised for vulnerable environments and is taken to be the predicted cadmium concentration in a particular environmental compartment.

2.1.3.3. The risk characterisation module

- (41) This module allows Sweden to estimate the incidence and severity of the adverse effects likely to occur due to actual or predicted exposure to cadmium.

2.1.4. The results of the risk assessment

- (42) The application of the modules has produced the following results:
- concerning surface water, the Swedish risk assessment report states that 'the chosen PNEC ⁽²¹⁾ value implies that in most rivers in southern Sweden, certain biota would already be affected by cadmium i.e. risk characterisation ratios ⁽²²⁾ are larger than one ⁽²³⁾. If higher cadmium content in fertilisers would be allowed, a further increase in the exposure of and the concern for effects in the aquatic environment is expected to occur',
 - concerning the soil, the Swedish risk assessment report states that 'by using the Swedish fertiliser for one hundred years on common Swedish soils (PNEC 0,25 mg/kg), no concern for ecological effects is predicted when potatoes or wheat are grown. A concern is predicted when carrots are grown, but this concern is also present at time zero. With the EC fertiliser, a concern is predicted in all cases. In acid, sandy soils that are poor in clay and organic matter (PNEC 0,06 mg/kg), a risk is predicted even if the cadmium content in fertilisers is zero'.
- (43) It is clear that these conclusions refer to the specific situation of the Swedish soil as well as the climatic conditions prevailing in Sweden.
- (44) In conclusion, the risk assessment carried out by Sweden shows that if fertilisers with a higher cadmium content than currently permitted would be allowed, this would lead to:
- a substantial increase in the cadmium concentrations of soils, which in turn would lead to toxic effects on soil organisms. Unacceptable concentrations could also appear in watercourses in agricultural regions,
 - a substantial increase in the dietary intake of cadmium. The safety margin between current exposure and the World Health Organisation Provisional Tolerable Weekly Intake level is extremely small. For some high-risk groups, such as women with low body iron stores, there are no safety margins at all. A high dietary intake of cadmium could therefore lead to a larger number of people becoming subject to reduced kidney function and increased osteoporosis.

2.1.5. Evaluation of the position of Sweden

- (45) The risk assessment submitted by the Swedish authorities has been carried out according to the procedures and the methodology established at Community level, which are considered to ensure a high degree of reliability of the information obtained.

⁽²¹⁾ PNEC: predicted no effect concentration.

⁽²²⁾ These ratios are PEC/PNEC where PEC is the predicted environmental concentration.

⁽²³⁾ A PEC/PNEC ratio greater than 1 indicates that there will be adverse effects.

- (46) The Commission already examined the information contained in this risk assessment in the context of the preparatory work of the proposal for a new Regulation relating to fertilisers ⁽²⁴⁾. At that time, the Commission considered that the information available provided sufficient indication of a risk for the environment and human health arising from the application to the Swedish soil of cadmium-containing fertilisers. The Commission therefore proposed in Article 33 of its proposal an extension of the derogation already granted to Austria, Finland and Sweden in the Accession Treaty. As the proposed Regulation could not be adopted in time, Sweden has applied for an individual Decision under Article 95(6).
- (47) After having re-examined the scientific evidence in the light of the Swedish request, the Commission considers that the Swedish authorities have shown that cadmium-containing fertilisers pose environmental and human health risks, and that the national provisions notified by the Swedish authorities aiming to limit to the minimum the exposure of the Swedish environment to cadmium-containing fertilisers are justified.

2.2. ABSENCE OF ARBITRARY DISCRIMINATION

- (48) Article 95(6) obliges the Commission to verify that the envisaged measures are not a means of arbitrary discrimination. According to the ruling of the Court of Justice, the absence of discrimination means that national restrictions on trade cannot be used in such a way as to create discrimination in respect of goods originating in other Member States.
- (49) The envisaged national provisions are general and apply to national and imported phosphorous-based EC-designated fertilisers alike. As a result, there is no evidence that they can be used as a means of arbitrary discrimination between economic operators in the Community.

2.3. ABSENCE OF A DISGUISED RESTRICTION ON TRADE

- (50) More restrictive national measures governing the composition of EC-designated fertilisers that derogate from the provisions of a Community Directive normally constitute a barrier to trade. Products that can be legally placed on the market in the rest of the Community cannot be placed on the market in the Member State concerned. The concept enshrined in paragraph 6 of Article 95 is intended to prevent the national provisions based on the criteria set out in paragraphs 4 and 5 being applied for inappropriate reasons, and in reality constituting economic measures to be introduced to impede the import of products from other Member States in order to indirectly protect national production.
- (51) As already established, there is concern with regard to the protection of the environment and human health due to the application on soil of cadmium-containing fertilisers. Therefore, the protection of the environment and human health appears to be the goal of maintaining the national provisions and not the creation of disguised barriers to trade.

