Official Journal
of the European Communities

ISSN 0378-6978

L 239

Volume 38

7 October 1995

English edition

Legislation

Contents

(Continued overleaf)

EN

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

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

II *Acts whose publication is not obligatory*

Commission

(1) Text with EEA relevance

EN

I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 2349/95

of 6 October 1995

amending Regulation (EC) No 1488/95 as regards the submission of licences without advance fixing of the refund

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables (1), as last amended by Regulation (EC) No 1363/95 (2), and in particular Article 26 (11) thereof,

Whereas Article 22 of Commission Regulation (EEC) No 3719/88 (3), as last amended by Regulation (EC) No 2137/95 (4), should not apply to the licences without advance fixing of the refund referred to in Article 5 of Commission Regulation (EC) No 1488/95 (5); whereas, therefore, provisions should be made to derogate from it;

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

HAS ADOPTED THIS REGULATION:

Article 1

The following paragraph is added to Article 5 of Regulation (EC) No 1488/95:

'6. Article 22 of Regulation (EEC) No 3719/88 shall not apply to the licences referred to in this Article.

The licences shall be submitted by the interested party direct to the body responsible for paying the export refund. This body shall certify the licence and set it off against the quota.'

Article 2

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

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

Done at Brussels, 6 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

(1) OJ No L 118, 20. 5. 1972, p. 1.
(2) OJ No L 132, 16. 6. 1995, p. 8.
(3) OJ No L 331, 2. 12. 1988, p. 1.
(4) OJ No L 214, 8. 9. 1995, p. 21.
(5) OJ No L 145, 29. 6. 1995, p. 68.

COMMISSION REGULATION (EC) No 2350/95

of 6 October 1995

derogating from Regulation (EEC) No 1442/93 laying down detailed rules for the application of the arrangements for importing bananas into the Community

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (1), as last amended by Regulation (EC) No 3290/94 (2), and in particular Article 20 thereof,

Whereas Commission Regulation (EEC) No 1442/93 (3), as last amended by Regulation (EC) No 1164/95 (4), lays down detailed rules for the application of the arrangements for importing bananas into the Community, in particular with regard to the determination of categories of operators and the conditions for the grant of import licences;

Whereas Regulation (EEC) No 1442/93 fixes the conditions for admission as a Category C operator, in particular, in the case of a new application for an allocation, the obligation of having used at least 50 % of the quantity allocated for the year during which the new application is submitted; whereas, for the first year of application of this measure, provision should be made for the time limit for submission of proof of compliance to be put back by one month and for the time limits laid down for certain notifications also to be put back;

Whereas this Regulation must enter into force immediately, given the time limits laid down in Regulation (EEC) No 1442/93;

Whereas this measure is in accordance with the opinion of the Management Committee for Bananas,

HAS ADOPTED THIS REGULATION:

Article 1

By derogation from Article 4 (4) of Regulation (EEC) No 1442/93, applications for an annual allocation for 1996 for operators in Category C must be submitted by 31 October 1995 at the latest. The competent authorities shall notify the Commission by 10 November 1995 at the latest of the total volume of quantities applied for. They shall inform the operators of the quantities which are allocated to them by 27 November 1995 at the latest.

Article 2

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, 6 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

(1) OJ No L 47, 25. 2. 1993, p. 1.
(2) OJ No L 349, 31. 12. 1994, p. 105.
(3) OJ No L 142, 12. 6. 1993, p. 6.
(4) OJ No L 117, 24. 5. 1995, p. 14.

COMMISSION REGULATION (EC) No 2351/95

of 6 October 1995

amending Regulation (EC) No 1445/95 on rules of application for import and export licences in the beef and veal sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 805/68 of 27 June 1968 on the common organization of the market in beef and veal (1), as last amended by Regulation (EC) No 424/95 (2), and in particular Articles 9, 13 and 25 thereof,

Whereas Commission Regulation (EC) No 1445/95 (3) establishes the rules of application for import and export licences in the beef and veal sector;

Whereas, following the entry into force of Regulation (EC) No 1445/95, it has been found that the period of validity of export licences should be reduced and the amount of the security for all products in the beef and veal sector should be increased in order to avoid jeopardizing the sound management of the market;

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

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1445/95 is hereby amended as follows:

1. Article 9 is replaced by the following:

   '*Article 9*

   The security against licences shall be:

   (a) ECU 65 per head for live animals;

   (b) ECU 44 per 100 kilograms for products falling within code 0201 30 00 100 of the agricultural product export refund nomenclature;

   (c) ECU 24 per 100 kilograms net weight for other products.'

2. In Article 8 (1), 'fifth' is replaced by 'fourth'.

Article 2

This Regulation shall enter into force on 7 October 1995.

It shall apply to export licences with advance fixing of the refund applied for from 9 October 1995 onwards.

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

Done at Brussels, 6 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

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(1) OJ No L 148, 28. 6. 1968, p. 24.
(2) OJ No L 45, 1. 3. 1995, p. 2.
(3) OJ No L 143, 27. 6. 1995, p. 35.

COMMISSION REGULATION (EC) No 2352/95

of 6 October 1995

imposing a provisional anti-dumping duty on imports of coumarin originating in the People's Republic of China

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community (1), as last amended by Regulation (EC) No 1251/95 (2), and in particular Article 23 thereof,

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

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

(1) In February 1994, the Commission received a complaint lodged by the European Chemical Industry Council (CEFIC), on behalf of Rhône-Poulenc SA, the only Community producer of coumarin.

The complaint contained evidence of dumping of the said product originating in the People's Republic of China and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.

(2) The Commission accordingly announced by a notice published in the *Official Journal of the European Communities* (5), the initiation of an anti-dumping proceeding concerning imports of coumarin originating in the People's Republic of China, falling within the CN code ex 2932 21 00 and it commenced an investigation.

(3) The Commission officially notified the producers/exporters and importers known to be concerned, the representatives of the exporting country and the complainant of the initiation of the proceedings and gave the parties concerned the opportunity to make their views known in writing and to request a hearing.

(1) OJ No L 349, 31. 12. 1994, p. 1.
(2) OJ No L 122, 2. 6. 1995, p. 1.
(3) OJ No L 209, 2. 8. 1988, p. 1.
(4) OJ No L 66, 10. 3. 1994, p. 10.
(5) OJ No C 138, 20. 5. 1994, p. 9.

(4) Most known importers and some users made their views known in writing. They requested and were granted hearings.

(5) The Commission sent a questionnaire to the parties known to be concerned and received detailed information from the complainant Community producer and most importers in the Community. out of the five producers/exporters contacted, only one, Tianjin No 1 Perfumery replied to the Commission's request for information; nevertheless its reply was largely incomplete and in many parts illegible.

(6) The Commission sought and verified all the information it deemed necessary for the purpose of a preliminary determination and carried out investigations at the premises of the following:

(a) Community producer:

— Rhône-Poulenc SA, Courbevoie, France;

(b) Unrelated importers in the Community:

— Paul Kaders GmbH, Hamburg, Germany,
— Adrian SA, Marseille, France,
— Irish Flavours and Fragrances Ltd, Drogheda, Ireland,
— Moelhausen Trading srl, Milan, Italy,
— International Flavours and Fragances IFF (Nederland) BV, Hilversum,
— The Netherlands,
— Impex Quimica SA, Barcelona, Spain,
— Amalgamated Metal Corporation Ltd, London, UK,
— Fuerst Day Lawson Ltd, London, UK.

(7) As the United States of America has been used as an analogue country for the purpose of calculating normal value (see recital 15) the Commission conducted an investigation at the premises of Rhône-Poulenc Inc., the United States producer of coumarin.

(8) The investigation of dumping covered the period from 1 April 1993 to 31 March 1994 (hereinafter referred to as 'the investigation period').

B. PRODUCT UNDER INVESTIGATION AND LIKE PRODUCT

1. Description of the product concerned

(9) The product concerned is coumarin, a whitish crystalline powder with the characteristic odour of newly mown hay. Its main uses are as an aroma

chemical and as a fixative in the preparation of fragance compounds, such compounds being used in the production of detergents, cosmetics and fine fragances.

(10) Coumarin, which was originally a natural product obtained from tonka beans, is now produced synthetically. It can be obtained by a synthesis process starting from phenol to obtain salicilaldehyde, (Perkin reaction) or by a synthesis from orthocresol (Raschig reaction). The main chemical physical specification of coumarin is its purity, of which the melting point is the indicator. The standard quality coumarin marketed in Europe has a melting point varying between 68 °C and 70 °C which corresponds to 99 % purity.

2. Like product

(11) The Commission found that coumarin produced by the Community industry and the United States producer, which were related companies, was comparable in its essential physical and chemical characteristics, application and use to that produced in the People's Republic of China and exported to the Community. In particular, the Community industry and the United States producer, which used the same raw material and production process, produced a coumarin whose specificaitons in terms of melting point closely resembled the Chinese one. In fact sales invoices of Chinese coumarin report a minimum melting point of 69 °C, while Rhône Poulenc's product has a melting point of between 68 °C and 70 °C. Therefore, as melting point is an indicator of purity, it can be assumed that the Chinese coumarin purity was of the same level as that of Rhône Poulenc's product. Furthermore, Chinese coumarin was used for the same purposes as Rhône Poulenc's, namely in the preparation of fragance compounds.

(12) Importers and users of coumarin argued that Chinese coumarin and Rhône Poulenc's could not be considered like products. in particular, they pointed out that the Chinese coumarin was produced from a different raw material — orthocresol, instead of phenol — and using a different production process — Raschig reaction instead of Perkin reaction. As a result, the Chinese coumarin was alleged to be of a lower quality than Rhône Poulenc's product and could not be used for as many purposes as that of Rhône Poulenc. Furthermore, due to poor quality control in China, the odour, which is the main characteristic for the use of this product, would be sometimes inconsistent even between batches of the same producer, or different when compared to the sample. It was claimed that these differences would in certain cases make the product unsuitable for the purpose for which it had been bought.