2.4. ABSENCE OF OBSTACLES TO THE FUNCTIONING OF THE INTERNAL MARKET

- (52) This condition cannot be interpreted in such a way that it prohibits the approval of any national measure likely to affect the establishment of the Internal Market. In fact, any national measure derogating from a harmonisation measure aiming at the establishment and operation of the Internal Market, constitutes in substance a measure that is likely to affect the Internal Market. Consequently, to preserve the useful character of the procedure for derogation provided for by Article 95 of the EC Treaty, the Commission considers that, in the context of Article 95(6), the concept of obstacle to the functioning of the Internal Market has to be understood as a disproportionate effect in relation to the pursued objective.

⁽²⁴⁾ Commission proposal for a European Parliament and Council Regulation relating to fertilisers – COM(2001) 508 final of 14.9.2001.

- (53) In view of the risks for both the environment and human health resulting from the application of cadmium-containing fertilisers to the Swedish soil and taking into account that:
- as indicated above, the Act of Accession and Directive 98/97/EC allowed Sweden to continue to apply its national provisions concerning the cadmium content in fertilisers awaiting the completion of the review of Directive 76/116/EEC as regards the issue of the cadmium content in fertilisers, and
 - the opinion of the SCTEE was not available in time to be considered for this Decision in order to provide a sufficient scientific basis for the Commission to propose an approximation of Community limit values for the cadmium content in fertilisers, or to determine whether there would be a less restrictive measure,

the Commission considers that, at this stage of the review, there is no evidence indicating that the national provisions do constitute a disproportionate obstacle to the functioning of the internal market in relation to the pursued objectives.

2.5. LIMITATION IN TIME

- (54) Sweden asked the Commission to take a decision under Article 95(6) of the Treaty before 31 December 2001. Should the Commission approve the request for a derogation, Sweden asked that the Decision shall take effect from 1 January 2002.
- (55) It should first be noted that given the procedural framework established in Article 95 of the Treaty and in particular the six-month deadline for a Decision to be adopted, it is incumbent on Member States to submit a notification to the Commission in time so that the Commission is able to adopt a decision on the notification before the relevant Community harmonisation measure becomes enforceable ⁽²⁵⁾.
- (56) It should be recalled that the principle of legal certainty, which is a general principle of Community law, excludes, for the most part, retroactive application of Community legislation, except where the objective to be achieved requires it and then only on condition that the legitimate expectations of the parties concerned are respected ⁽²⁶⁾.
- (57) In the light of the foregoing, the Commission does not consider that in the present case the conditions exist for giving a retroactive effect to the Decision approving the national provisions. In fact, although there is a need to protect human health and the environment from the risks posed by cadmium in fertilisers, to render the more stringent national measures applicable retroactively would, in effect, be tantamount to undermining the legitimate expectations of those economic operators who acted in the belief that the rules in force after 31 December 2001 were the more liberal ones deriving from Directive 76/116/EEC.
- (58) The period for which the derogation is granted should allow sufficient time for the Commission to propose and for the Council and the European Parliament to adopt a Legislation concerning cadmium in fertilisers at Community level. It is estimated that such a Legislation could enter into force in 2005. The derogation of Sweden should therefore expire on 31 December 2005.

IV. CONCLUSION

- (59) In the light of the foregoing, it can be concluded that the request by Sweden for maintaining national provisions that are more restrictive than the provisions of Directive 76/116/EEC with regard to the cadmium content of fertilisers, as submitted on 7 December 2001, is admissible.

⁽²⁵⁾ In this connection, it is pointed out that the European Court of Justice, in paragraph 35 of its judgement of 1 June 1999 delivered in case C-319/97, states that 'it is incumbent on Member States under Article 10 EC (ex Article 5) to notify as soon as possible the provisions of national law which are incompatible with a harmonisation measure and which they intend to maintain in force'.

⁽²⁶⁾ European Court of Justice's judgement of 25 January 1979 delivered in case C-98/78 Racke [1979] ECR 69, paragraph 20. See also the judgements delivered in the following cases: C-110/97 the Netherlands v Council, [2001] ECR 000, paragraph 151; C-99/78 Decker [1979] ECR 101, paragraph 8; C-258/80 Rummy v Commission [1982] ECR 487, paragraph 11; and C-337/88 SAFA [1990] ECR I-1, paragraph 13.

Moreover, the Commission finds that the national provisions:

- meet needs on grounds of the protection of human health and the environment;
- are proportionate to the objectives pursued;
- do not constitute a means of arbitrary discrimination and
- do not constitute a disguised restriction on trade between Member States.

The Commission therefore considers that they can be approved,

HAS ADOPTED THIS DECISION:

Article 1

In derogation from Directive 76/116/EEC, the Swedish provisions which prohibit the placing on the Swedish market of fertilisers containing in excess of 100 grams of cadmium per tonne of phosphorous are approved.

The derogation shall apply until 31 December 2005.

Article 2

This Decision is addressed to the Kingdom of Sweden.

Done at Brussels, 24 May 2002.