The Commission has established that the two products could be used and were used indiscriminately in most applications, the only exception being formulae for fine fragances, for which most users demanded Rhône Poulenc's coumarin. However, this last use accounted for only a very minor part of total consumption of coumarin. The two products appeared therefore almost entirely interchangeable ; this fact was further substantiated by the systematic replacement of Rhône Poulenc's coumarin by Chinese coumarin in the Community perfume compound production (see recitals 27 and 35). Differences in quality had no effect on the definition of 'like product', as no clear distinction could be made between the two products in relation to the use and to the perception by the users with the sole exception of formulae for fine fragances. The Commission therefore consided that the coumarin produced and sold by the Community industry was a like product relative to that produced in and imported from the People's Republic of China, within the meaning of Article 2 (12) of Regulation (EEC) No 2423/88, (hereinafter referred to as 'the Basic Regulation').

C. COMMUNITY INDUSTRY

(13) The complainant company was the only producer of coumarin in the Community during the investigation period. Therefore, as it represented the totality of Community production, it is considered to be the 'Community industry' for the purposes of Article 4 (5) of the Basic Regulation.

D. DUMPING

1. Normal value

(14) In order to establish the normal value of coumarin produced in the People's Republic of China, the Commission took account of the fact that the People's Republic of China is a non-market economy country. Therefore, in accordance with Article 2 (5) of the Basic Regulation, the determination of normal value had to be based on a market economy country (analogue country). The complainant suggested that the United States of America could be used as an analogue country for the determination of normal value. For their part, the importers concerned considered that the United States was inappropriate because there was only one producer of coumarin in the United States and this producer was a related company of Rhône Poulenc SA. They requested therefore that India should be selected as an analogue country, given the fact that India's production technology and product standards would be similar to those of the People's Republic of China and there would also be sufficient internal competition.

India, the United States of America and Japan were, according to the information supplied during the investigation, the only market-economy countries where coumarin was manufactured outside the Community. The Commission requested the only known Indian producer of coumarin to cooperate in the present anti-dumping proceeding and a questionnaire was forwarded to it. However, it refused to provide the required information. The only known Japanese producer was also approached, but no reaction was obtained. Consequently, the United States was the only remaining option as a market economy that could be considered an analogue country.

(15) The United States producer, Rhône-Poulenc Inc., used the same production process as Rhône-Poulenc SA, employing phenol as the raw material to obtain salycilaldhyde and subsequently coumarin. Rhône-Poulenc SA switched from the Raschig process, still used by the Chinese, to the Perkin process about 40 years ago, because of the improved cost efficiency of the latter. In fact a smaller quantity of phenol, rather than orthocresol, is needed in order to obtain a unit of coumarin; moreover, it was found that the price of phenol was generally lower than that of orthocresol during the period under examination.

Phenol and orthocresol are both raw materials which can be easily found on the world market, so that access to raw materials can be considered comparable in the analogue country and in China.

Furthermore, the fact that Rhône-Poulenc Inc. was a company related to the complainant did not affect the determination of normal value because this was based on the prices at which coumarin was sold by Rhône-Poulenc on the United States market. It was found that in spite of the existence of a single producer of coumarin in the United States the competition was particularly fierce, as the high volume of imported products showed; in particular during the investigation period, China, the major exporter of coumarin to the United States, held a substantial share of the United States market and an anti-dumping proceeding in respect of these imports was being conducted by the United States authorities.

Finally the production and domestic sales volumes of the United States producer were found to be largely representative, because they were of a comparable size to the Chinese exports to the Community. The Commission therefore selected the United States as an analogue country and based the normal value calculation on the information provided by the United States producer and verified by an on-spot investigation.

(16) In relation to the question of determining the normal value in an appropriate and not unreasonable way in the chosen analogue country, a group of importers concerned pointed out that the Rhône-Poulenc plant in the United States was designed for the production of a wide range of chemicals, but that during the investigation period only coumarin was produced. Consequently the incidence of fixed costs per unit on production cost would be abnormaly increased. The verification has shown that the Rhône-Poulenc plant was not deisgned for the production of a wide range of products as alleged; moreover, this allegation is not relevant when normal value is based on sales prices.

However, it was found that production costs per unit had increased considerably since 1992, following the fall in the capacity utilization rate to an exceptionally low level both for coumarin and salicyladehyde facilities. Irrespective of the cause of this fall, the Commission, in order to establish normal value, decided to calculate the production cost per unit on the basis of a production level corresponding to that used internally by the company for establishing its standard cost. Under these conditions sales prices on the domestic market allowed for the recovery of all costs reasonably allocated and, consequently, domestic sales prices were considered as occurring in the ordinary course of trade.

(17) Therefore, in accordance with Article 2 (5) (a) (i) of the Basic Regulation normal value was established on the basis of the average ex-factory price of coumarin sold on the United States market during the investigation period.

2. Export prices

(18) The export price was determiend on the basis of the price actually paid for the product sold for export from the People's Republic of China to the Community.

(19) As no Chinese exporters of coumarin cooperated, the export price was based on the information supplied by the importers of Chinese coumarin which cooperated. For the purposes of the preliminary determination, the exports of coumarin originating in China, but sold via traders based in Hong Kong, have not been taken into consideration due to the fact that the mark-up applied by these traders is not known by the Commission and therefore a reconstruction of the fob export price in China necessary for comparison purposes was not possible. Therefore, for the preliminary determination, the export price has been based only on the prices of coumarin exported direct from China to the Community, which represented more than 60 % of the total exports from China to the Community during the investigation period.

3. Comparison

(20) Normal value was compared with export prices on a transaction-by-transaction basis at the fob level and the same level of trade. For the purpose of ensuring a fair comparison of normal value and export prices, the Commission took account, in accordance with Article 2 (9) and (10) of the Basic Regulation of differences affecting price comparability.

(21) As the Chinese exports were mainly sold to importers acting as traders, and in order to make the comparison at the same level of trade, normal value was based on the selling prices at distributor level in the United States by Rhône-Poulenc Inc.

Adjustments for selling expenses have been made to export prices. Ocean freight and, where appropriate, insurance costs for transport were deducted from export prices, to arrive at the Chinese border fob prices.

In the case of normal value, adjustments were made to take account of differences in physical characteristics (see recital 22 below) and credit costs. No adjustment for inland transport and loading costs was made, so as to bring the normal value at ex-factory level to fob level in view of the negligible costs involved.

(22) Importers and users claimed that adjustments for physical differences should be made to take into consideration quality control costs carried out by traders and end users and costs linked to rejected material not conforming to the sample, which the Chinese producers did not take back. For the provisional determination, the Commission did not accept the amount of adjustment claimed for physical differences, either because almost all the evidence provided could not be related with complete certainty to the quality control costs, or because no evidence was provided at all.

The Commission, however, considered well-founded the claim for adjustment for physical differences by reason of the slightly more limited scope of application of Chinese coumarin compared with that manufactured by Rhône-Poulenc SA and by Rhône-Poulenc Inc., (see recital 12). In the absence of any other reasonable basis, the adjustment in question for the preliminary determination has been based on the difference between the domestic sales price of Rhône-Poulenc SA in the Community and the cif import price in the Community, duty paid, from China in 1988. The year 1988 was considered appropriate because the evidence available to the Commission suggested that the Chinese exporters had not, at that time, begun the pricing behaviour which led to the present investigation. This occurred in 1990 when the market share of Chinese coumarin recorded a substantial jump from its 21,3 % share in 1988. In fact, between 1988 and 1990 the import price of Chinese coumarin dropped by 20 % and remained virtually constant until 1992. Between 1990 and 1992, the Chinese market share underwent significant further yearly increases. Consequently the price difference in 1988 was found to be a reasonble measure of the difference in market value between Rhône-Poulenc SA and Chinese coumarin. As the coumarin produced by Rhône-Poulenc Inc. is identical to that of Rhône-Poulenc SA, this market value difference applies in respect of the United States product as well. In this context it should be noted, however, that it is generally admitted that the quality of Chinese coumarin has significantly improved during the last few years, but since the quality is still perceived to be lower than that of Rhône Poulenc an allowance was nevertheless granted. Therefore, for the preliminary determination normal value has been adjusted downwards by the amount corresponding to the abovementioned price difference.

4. Dumping margin

(23) Normal value, determined as described above, was compared with the export prices, on a transaction-by-transaction basis after all adjustments. The preliminary examination of the facts shows that imports of coumarin originating in the People's Republic of China have been dumped. A single dumping margin higher than 50 % of the cif Community import price, duty unpaid, has been determiend for the Chinese exporters as a whole.

E. INJURY

1. Preliminary remarks

(24) In establishing the import volume of coumarin from China and consequently the Community consumption and the market shares, some importers argued that the heading CN ex 2932 21 00, within which the product under investigation falls, comprises not only coumarin, but also methyl coumarin and ethyl coumarin, which have properties and chemical formulae different from those of coumarin and are not interchangeable with it. Therefore they alleged that the Eurostat import data, corresponding to the above heading under which 331 tonnes of imports from China into the Community are recorded for the investigation period, would include imports of methyl coumarin and ethyl coumarin and consequently that the import volume and market share of coumarin originating from the People's Republic of China has been overestimated. Invoices provided by the importers which cooperated account for the import of 307 tonnes of coumarin originating in the

People's Republic of China into the Community during the investigation period. This figure represents 92,7 % of the imports recorded by Eurostat under the heading CN ex 2932 21 00. As not all importers of coumarin cooperated, it can be assumed that the actual imports are very close to the figure of 331 tonnes. Consequently the imports of methyl coumarin and ethyl coumarin must have been marginal, if any, during the investigation period. A similar conclusion can be drawn for the years 1992 and 1993. At the beginning of the period under examination that is, in 1990, the imports of coumarin established on the basis of information supplied by the cooperating importers were 135 tonnes. Compared to the Eurostat figure of 199 tonnes for the same year the discrepancy is much bigger. This can be explained by the fact that some importers which did not cooperate were particularly active in 1990. Consequently, in the absence of any evidence of imports of methyl coumarin and ethyl coumarin during the years under examination, the Commission, for the purposes of the preliminary determination, has decided to consider Eurostat figures recorded under the heading CN code ex 2932 21 00 as concerning exclusively coumarin, in establishing the development of Chinese imports and consequently consumption and market share. This choice leads to a more conservative estimate of the rate of increase of the indicators in question, compared to an approach based exclusively on the invoices of cooperating importers.