For the Commission

Erkki LIIKANEN

Member of the Commission

(Acts adopted pursuant to Title V of the Treaty on European Union)

COUNCIL COMMON POSITION
of 21 May 2002
concerning the temporary reception by Member States of the European Union of certain
Palestinians

(2002/400/CFSP)

THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on European Union, and in particular Article 15 thereof,

Whereas:

- (1) The peaceful evacuation of the Church of the Nativity in Bethlehem in accordance with the terms of an understanding between the Palestinian Authority and the Government of Israel reached on 5 May 2002, and its flanking arrangements or unilateral undertakings by parties to that understanding, constitutes an important effort to help tempering the crisis situation in the region and to restore a dialogue between the parties.
- (2) The understanding reached between the Palestinian Authority and the Government of Israel implies that 13 persons from a group of Palestinians evacuated from the Church of the Nativity have agreed to be transferred abroad and that the Government of Israel, the Palestinian Authority and other parties concerned have agreed on the transfer abroad of the 13 Palestinians in question, 12 of whom are to be received by Member States and one of whom is to remain in the Republic of Cyprus.
- (3) The European Union is committed to making every effort to contribute to the establishment of a lasting peace and friendly relations between the Israeli and Palestinian peoples, in accordance with the principles of the United Nations Charter. With a view to contributing to that effort and in the light of the agreement by the Government of Israel, the Palestinian Authority and other parties concerned on the transfer abroad of the said Palestinians, several Member States have declared themselves willing to receive, on a temporary basis and exclusively for humanitarian reasons, one or more of these Palestinians who have agreed to be transferred to their territories.
- (4) Although the decisions to grant entry into, and stay in, their territory to any of those persons on humanitarian grounds fall within the competence of each receiving Member State and do not imply a right for the persons concerned to move freely within the territories of the Member States, it is important to adopt a common

approach at the level of the European Union to certain aspects related to such decisions.

- (5) It is in particular desirable to ensure that the persons concerned receive a comparable treatment in each of the receiving Member States with respect to such matters as the duration of their permit to stay, the protection of their security and the security of others, and to ensure that the Member States concerned exchange information to that end.
- (6) In exercising their responsibilities with regard to the maintenance of law and order in their own territories and the safeguarding of their own internal security, the receiving Member States will take account of the public order and security concerns of other Member States. Receiving Member States accordingly express their readiness to readmit any of the Palestinians they have received who may illegally enter the territory of another Member State or who are otherwise not allowed to stay there.
- (7) It is desirable to evaluate at the level of the Union after a reasonable period the way in which the reception of the 12 Palestinians by the Member States concerned is being carried out in practice and any questions which may have arisen in the application of this instrument,

HAS ADOPTED THIS COMMON POSITION:

Article 1

This Common Position concerns 12 of the 13 Palestinians belonging to the group of Palestinians in respect of which a Memorandum of Understanding has been reached between the Palestinian Authority and the Government of Israel as of 5 May 2002 concerning the peaceful evacuation of the Bethlehem Church of the Nativity and who have agreed to be transferred temporarily to, and be received by, Member States of the European Union.

Article 2

12 of the 13 Palestinians referred to in Article 1 shall be received on a temporary basis and exclusively on humanitarian grounds by the following Member States: Belgium, Greece, Spain, Ireland, Italy and Portugal.

Article 3

Each of the Member States referred to in Article 2 shall provide the Palestinians it receives with a national permit to enter its territory and stay for a period of up to 12 months.

The validity of this permit shall be limited to the territory of the Member State concerned, which shall take the appropriate measures in that regard. The issuance of this permit may be submitted to specific conditions to be accepted by the Palestinians concerned before their arrival.

Article 4

Each Member State referred to in Article 2 shall take appropriate measures within its legal system to protect the personal security of Palestinians received by it and to avoid them compromising the public order or internal security of the Member States.

Article 5

In addition to their obligations under existing provisions of Community law and of acts adopted pursuant to Title VI of the Treaty on European Union, Member States shall exchange between each other such information as may be relevant for the proper application of measures taken pursuant to this Common Position, including such information as may be necessary to permit the identification of the persons referred to in Article 1.

Article 6

Such matters as those related to housing, living conditions, relations to members of their family, access to employment or vocational training shall be governed by the national law of each receiving Member State. The Member States referred to in Article 2 shall, however, provide each other and, upon request, other Member States, with relevant information on these

matters, in order to encourage as far as possible a comparable treatment.

Article 7

If a Member State referred to in Article 2 is requested by a third State to extradite a Palestinian received by it, that Member State shall inform the other Member States promptly thereof. It shall, before taking a position as to the response to be given to such extradition request in accordance with national legal practices, consult the other Member States, within the Council, in order to examine the situation and to see whether Member States can approach the matter along common lines.

Article 8

The Council shall keep the application of this Common Position under review and shall evaluate such application within 11 months from its adoption or earlier at the request of any of its members.

Article 9

This Common Position shall take effect on the day of its adoption.

Article 10

This Common Position shall be published in the Official Journal.

Done at Brussels, 21 May 2002.

For the Council

The President

J. PIQUÉ I CAMPS