(25) Owing to the fact that the Community industry consists of a single company, for reasons of confidentiality no absolute figure concerning the Community industry, nor other figures which would enable the calculation of confidential figures are given in this Regulation.

2. Apparent consumption in the Community market

(26) Apparent consumption of coumarin in the Community has been based on domestic sales of the Community industry to which imports net of re-exports have been added. On this basis, the apparent consumption of coumarin fell slightly, declining by less than 10 % between 1990 and the investigation period. During the period under examination the apparent consumption fluctuated, with a significant increase from 1990 to 1991 and a strong fall between 1991 and 1992. An upward trend between 1992 and the investigation period can be observed.

3. Volume and market share of imports originating in the People's Republic of China

(27) Dumped imports originating in China rose steadily from 199 tonnes in 1990 to 331 tonnes during the investigation period, representing an increase of 66 % over the period.

(28) As a result of the shrinking of the Community market during the period under examination and at the same time the steadily increasing volume of Chinese imports, the market share of Chinese coumarin rose even more dramatically than the import volume. In fact, it went up steadily and more than doubled between 1990 and the investigation period.

4. Price of dumped imports

(29) On the basis of information supplied in Rhône-Poulenc SA's response to the questionnaire and provided by importers, it was found that prices of coumarin originating in the People's Republic of China have consistenly undercut the Community producer's coumarin prices since 1990, that is from the beginning of the period under examination. For the investigation peirod, price undercutting has been calculated as the difference between the selling prices of coumarin imported from China, transaction-by-transaction, and the weighted average sales price of the Community producer at the same level of trade, i.e. users of coumarin. This difference has been expressed as a percentage of the Community producer's price and has resulted in a figure of 28,7 % for the investigation period.

5. Situation of the Community industry

(a) Total production

(30) The production of coumarin by the Community producer fall by 56,3 % between 1990 and the investigation period. A first significant fall occurred between 1990 and 1992 when the production level was more than halved. Production increased slightly in 1993, but a further fall of 10 % was recorded between 1993 and the investigation period.

(b) Production capacity and its utilization

(31) Production capacity was based on the highest monthly production of the last 10 years, multiplied by 11 working months. On this basis production capacity remained constant over the period under examination. However, the utilization of production capacity went down by 56 % between 1990 and the investigation period.

(c) **Volume of sales**

(32) Sales on the Community market by the Community industry were more than halved between 1990 and the investigation period.

(d) **Employment**

(33) The number of employees involved in the production of coumarin decreased by more than 50 % during the period under consideration, in line with the diminishing production volume.

(e) **Stocks**

(34) During the period under examination stocks decreased in volume so that a relatively stable ratio with the total sales volume was maintained.

(f) **Market share held by the Community industry**

(35) The market share of the Community industry dropped by more than half between 1990 and the investigation period.

(g) **Evolution of net sales prices of Community industry**

(36) Sales prices charged by the Community producer in the Community market underwent a slight increase of about 9 % between 1990 and 1992, and then declined gradually to fall back to the price level of 1990 during the investigation period.

(h) **Profitability**

(37) The sharp drop in production by the Community producer resulting from the decline of sales in the Community had a negative impact on the profitability of the coumarin business. The Community producer tried to maintain its prices at the level of 1990, while its unit costs increased by about 20 % mainly because of the decline of the capacity/use ratio. Consequently, although the coumarin business was still profitable until 1991, increasing losses were recorded from 1992 until the investigation period, when they reached a level between 5 and 10 % of turnover.

6. Conclusion on injury

(38) In an already shrinking market, the Community producer suffered a dramatic erosion of its market share. It tried to face this situation by a limited reduction of its sales price down to a level still sufficient at least to cover its operational costs. However, the sharp decline in sales volume heavily affected the level of capacity use and caused a significant growth in unit production costs. Consequently, the Community producer started to record losses as from 1992.

It has therefore been provisionally concluded that the Community industry suffered 'material injury' within the meaning of Article 4 (1) of the Basic Regulation.

F. CAUSATION OF INJURY

1. Effect of dumped imports

(39) A clear inverse correlation can be observed between the movement of the domestic sales of the Community producer and that of imports originating from China over the period under examination. While the Community producer's sales decreased by 58,5 % in the Community market, Chinese imports grew by 66 % between 1990 and the investigation period. Furthermore, the profitability of coumarin production, which in 1990 was still relatively satisfactory for the Community producer, deteriorated gradually until it became negative from 1992 onwards. This negative financial change coincided with a price undercutting policy which the Chinese exporters began to practice in 1990 and which intensified year by year until the investigation period, when the undercutting margin reached a level of 28,7 %. In particular, a heavy loss was recorded during the investigation period, when the dumped imports from China reached their highest level in terms of volume, market share and undercutting. The Community producer tried to maintain its prices as it had to cope with increasing unit costs because of higher norms of environmental protection which had to be observed, but above all owing to the fact that the fixed costs had to be distributed over an ever-decreasing production volume resulting from the impact of dumped imports on the Community market.

Consequently, as a result of the pressure of ever lower-priced imports, whose volume increased steadily and which were found to be heavily dumped during the investigation period, the break-even point for the Community producer was passed in 1992 when it started recording losses, which were aggravated during the investigation period. The Commission therefore considers that a clear causal link exists between the injurious situation suffered by the Community industry and the dumped imports originating in the People's Republic of China.

2. Other factors

(40) The Commission also considered whether the injury suffered by the Community industry could have been caused by factors other than dumped imports. In particular, the trend in consumption in the Community, in exports to third countries and the impact of imports from third countries other than the People's Republic of China were examined.

(41) Community consumption, as explained in recital 26, fluctuated during the period under examination, but went down by less than 10 % for the period as a whole. However, between 1992 and the investigation period when coumarin production entailed increasing losses, Community consumption recovered somewhat. Therefore, the globally negative development of demand contributed only very marginally to the injury suffered by the Community industry.

(42) As far as exports of the Community industry to third countries are concerned, it has been observed that they declined between 1990 and 1992 by 40,1 %, much less than its domestic sales in percentage and above all in absolute terms. Exports did, however, increase by 6 % between 1993 and the investigation period, that is to say during the years when coumarin turned into an increasingly unprofitable business. Nevertheless, considering the whole period under investigation, exports declined by 38,7 % compared to the drop of more than 50 % in domestic sales as referred to in recital 32. Consequently, a decline in exports has also adversely affected the production level of the Community industry and therefore contributed to its negative financial situation.

(43) The Commission also looked at the trend in imports originating in third countries other than the People's Republic of China. In this respect it was found that the market share of the imports from these countries taken together increased by 160 % between 1990 and the investigation period. When import volume from these countries, taken individually, was exmanined no clear trend could be detected. Russia and Japan were the main exporters after China, but in far less significant quantities than the latter.

Their exports to the Community represented less than 4 % of the market. In this respect, it has been observed that during the investigation period they exported coumarin at prices slightly lower than the People's Republic of China. However, even if those two countries contributed to the injury suffered by the Community industry, their contribution remains only marginal, given the small volume of their exports compared to that of the Chinese.

(44) Some importers argued that Rhône-Poulenc SA's, own inefficiency was the cause of the injury it had suffered. They referred in particular to a consistent increase in production cost per unit of Rhône-Poulenc SA's coumarin during the period under examination, and in particular to the increase in the overhead costs per unit, which more than doubled between 1990 and the investigation period. The Commission has examined this argument and found that the rise in overheads per unit occurred owing to the fact that these types of costs, being by their very nature fixed costs, had to be spread over a smaller and smaller production volume, which fall by 56,3 % between 1990 and the investigation period, owing mainly to the Chinese dumped imports. However, Rhône-Poulenc SA made considerable efforts to limit the production costs per unit reducing direct manpower through a laying-off plan and by improving the yield of the plant which resulted in lower raw material costs. The argument of inefficiency of the Community industry has therefore to be rejected.

(45) The importers further claimed that Rhône-Poulenc SA had inflicted injury upon itself by its pricing policy. They referred in particular to the sales price increase of 9,3 % that Rhône-Poulenc SA had applied between 1990 and 1992. In this respect, the Commission points out that it is normal commercial behaviour for a company to try to cover its production costs by the sales price and that this has been the policy of Rhône-Poulenc SA for its coumarin business, whose profitability nevertheless had deteriorated since 1990 until it became negative in 1992. Subsequently, Rhône-Poulenc SA reduced its sales prices during the following years by the same amount under pressure from dumped Chinese imports, whose prices fell by more than 10 % between 1992 and the investigation period.

(46) The Commission considered that, notwithstanding the fact that other factors may have had a negative impact on the Community industry, dumped imports from the People's Republic of China, through their continuous erosion of market share and the depressing effect on prices have, taken in isolation, caused material injury to the Community industry.

G. COMMUNITY INTEREST

1. General considerations

(47) The purpose of anti-dumping measures is to eliminate the trade distorting effects of injurious dumping and to restore effective competition on the Community market which, as such, is in the

Community interest. Against this background, the Commission has considered the effect of anti-dumping measures on coumarin originating in the People's Republic of China in relation to the specific interests of the Community industry and of the users.

2. Interest of the Community industry

(48) In view of the persistent and increasing financial losses in coumarin production incurred by the Community industry as a consequence of the dumped imports, there is a material risk that, in the absence of intervention, the plant for the production of coumarin, which is already running at a very low level, will be definitively dismantled. In this event, the loss of employment would not be limited to the people still directly involved in the production of coumarin, but would also include a larger number who are involved in the production of raw materials for coumarin and in other linked production processes. Such processes risk becoming uncompetitive if they have to bear all the fixed costs which formerly could be shared with coumarin.

3. Interest of users

(49) The Commission has considered the possible consequences of a price increase of coumarin following the imposition of an anti-dumping duty on the price of fragrance compounds. In this respect, coumarin is only one of the many fragrances which makes up a compound. It has been found during the investigation that, for those importers who process coumarin themselves, the coumarin content in a compound is limited to a few percentage points and reaches or exceeds 10 % in only a very few cases. The cost incidence of coumarin in relation to the production cost of a fragrance compound consequently does not exceed a few percentage points at the most. Accordingly, the effect of an increase in the price of coumarin due to an anti-dumping duty on the production cost of most fragrance compounds would be minimal. *A fortiori,* the impact on the price of the end product, namely detergents, cosmetics and fine fragrances in which the fragrance compound is incorporated, would be entirely negligible.

(50) Importers and fragrance compound producers argued that the imposition of an anti-dumping duty on coumarin from the People's Republic of China would secure a competitive cost advantage for producers based outside the Community, to whom the Chinese coumarin would be available without duty. In this respect, the Commission points out that in the present situation the price advantages enjoyed by the users in the Community are the result of the unfair trade practices, causing injury to the Community industry. The coumarin user cannot therefore claim that such a situation should be maintained further. However, the Commission considers that, because of the insignificant cost incidence of coumarin on the sales price of most fragrance compounds, (as stated in recital (49) above), it is highly unlikely that a transfer of the production of certain compounds to companies located outside the Community would occur simply as a result of the imposition of anti-dumping measures.

(51) Importers and coumarin users alleged that recent Rhône-Poulenc SA marketing policy constituted an abuse of dominant position, in the form of imposing five-year contracts on certain users in which a minimum quantity, the price for the first year and a price revision mechanism are predetermined. It was further alleged that, in the absence of such purchase commitment, Rhône-Poulenc SA would not be able to guarantee the delivery of the quantity needed. The Commission observes in this context that Rhône-Poulenc SA has a much lower market share than that of China. Furthermore, no evidence has been submitted showing that Rhône-Poulenc SA was refusing to deliver, or threatening not to deliver coumarin to the consumer companies.

Even if Rhône-Poulenc was not running at full capacity, substantial production increases need to be planned in advance and take a certain period of time to be realized. It appears therefore that Rhône-Poulenc SA's policy, which consisted in giving priority to supplying the customers with which it already had a contractual commitment corresponds to normal commercial practice.

(52) The Commission considers that, should Rhône-Poulenc SA fail to make coumarin production profitable by selling at prices which merely cover its production costs, there is a serious risk that the coumarin plant will be shut down. If such an event should occur, the Community market would become entirely dependent on imports of which more than 80 % originate from a single country, namely the People's Republic of China. This could lead to the Community coumarin market being dominated by the People's Republic of China, a fact which itself would put at risk fair price competition.

4. Conclusion

(53) Having considered the various arguments put forward by importers and users, the Commission concludes that it is in the Community interest to impose provisional anti-dumping measures on imports of coumarin of Chinese origin in order to prevent further injury during the remainder of the investigation.

H. PROVISIONAL DUTY

(54) In the light of the foregoing, measures should take the form of a provisional anti-dumping duty. For the purpose of establishing the level of this duty, the Commission calculated the amount of duty necessary to eliminate the injury caused by dumped imports to the Community industry in order to determine whether a duty lower than that based on the dumping margin should be imposed pursuant to with Article 13 (3) of the Basic Regulation.

(55) Since the injury resulted mostly from the continuous reduction in Chinese export prices leading to market share losses and financial losses for the Community industry, the elimination of such injury requires that these export prices be increased to a level which will enable the Community producer to price at a level coresponding to its production costs plus a reasonable profit margin. A profit margin of 5 % appeared to be reasonable in order to allow an adequate return on investment.

From the analysis of the production costs of the Community industry, the Commission has observed that the overhead costs per unit were exceptionally high as a result of the significant decline in production volume, which fell to an exceptionally low use of production capacity. Furthermore, the Commission has established that this fall in production was not due exclusively to the dumped imports from the People's Republic of China but also to other factors and in particular to the decrease of Community exports to third countries. Given these particular circumstances, it appeared reassonable to reduce the overhead cost per unit to reflect the impact of the Chinese exports on Rhône-Poulenc SA's production volume. for this purpose a ratio, based on the increase in the import volume from China over Rhône-Poulenc SA's decrease in production volume, has been applied to the increase in Rhône-Poulenc SA's overhead costs during the period under examination.

The production cost so calculated and increased by a 5 % profit margin on turnover has been adjusted to take into account the difference in physical characteristics, determined as explained in recital 22 in order to establish the price level required for the elimination of the injury.

The Commission compared this price level with the Community-frontier import price, adjusted to the users' level of trade, and expressed the difference as a percentage of the import price, duty unpaid. On this basis the average free-at-Community-frontier price of Chinese exports would have to be increased by 42,9 % to eliminate the injury caused by the dumped imports originating in the People's Republic of China.

(56) In accordance with Article 13 (3) of the Basic Regulation the anti-dumping duty should be based on this level since it is lower than the dumping margin as provisionally established.

(57) In order to minimize the risk of the duties being evaded by price manipulation, it is considered appropriate to impose the duty in the form of a specific amount of ecus per tonne. The rate of duty expressed on this basis equals ECU 3 479 per tonne.

I. FINAL PROVISION

(58) In the interest of sound administration, a period should be fixed within which the parties concerned may make their views known in writing and request a hearing. Furthermore, it should be stated that all findings made for the purpose of this Regulation are provisional and may have to be reconsidered for the purpose of any definitive duty which the Commission may propose,

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty of ECU 3 479 per tonne is hereby imposed on imports of coumarin falling with CN code ex 2932 21 00 (Taric code 2932 21 00* 10), originating in the People's Republic of China.

2. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

3. The release for free circulation in the Community of the product referred to in paragraph 1 shall be subject to the provision of a security equivalent to the amount of the provisional duty.

Article 2

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

Article 3

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

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

Done at Brussels, 6 October 1995.

For the Commission

Leon BRITTAN

Vice-President

COMMISSION REGULATION (EC) No 2353/95
of 6 October 1995
on the issuing of export licences for fruit and vegetables with advance fixing of the refund

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1488/95 of 28 June 1995 on implementing rules for export refunds on fruit and vegetables (1), and in particular Article 4 (1) thereof,

Whereas Commission Regulation (EC) No 1489/95 (2) specifies the quantities which may be covered by applications submitted for export licences with advance fixing of the refund other than those applied for in connection with food aid;

Whereas Article 4 of Regulation (EC) No 1488/95 lays down the conditions under which special measures may be taken by the Commission to prevent an overrun in the quantities for which export licence applications may be submitted;

Whereas, in view of the information available to the Commission as of today, the quantities of 304 tonnes of almonds without shells in Annex I to Regulation (EC) No 1489/95, reduced or increased by the quantities referred to in Article 4 (1) of Regulation (EC) No 1488/95, would be exceeded if licences were issued with advanced fixing of refunds without restriction in response to applications submitted since 3 October 1995; whereas a reduction factor should accordingly be applied to the quantities applied for on 3 October 1995 and applications for export licences with advance fixing of refunds submitted subsequently with a view to such licences being issued during the current period should be rejected,

HAS ADOPTED THIS REGULATION:

Article 1

Export licences with advance fixing of the refund for almonds without shells for which applications are submitted on 3 October 1995 under Article 1 of Regulation (EC) No 1489/95 shall be issued for 81,09 % of the quantities applied for.

Applications for export licences with advance fixing of refunds for the above product submitted after 3 October 1995 and before 25 October 1995 shall be rejected.

Article 2

This Regulation shall enter into force on 7 October 1995.

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

Done at Brussels, 6 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

(1) OJ No L 145, 29. 6. 1995, p. 68.
(2) OJ No L 145, 29. 6. 1995, p. 75.

COMMISSION REGULATION (EC) No 2354/95

of 6 October 1995

amending representative prices and additional duties for the import of certain products in the sugar sector

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organization of the markets in the sugar sector (1), as last amended by Regulation (EC) No 1101/95 (2),

Having regard to Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses (3), and in particular the second subparagraph of Article 1 (2), and Article 3 (1) thereof,

Whereas the amounts of the representative prices and additional duties applicable to the import of white sugar, raw sugar and certain syrups are fixed by Commission Regulation (EC) No 1568/95 (4), as last amended by Regulation (EC) No 2323/95 (5);

Whereas it follows from applying the general and detailed fixing rules contained in Regulation (EC) No 1423/95 to the information known to the Commission that the representative prices and additional duties at present in force should be altered to the amounts set out in the Annex hereto,

HAS ADOPTED THIS REGULATION:

Article 1

The representative prices and additional duties on imports of the products referred to in Article 1 of Regulation (EC) No 1423/95 shall be as set out in the Annex hereto.

Article 2

This Regulation shall enter into force on 7 October 1995.

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

Done at Brussels, 6 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

(1) OJ No L 177, 1. 7. 1981, p. 4.
(2) OJ No L 110, 17. 5. 1995, p. 1.
(3) OJ No L 141, 24. 6. 1995, p. 16.
(4) OJ No L 150, 1. 7. 1995, p. 36.
(5) OJ No L 234, 7. 10. 1995, p. 25.

ANNEX

to the Commission Regulation of 6 October 1995 amending representative prices and the amounts of additional duties applicable to imports of white sugar, raw sugar and products covered by CN code 1702 90 99

(ECU)

CN code	Amount of representative prices per 100 kg net of product concerned	Amount of additional duty per 100 kg net of product concerned
1701 11 10 (1)	22,49	5,06
1701 11 90 (1)	22,49	10,29
1701 12 10 (1)	22,49	4,87
1701 12 90 (1)	22,49	9,86
1701 91 00 (2)	28,85	10,81
1701 99 10 (2)	28,85	6,29
1701 99 90 (2)	28,85	6,29
1702 90 99 (3)	0,29	0,36

(1) For the standard quality as defined in Article 1 of Council Regulation (EEC) No 431/68 (OJ No L 89, 10. 4. 1968, p. 3).

(2) For the standard quality as defined in Article 1 of Council Regulation (EEC) No 793/72 (OJ No L 94, 21. 4. 1972, p. 1).

(3) By 1 % sucrose content.

COMMISSION REGULATION (EC) No 2355/95

of 6 October 1995

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 1740/95 [2], and in particular Article 4 (1) thereof,

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

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

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

HAS ADOPTED THIS REGULATION:

Article 1

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

Article 2

This Regulation shall enter into force on 7 October 1995.

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

Done at Brussels, 6 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

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(1) OJ No L 337, 24. 12. 1994, p. 66.
(2) OJ No L 167, 18. 7. 1995, p. 10.
(3) OJ No L 387, 31. 12. 1992, p. 1.
(4) OJ No L 22, 31. 1. 1995, p. 1.

ANNEX

to the Commission Regulation of 6 October 1995 establishing the standard import values for determining the entry price of certain fruit and vegetables

(ECU/100 kg)

CN code	Third country code ([1])	Standard import value
0702 00 40	052	54,3
	060	80,2
	064	59,6
	066	41,7
	068	62,3
	204	50,9
	212	117,9
	624	75,0
	999	67,7
ex 0707 00 30	052	70,1
	053	166,9
	060	61,0
	066	53,8
	068	60,4
	204	49,1
	624	207,3
	999	95,5
0709 90 79	052	55,6
	204	77,5
	624	196,3
	999	109,8
0805 30 30	052	66,3
	388	66,7
	400	151,4
	512	61,7
	520	66,5
	524	62,8
	528	63,8
	600	54,7
	624	78,0
	999	74,7
0806 10 40	052	107,0
	064	56,6
	066	49,4
	220	110,8
	400	135,7
	412	132,4
	512	186,0
	600	64,5
	624	123,2
	999	107,3
0808 10 92, 0808 10 94, 0808 10 98	039	79,3
	064	77,0
	388	50,3
	400	54,7
	404	61,5
	508	68,4
	512	50,7
	524	57,4
	528	48,0
	800	62,5
	804	38,1
	999	58,9
0808 20 57	052	86,2
	064	80,8
	388	79,6
	512	89,7
	528	84,1
	800	55,8
	804	112,9
	999	84,2

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

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 July 1995

on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(95/404/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (1), and in particular Article 4 (5) thereof,

Having regard to the request of the Belgian Government,

Whereas:

BACKGROUND

I

On 4 May 1995, the Belgian State and Swissair Société Anonyme Suisse pour la Navigation Aérienne (Swissair) entered into an agreement under which the latter was to acquire 49,5 % of the share capital of the Belgian air carrier Sabena SA (Sabena). The agreement sets out in detail the terms and conditions of that acquisition as well as the rights and obligations of the parties in the governance of Sabena.

By letter of 12 May 1995, registered with the Commission on 18 May, the Belgian Government requested the Commission under Article 4 (5) of Regulation (EEC) No 2407/92 to examine whether Sabena complies with the requirements of that Article, in particular as regards the ownership and control of Sabena and to take a decision on that question. The letter was accompanied by a technical note and copies of the agreement with Swissair and its exhibits, including drafts of Sabena's new articles of incorporation and of a cooperation agreement to be concluded between the two carriers.

By a supplementary letter of 15 June 1995, registered with the Commission on 16 June, the Belgian Government informed the Commission that the parties had concluded an addendum dated 12 June 1995 amending the agreement of 4 May and the draft cooperation agreement on a number of points.

The following outline of the entire transaction between the Belgian State, Swissair and Sabena is based on the information contained in the two letters of 12 May and 15 June 1995 as well as their enclosures.

II

Sabena is a public limited company *(société anonyme)* set up under the laws of Belgium and having its registered office in Brussels. It is fully subject to the general company law rules prevailing in Belgium. Its new articles of incorporation define the object of the company as the provision of domestic and international air services as well as any other activities ancillary to air transport.

(1) OJ No L 240, 24. 8. 1992, p. 1.

Sabena's shares are currently distributed as follows: the Belgian State holds some 61,6 %, either directly or indirectly through the Société fédérale d'Investissement (SFI), which is a public holding company; 37,49 % of the shares are held by Air France via its subsidiary Finacta; the remaining 0,9 % are in the hands of Belgian institutional investors and, to a marginal extent, former as well as current employees of the company.

The agreement between Swissair and the Belgian State of 4 May 1995 provides for three major capital transactions.

First, SFI is to purchase all the Sabena shares presently held by Finacta. The purchase is to be financed by a loan of Bfrs 4 billion granted to SFI by Swissair. Attached to that loan are 691 666 127 warrants which, under certain circumstances, will permit Swissair to purchase additional shares of Sabena.

Second, Sabena's share capital is to be increased by a total of Bfrs 9,5 billion, of which 2 billion is to be subscribed, at the initiative of the Belgian State, by Belgian institutional investors (divided into 895 323 084 shares), 1,5 billion by SFI (divided into 671 492 313 shares) and the remaining 6 billion by Swissair (divided into 2 685 969 251 shares). The capital increase will result in 49,5 % of Sabena's voting shares being owned by Swissair and the remaining 50,5 % by all other parties (corresponding to 2 740 283 257 shares of which at least 1 834 459 013 will be owned by the Belgian State and SFI). The agreement further provides that the institutional investors are to act through a single special-purpose vehicle established in Belgium under majority ownership and effective control of Belgian nationals. The Belgian State and SFI are to enter into a shareholders' agreement with that special-purpose vehicle containing voting arrangements and mutual rights of first refusal with respect to the shares in Sabena. Those arrangements will ensure, *inter alia*, that the joint views of the Belgian State and SFI will always prevail over those of the institutional investors.

Third, Swissair is to pay an additional Bfrs 0,5 billion in return for 223 830 770 special participation certificates issued by Sabena. Those certificates shall have the following characteristics:

— they will not be part of the capital stock of Sabena,

— they will be in registered from,

— they will not carry any voting rights,

— they will entitle their holder to the same dividend as ordinary capital shares but with a minimum of 5 % of their issue price,

— upon liquidation, they will entitle the holder to repayment of the original issue price prior to any repayment on capital stock, but to the exclusion of any share in liquidation surplus.

Both parties to the agreement are entitled, under certain conditions and subject to the right of first refusal of the other party, to sell or float all or part of their shares in Sabena. However, any such sale or flotation shall be carried out in a way which ensures that Sabena complies with the requirements of Regulation (EEC) No 2407/92. Moreover, Sabena's articles of incorporation provide that any transfer of shares is to be notified to the carrier's board of directors which, in turn, is to oppose such transfer if compliance with those requirements is affected.

III

In parallel to the implementation of the transactions described in Section II, Sabena is to terminate its structural link to Air France resulting from the 'protocole d'accord' of 10 April 1992 and is henceforth to be governed and managed by the parties to the agreement of 4 May 1995 in accordance with the rules set out below.

At a general meeting of Sabena's shareholders, voting rights correspond to the percentage of share capital held by each individual party. The general meeting is to decide, by a majority of 75 % of the votes cast, on any amendments to the company's articles of incorporation (including changes of legal form and corporate purposes), any increase or decrease of its share capital, as well as on any liquidation, merger or split-up of the company. Moreover, the general meeting is empowered to decide, by a simple majority of votes, on the following issues:

— distribution of dividends;

— approval of the annual accounts of the company,

— appointment and dismissal of the members of the board of directors and the statutory auditors,

— discharging of the members of the board of directors and the statutory auditors,

— any other matter referred to the meeting by the board of directors on the ground that three or more of the board members have a conflict of interest.

Both the agreement of 4 May 1995 and Sabena's new articles of incorporation provide that, at any general meeting, the aggregate votes cast by non-Community (or assimilated) national or persons controlled by such nationals are always to account for less than 50 % of total votes.

Subject to the powers reserved to the general meeting, it is for the board of directors to determine the company's general policy and to decide on all strategic issues such as, for example, the adoption of the business plan and the annual budget, material fleet investments and material changes to network configuration. The board shall delegate day-to-day management to a chief executive officer (CEO), but such delegation shall not detract from the fullness of management powers of the board of directors which, therefore, always retains ultimate responsibility for decisions. The parties thus comply with the general rules provided for in Belgian company law.

The board is to comprise twelve members, including the chairman, who shall take all decisions by simple majority (provided that at least six members are present or represented). No board member shall retain a casting vote. Their appointment and dismissal by the general meeting is to be subject to the following conditions provided for in the agreement of 4 May 1995:

— five board members are to be appointed in accordance with a proposal made by Swissair,

— six board members are to be appointed in accordance with a proposal made by the Belgian shareholders,

— the chairman is to be appointed upon a joint proposal made by both groups of shareholders. In case the parties cannot agree on a joint proposal within a certain time limit, Swissair's proposal is to prevail. In contrast to the two preceding groups of board members, however, the general meeting is to be free to accept or reject any such proposal;

— any board member other than the chairman is to be dismissed upon the request of the shareholders on whose proposal he was appointed, unless his dismissal is opposed by a majority of 75 % at a general meeting,

— the chairman may be dismissed at any time by a majority vote at a general meeting.

The agreement further provides that at least the chairman and the six members appointed upon a proposal made by the Belgian shareholders shall be nationals of Member States or assimilated nationals, in order to safeguard Sabena's status as a Belgian air carrier under applicable Community legislation and Belgium's bilateral air service agreements.

Where a board member is dismissed or ceases to hold office on any other ground, his or her replacement is to be provisionally co-opted to the board upon a proposal by the relevant group of shareholders until definitive election by the general meeting. However, a new chairman may be co-opted only on a joint proposal by both groups of shareholders. The Belgian Government indicates in its letter of 12 May 1995 that, in the absence of an agreement on such a joint proposal, the position of chairman cannot be filled by co-option and, thus, will remain temporarily vacant.

As already indicated above, the day-to-day management of the company is to be entrusted to a CEO who, for the term of the addendum of 12 June 1995, is to be appointed and dismissed by the board of directors, acting by simple majority, upon a joint proposal of, first, the majority of the chairman and the six board members appointed upon a proposal of the Belgian shareholders and, second, the majority of the five board members appointed upon a proposal of Swissair. According to the agreement of 4 May 1995, the position of CEO can be combined with that of chairman of the board if the parties so agree. The Belgian Government states in its letter of 12 May 1995 that it does not intend to allow such combination in circumstances where this would concentrate management influence in the hands of a Swissair appointee.

The board of directors is also to be responsible for appointing and dismissing the chief financial officer and the other members of the executive management. Any such appointments are to be made upon a proposal by the CEO or, in the case of the chief financial officer, by Swissair.

IV

The agreement of 4 May 1995 also sets out some basic principles for the management of Sabena. Those principles include that the company is to be operated 'as a profit-oriented and competitive airline with a high-quality image' and that it is to cooperate closely with Swissair. To this latter end, the two carriers are to enter into a draft cooperation agreement which provides primarily for:

— the creation of common planning and verification processes on the basis of models developed by Swissair, as well as of joint planning functions in such areas as fleet investment and route network development,

— the establishment of joint system management functions with responsibility for the designing, selecting and marketing of the products of both carriers and overall network profitability,

— the assignment, within that cooperation framework, of planning and line management responsibility for two routes areas (Africa and Europe to and from Belgium) to Sabena and for the remaining route areas to Swissair, whereby such responsibilities are to be discharged in accordance with the standards and procedures defined by Swissair,

— the combination of parts of both parties' operations in the areas of marketing programmes, reservation systems and sales organizations.

At the same time, however, the relevant clauses of the draft cooperation agreement explicitly provide that each carrier is to retain its own functional responsibilities under any common planning and verification processes and that the joint functions are to submit the results of their work for prior approval to the board of directors of the respective carrier. In particular, it is stipulated that the joint system management functions do not imply a limitation of the responsibility of either carrier for its own financial result, nor a delegation of decision-making authority or a distribution of route operations between the carriers. The Belgian Government contends in its letter of 12 May 1995 that the draft agreement relates essentially to planning and management cooperation procedures and leaves the final determination of substantive issues to each carrier's board of directors.

The cooperation agreement is intended to be concluded for an initial term of 10 years and, unless terminated by either party, is to be extended automatically for periods of five years. Those clauses of the agreement relating to the application of common planning and verification processes and to the standards and procedures to be used in the planning and line management of route areas are to be reviewed by the parties at least every three years with a view to maximizing the efficiency and competitiveness of the two carriers.

V

Moveover, the agreement of 4 May 1995 provides for two different scenarios for future changes in the stucture of shareholdings in Sabena which go beyond the selling rights mentioned in Section II.

First, the Belgian State has the option of acquiring all the shares to be held by Swissair where its general interests are substantially prejudiced and no remedy can be found within a period of six months. Prior to the end of 1998, the price to be paid for the shares is to equal the price initially paid by Swissair, plus interest. After that date, it is to be determined by an international investment bank to be agreed upon by the parties.

Secondly, Swissair has the option of acquiring a majority of the voting rights of Sabena by exercising all of the warrants attached to the loan granted to SFI and, if necessary, requiring the Belgian State and SFI to sell parts of their holdings and/or to refrain from participating in any further increase of the capital of Sabena. Any exercise of this option is, however, dependent upon the entry into force of an agreement between the Community and Switzerland or a unilateral change of the relevant Community rules which would allow the implementation of such a transaction without Sabena losing its status as a Community air carrier under Regulation (EEC) No 2407/92. Moreover, the option cannot be exercised before the year 2000 and could, if requested by the Belgian State, imply such split-up of Sabena as is necessary to safeguard the carrier's continued designation under any applicable air service agreements with third countries. In view of those conditions and the uncertainty resulting therefrom, the Belgian Government takes the view that Swissair's option of acquiring a majority of voting rights should be without any current incidence on the corporate governance of Sabena and, thus, is not covered by the Government's present request.

Finally, it should be noted that the addendum of 12 June 1995 to the agreement of 4 May is to terminate automatically in the event that, due to a change in the regulatory environment, its provisions are no longer necessary to safeguard Sabena's status as a Community carrier under Regulation (EEC) No 2407/92.

LEGAL ASSESSMENT

VI

Regulation (EEC) No 2407/92 forms an integral part, together with Council Regulations (EEC) No 2408/92 [1] and (EEC) No 2409/92 [2], of the third aviation package of 23 July 1992 establishing the internal market in air transport. On the one hand, Article 3 (3) of the Regulation provides that no undertaking established in the Community shall be permitted within the territory of the Community to provide air transport services unless it has been granted the appropriate operation licence. The granting and maintenance of such a licence, in turn, is subject to the undertaking complying with the rules laid down in the Regulation. On the other hand, an air carrier licensed in accordance with those rules enjoys free access to all intra-Community routes under Regulation (EEC) No 2408/92 (see Commission Decision 93/347/EEC (Viva Air)) [3].

It must also be noted that, by virtue of Decision No 7/94 of the EEA Joint Committee [4], Regulation (EEC) No 2407/92 has ben included in the scope of application of the EEA Agreement with effect from 1 July 1994. For the purpose of applying that Regulation, the EFTA Member States participating in the EEA Agreement (and their nationals) must therefore be assimilated to Member States of the Community (and their nationals).

It is against this background that the present case has to be assessed.

VII

Article 4 of Regulation (EEC) No 2407/92 sets out four substantive requirements which the holder of an operating licence must respect:

— its principal place of business and, if any, registered office must be located in the licensing Member State,

— its main occupation must be air transport in isolation or combined with any other commercial operation of aircraft or repair and maintenance of aircraft,

— it must be owned and continue to be owned directly or through majority ownership by Member States and/or nationals of Member States,

— it must at all times be effectively controlled by such States or such nationals.

It is in the first instance for the national licensing authorities to verify whether an individual undertaking complies with the abovementioned requirements of Article 4. However, the fifth paragraph of that Article provides that the Commission, acting at the request of a Member State, is to examine compliance with those requirements and take a decision if necessary.

The Commission takes the view that any Member State, including the one responsible for the licensing of the undertaking in question, may make a request under Article 4 (5). For the purpose of that provision, the Belgian Government's letter of 12 May 1995 must therefore be considered as a request of a Member State which obliges the Commission to examine whether Sabena complies with the requirements of Article 4 under the agreement between the Belgian State and Swissair of 4 May 1995. That examination cannot comprise an analysis of Swissair's option to acquire a majority of voting rights since the exercise of that option is explicitly made subject to a change in the regulatory environment which would allow Swissair to acquire the majority ownership and effective control of Sabena. For the same reasons, it will be based on the text of the agreement of 4 May 1995 as amended by the addendum of 12 June 1995 and will not take account of any possible termination of that addendum.

It must further be noted that the transaction provided for in the agreement of 4 May 1995 is of considerable size and, thus, will have a significant impact on the air transport market. Moreover, the requirements of Article 4 have not, as yet, been subject to interpretation by either the Commission or the Court of Justice. In view of those circumstances and having regard to the particular importance of a uniform application of Article 4 for the proper functioning of the internal air transport market, the Commission considers that it is necessary to take a decision in the present case.

VIII

First of all, Sabena must comply with the requirements relating to its principal place of business and main occupation enshrined in Article 4 (1) of Regulation (EEC) No 2407/92. It can be noted in this respect that, under the agreement of 4 May 1995, Sabena is to remain a separate legal entity having its registered office and corporate headquarters in Belgium. Moreover, Sabena's new articles of incorporation define the company purpose as the provision of domestic and international air services as well as any other activities ancillary to air transport. The Commission therefore concludes that the agreement of 4 May 1995 does not affect Sabena's compliance with the two abovementioned requirements.

IX

Secondly, the Commission must verify whether Sabena also complies with the requirements of being majority owned and effectively controlled by Member States and/or nationals of Member States as provided for in Article 4 (2) of Regulation (EEC) No 2407/92.

(1) OJ No L 240, 24. 8. 1992, p. 8.
(2) OJ No L 240, 24. 8. 1992, p. 15.
(3) OJ No L 140, 11. 6. 1993, p. 51.
(4) OJ No L 160, 28. 6. 1994, p. 1.

The majority ownership and effective control requirements reflect, as the level of the Community, restrictions traditionally imposed on air carriers by virtue of international air service agreements. Those restrictions, initially justified on grounds of national security, are nowadays primarily designed to ensure that traffic rights exchanged under such agreements will be exploited effectively for the benefit of the partcipating parties and will not be exercised, either directly or through subsidiaries, by companies from third countries. Moreover, they prevent such third-country companies from operating from third countries. Moreover, they present such third-country companies from operating services wholly within a State or group of States through subsidiaries established in that State or group of States. The Commission therefore takes the view that the provisions of Article 4 (2) must be applied in the same light. Any such application must, in particular, take into account the overall objective of safeguarding the interests of the Community's air transport industry. This implies notably that companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the Community's liberalized internal air transport market. In other words, such companies may benefit from the internal market by way of participations only within the ownership and control limits set out in Article 4 (2).

Each of the two requirements of majority ownership and effective control will be examined separately below in the light of the preceding considerations.

X

The Commission takes the view that the majority ownership requirement is complied with if at least 50 % plus one share of the capital of the air carrier concerned is owned by Member States and/or national of Member States. The remaining shares may indeed be held by one or more investors from third countries, and such shareholding must not in itself be considered incompatible with Article 4 (2). It should be emphasized, however, that the scale of the third-country investment as well as the distribution of the shares within each group of shareholders need to be taken into account in any assessing compliance with the effective control requirement enshrined in the same Article.

The Commission further considers that Article 4 (2) refers to a concept of ownership of an undertaking which is essentially based on the notion of equity capital. Holders of such capital normally have the right to participate in decisions affecting the management of the undertaking as well as to share in the residual profits or, in the event of liquidation, in the residual assets of the undertaking after all other obligations have been met (see Commission Decision 94/653/EC of 27 July 1994 concerning the notified capital increase of Air France ([1])). The conditions for exercising those rights may, of course, vary according to the agreement of the participating parties. Therefore, the question whether a particular type of capital qualifies as equity capital and must therefore be taken into account under the ownership concept of Article 4 (2) can be answered only on a case-by-case basis in the light of all relevant circumstances, including any possible consequences for compliance with the effective control requirement. If, however, capital does not confer upon its holders any of the two abovementioned rights to an appreciable extent, it must generally be disregarded in determining the ownership situation of an undertaking.

In the present case, the financial transactions required under the agreement of 4 May 1995 will result in 2 685 969 251 shares of 49,5 % of the voting shares of Sabena being held by Swissair which, for the purposes of Regulation (EEC) No 2407/92, must be considered a third-country company (Swissair is itself subject to ownership and control restrictions under the applicable laws of Switzerland). The remaining 2 740 283 257 shares or 50,5 % of the voting shares of Sabena will be owned by the Belgian State, SFI, Belgian institutional investors and former as well as current employees of the company. At least 2 729 782 097 of those later shares and, thus, more than 50 % of total voting shares will be owned by the Belgian State, SFI and those institutional investors participating in the capital increase.

The agreement of 4 May 1995 also provides that Swissair is to receive 223 830 770 special participation certificates in return for an additional Bfrs 0,5 billion contribution to an undistributable surplus reserve of Sabena. Those certificate are, however, not to carry any voting rights, nor to entitle their holder to any share in the residual assets of the company in the event of its liquidation. On the contrary, they will be repaid in that event at their original issue price prior to any repayment on capital stock. Moreover, they generally give rise to a minimum return of 5 % of their issue price and, thus, exclude most of the financial risk for their holder. The Commission therefore takes the view that those special participation certificates are essentially a form of loan capital and, for present purposes, do not constitute equity capital. Consequently, they must not be added to the voting shares of Sabena when assessing the company's ownership situation under Article 4 (2).

([1]) OJ No L 254, 30. 9. 1994, p. 73 (at p. 84, right-hand column, at the top).

Finally, it must be noted in this context that Swissair is to receive 691 666 127 warrants in return for the loan to be granted to SFI. Those warrants will entitle their holder to subsequently purchase additional shares of Sabena. However, the agreement of 4 May 1995 explicitly provides that, unless the regulatory environment has been changed so as to allow Swissair to acquire the majority ownership and effective control of Sabena, Swissair cannot exercise the warrants to increase its participation in Sabena above the initially envisaged level of 49,5 %. Thus, any exercice of the warrants is subject to the same conditions and restrictions as the exercise of the option to acquire a majority of voting rights enjoyed by Swissair. Consequently, the warrants cannot affect the ownership situation of Sabena to the extent that it is possible to make such an assessment within the framework of the present procedure.

In view of the preceding considerations, the Commission concludes that, as regards the agreement of 4 May 1995, Sabena complies with the majority ownership requirement enshrined in the first sentence of Article 4 (2).

XI

'Effective control' is defined in point (g) of Article 2 of Regulation (EEC) No 2407/92 as:

'a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:

(a) the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.'

The Commission considers that this definition of effective control must be interpreted and applied in the overall context of Article 4 (2), as discussed in Section IX. In particular, each and every individual case must be assessed in the light of the objective of safeguarding the interests of the Community's air transport industry which implies, in particular, that companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the Community's liberalized internal air transport market. In other words, such third-country companies may benefit from the internal market by way of participations only within the ownership and control limits set out in Article 4 (2).

Accordingly, Article 4 (2) requires effective control to be exercised by Member States and/or nationals of Member States. They may do so by acting either individually or together with other Member States or nationals of Member States. In contrast, both the wording and the abovementioned objecives of Article 4 (2) exclude that effective control is exercised together with natural or legal persons from third countries. Such natural or legal persons must therefore not have a decisive influence, within the meaning of point (g) of Article 2, in the carrier concerned.

Having regard to the preceding considerations, the Commission takes the view that, essentially, Article 4 (2) requires Member States and/or nationals of Member States to have, either individually or acting together with other Member States or nationals of Member States, the ultimate decision-making power in the management of the air carrier concerned. They msut be able, either directly or indirectly through appointments to the decisive corporate bodies of the carrier, to have the final say on such key questions as, for example, the carrier's business plan, its annual budget or any major investment or cooperation projects. Such ability must not be substantially dependent upon the support of natural or legal persons from third countries. It must be emphasized, however, that point (g) of Article 2 requires those general principles to be applied by having regard to all the considerations of fact or law involved. This implies that each and every individual case must be assessed on its own merits and that, in a more general perspective, the effective control requirement can be applied only on a case-by-case basis.

It is on this basis that Sabena's compliance with the effective control requirement under the agreement of 4 May 1995 must be examined.

Voting arrangements between the Belgian shareholders

The Commission notes that the Belgian State, SFI and the Belgian institutional investors participating in the capital increase, which together are to hold the majority of the voting shares of Sabena, are to be bound by a shareholders' agreement containing voting arrangements to ensure that the joint views of the Belgian State and SFI always prevail. In practice, Sabena's majority shareholders will therefore always act as one single entity and, thus, be able to prevent Swissair from taking advantage of the existence of several shareholders on the Belgian side.

Sabena's corporate governance

As regards the corporate governance of Sabena, it must in the first instance be noted that the primary responsibility for the management of the company will be entrusted to its board of directors. The agreement of 4 May 1995 provides that the board shall have all powers to determine Sabena's general policy and to decide all strategic issues, including (but not limited to) the adoption of Sabena's business plan and its annual budget, material fleet investments and material changes to network configuration. Moreover, the envisaged delegation of day-to-day management to the CEO is not to detract from the fullness of the management powers of the board of directors as a matter of Belgian company law. The Commission therefore considers the composition and voting rules of the board of directors to be of key importance in the present context.

Sabena's board of directors is to comprise 12 members who are to decide all questions by a simple majority. The Belgian shareholders will be entitled to appoint and, if necessary, dismiss six members, all of whom will be nationals of Member States, while Swissair is to have the same rights with respect to five members. Thus, only the board members representing the Belgian shareholders will jointly be able to veto decisions of the board without any further support from other board members.

Special rules govern the appointment and possible dismissal of the 12th member and chairman of the board who is also to be a national of a Member State. This 12th member is to be appointed upon a joint proposal made by both groups of shareholders or, where they cannot agree on such a joint proposal, upon a proposal by Swissair. However, the agreement of 4 May 1995 explicitly provides that the general meeting is to be free to accept or reject any such proposal and that the meeting can at all times dismiss the appointed chairman by majority vote. Since the Belgian shareholders will hold the absolute majority of votes in the general meeting, they will ultimately decide on the chairman. Even more important, they may at all times require the resignation of the chairman.

The Commission therefore takes the view that, while any proposal for the chairman needs to be endorsed by Swissair, he will essentially be dependent upon the continuing support of the Belgian shareholders when carrying out his duties. The Belgian shareholders' position is further reinforced by the fact that, in the exceptional case of a deadlock between the parties, their representatives will hold the absolute majority on the board of directors and, thus, be able to autonomously take decisions without the need for any further support. Consequently, the decision-making mechanism under the agreement of 4 May 1995 ensures that the interests of the Belgian shareholders will ultimately prevail in the decision taken by the board of directors.

Secondly, account must be taken of the fact that the CEO is to assume responsibility for the day-to-day management of the company only within the limits set out by the board of directors and that the latter may reserve any individual decision for itself. Thus, the delegation of management powers to the CEO may, for the purposes of the effective control requirement of Article 4 (2), be considered of secondary importance compared to the role of the board of directors. A possible strengthening of the CEO's position as a result of a combination of this post with that of the chairman of the board of directors is made subject to the agreement of the Belgian State. In this context, the Commission takes note of the Belgian Government's intention not to allow such combination in circumstances where this would concentrate management influence in the hands of a Swissair appointee. In any case, the rules governing the appointment of the CEO ensure that the Belgian shareholders enjoy veto powers at all stages of the selection process for this post.

Thirdly, the agreement of 4 May 1995 confers only rather limited powers on the general meeting of shareholders of Sabena. With the exception of the powers relating to the appointment and possible dismissal of the chairman of the board of directors, discussed above, the role of the general meeting is restricted to the protection of essential investment interests and does not interfere with the management of the company. Moreover, most of the issues reserved to the general meeting may be decided by a simple majority of votes and, thus, by joint action of the Belgian shareholders. Swissair retains only veto rights as regards any amendments to Sabena's articles of incorporation, increases or decreases of its share capital as well as any liquidation, meger or split-up of the company. However, such veto rights merely reflect a normal degree of minority shareholder protection as prescribed by the company laws of most Member States, including Belgium. The Commission therefore considers the veto rights which Swissair enjoys in general meetings of Sabena's shareholders to be without any incidence in the present context.

Having regard to the foregoing considerations, the Commission concludes that the terms of corporate governance of Sabena under the agreement of 4 May 1995 do not detract from the ultimate decision-making power of the Belgian shareholders and, thus, do not confer on Swissair any powers which would, in themselves, be incompatible with the effective control requirement of Article 4 (2).

Draft cooperation agreement

As regards the cooperation between Swissair and Sabena, it must first be noted that the two carriers are to enter into a comprehensive cooperation agreement which will have an initial term of 10 years and will be extended automatically for further periods of five years. The cooperation envisaged must therefore be qualified as being of a long-term strategic nature and as bringing about structural changes for both parties.

The Commission generally considers that, without prejudice to other rules of Community law, Article 4 (2) is not designed to prevent Community air carriers from cooperating with carriers from third countries on a long-term strategic basis. The provision must not be read as prohibiting a Community carrier from limiting its commercial freedom in the context of such long-term strategic cooperation. The carrier's compliance with the effective control requirement will be endangered only where the third-country carrier is empowered under the terms of the cooperation to substitute, on a substantial basis, its own decisions for those of the competent corporate bodies of its community partner. It must therefore be examined whether or not the clauses of the cooperation agreement to be concluded between Swissair and Sabena provide for such a transfer of decision-making powers.

The draft cooperation agreement annexed to the agreement of 4 May 1995 requires Sabena to follow certain planning and verification processes developed by Swissair and to respect the standards and procedures defined by Swissair for certain planning and line management activities. Swissair will further assume responsibility for such planning and line management in certain route areas presently served by Sabena such as, for example, the routes to North America. However, the relevant clauses of the draft cooperation agreement explicitly stipulate that any substantive proposal emerging from the joint planning activities is to be submitted to the board of directors of the respective carrier for prior approval. Similarly, any assignment of planning and line management responsibility is not to be understood as implying a delegation of decision-making authority or a distribution of actual route operations between the carriers. On the basis of the documents and information provided by the Belgian Government, the Commission thus takes the view that Sabena's abovementioned obligations under the draft cooperation agreement appear to be essentially of a procedural nature and do not include any transfer of decision-making powers on substantive issues to Swissair.

It should further be noted that the most important clauses of the draft cooperation agreement will be subject to a review by both parties at least every three years. Thus, Sabena has the possibility of influencing the standards and procedures to be followed in the cooperation with Swissair.

The Commission therefore concludes that the draft cooperation agreement in its present version does not include any terms which are incompatible with the effective control requirement of Article 4 (2).

General considerations

Finally, it is necessary to place the individual elements discussed in the preceeding paragraphs and the entire transaction as a whole in their respective contexts.

In the first instance, the Belgian State has the possibility of reversing the entire transaction by exercising its call option to acquire all the shares to be held by Swissair. While that possibility will probably be considered seriously only in the event of irreconcilable differences between the parties, it nonetheless represents a threat which may have the effect that Swissair systematically tries to avoid taking any action against the essential interests of the Belgian State. Equally, the agreement of 4 May 1995 explicitly requires Swissair to use its best efforts to avoid any action which would endanger Sabena's status as a Community air carrier under Regulation (EEC) No 2407/92. Moreover, several clauses of the agreement, particularly those on possible transfers of shares, stipulate that neither party may exercise its rights thereunder if such exercise jeopardizes that status of Sabena. The Commission considers all those elements to be additional safeguards against a possible dilution of the ultimate decision-making power of the Belgian shareholders in the management of Sabena.

Secondly, the Commission takes the view that any evaluation of the consequences of a substantial investment by a third-country air carrier in a Community carrier should also take into account the broader context in which that investment is taking place and, in particular, the Community's aviation relations with the third country in question. Such additional considerations are required in view of the purpose of the ownership and control requirements, as discussed in Section IX, of safeguarding the interests of the Community's air transport industry. This implies, in particular, that companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the Community's liberalized internal air transport market.

The Swiss rules on ownership and control of air carriers require that at least 60 % of a carrier's share capital and at least two thirds of the seats of its managing bodies must be held by Swiss nationals, or any other persons assimilated to Swiss nationals by virtue of international agreements. Those requirements are largely comparable to those of Article 4 (2) of Regulation (EEC) No 2407/92. In particular, both the Swiss and the Community legislation provide for the possibility that more liberal arrangements are concluded with third countries on a reciprocal basis. On this latter aspect it must be noted that on 14 March 1995 the Council of the European Union adopted a decision authorizing the Commission to negotiate a comprehensive air transport agreement between the Community and Switzerland. The decision envisages that, subject to certain exceptions the rules governing the Community's internal air transport market shall be extended to Switzerland.

In view of this broader context, the agreements between the Belgian State and Swissair examined in this Decision appear essentially to be of a transitional nature. They provide an interim solution until the existing ownership and control restrictions between Switzerland and the Community are lifted on a reciprocal basis. An eventual elimination of those restrictions is already anticipated in the agreement between the parties of 4 May 1995 in so far as that agreement explicitly accords Swissair an option of acquiring a majority holding in Sabena.

On balance, the additional elements discussed in this Section provide further evidence in support of the conclusion that Sabena is effectively controlled by its Belgian shareholders under the agreement of 4 May 1995.

XII

Having regard to the preceding considerations and on the basis of the documents and information which the Belgian Government provided by letters of 12 May and 15 June 1995, the Commission concludes that with regard to the terms of the notified agreement between the Belgian State and Swissair of 4 May 1995, as amended by the addendum of 12 June 1995, Sabena complies with the requirements of Article 4 of Regulation (EEC) No 2407/92 and that it is necessary to take a decision to that effect,

HAS ADOPTED THIS DECISION:

Article 1

Under the terms of the notified agreement between the Belgian State and Swissair of 4 May 1995, as amended by the addendum of 12 June 1995, Sabena complies with the requirements of Article 4 of Regulation (EEC) No 2407/92.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 19 July 1995.

For the Commission

Neil KINNOCK

Member of the Commission

COMMISSION DECISION

of 2 October 1995

amending Decision 95/301/EC concerning protection measures in relation to foot and mouth disease in Russia

(Text with EEA relevance)

(95/405/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 90/675/EEC of 10 December 1990 laying down the principles governing the organization of veterinary checks on products entering the Community from third countries (1), as last amended by the Treaty of Accession for Austria, Finland and Sweden, and in particular Article 19 (1) thereof,

Whereas an outbreak of foot and mouth disease has been confirmed in the Moscow region of Russia;

Whereas the occurrence of foot and mouth disease in Russia presents a serious threat to the herds of Member States in view of the trade in certain animal products;

Whereas Commission Decision 95/301/EC of 26 July 1995 concerning protection measures in relation to foot and mouth disease in Russia (2) introduced restrictions on imports of these products from the region of Moscow, including a prohibition on imports of blood products not intended for human consumption; whereas, however, certain blood products which have been subjected to pH change could be imported without risk to the Community;

Whereas the measures provided for in this Decision are in accordance with the opinion of the Standing Veterinary Committee,

HAS ADOPTED THIS DECISION:

Article 1

Decision 95/301/EC is hereby amended as follows:

1. In Article 1, paragraph 3, the following is added after the word 'Russia': 'as amended by Decision 95/405/EC'.

2. The following is added to Article 1:

'4. The prohibition referred to in paragraph 1 shall not apply to blood products which have undergone an acidification process such that the pH has been maintained at less than 6 for at least one hour.

5. Member States shall ensure that the certificates accompanying blood products to be sent from Russia shall bear the following words:

"Blood products conforming to Commission Decision 95/301/EC concerning protection measures in relation to foot and mouth disease in Russia, as amended by Decision 95/405/EC."'

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 2 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

(1) OJ No L 373, 31. 12. 1990, p. 1.
(2) OJ No L 184, 3. 8. 1995, p. 59.

COMMISSION DECISION

of 5 October 1995

terminating the anti-dumping proceeding concerning imports of parts of gas-fuelled, non-refillable pocket lighters originating in Japan

(95/406/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community [1], as last amended by Regulation (EC) No 1251/95 [2], and in particular Article 23 thereof,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [3], as last amended by Regulation (EC) No 522/94 [4], and in particular Articles 5 and 9 thereof,

After consulting the Advisory Committee,

Whereas :

A. PROCEDURE

(1) In January 1991 the Commission received a complaint lodged by two Community producers representing a major proportion of the total Community production of parts of gas-fuelled, non-refillable pocket lighters. The complaint contained evidence of dumping and of material injury resulting therefrom to justify the initiation of a proceeding. The Commission accordingly announced, by a notice published in the *Official Journal of the European Communities* [5], the initiation of an anti-dumping proceeding concerning imports of parts of gas-fuelled, non-refillable pocket lighters originating in Japan. After publication of this notice a third Community producer joined the complaint.

(2) The Commission officially advised the exporter and importers known to be concerned, the representatives of the exporting country and the complainants and gave the parties directly concerned the opportunity to make their views known in writing and to request a hearing.

(3) The known producer in the country concerned, four importers and the complaining Community producers replied to the questionnaire sent to them and made their views known in writing. Those of the abovementioned companies having so requested were granted hearings.

(4) The Commission sought and verified all the information it deemed necessary for the purpose of its investigation and carried out investigations at the premises of the producer and exporter in Japan, four importers in the Community and the three complaining Community producers.

B. RESULT OF INVESTIGATIONS

(5) In the course of the investigation, the Commission found that subsequent to the complaint being lodged, the pattern of trade had changed in so far as parts of lighters were no longer exclusively sourced from Japan. Since doubts existed concerning the actual origin of the parts in question, the Commission decided to request Member States to carry out an investigation in order to determine the real origin of the goods.

(6) This additional investigation did not reveal any misdeclaration in repect of origin but, given the long period of time which it required, during which the anti-dumping investigation was merely suspended, the Commission considered it appropriate to verify whether the resumption of the latter investigation was warranted. Questioned in this respect, the complaining Community producers admitted that market developments since the initiation of the proceeding had resulted in imports of parts of gas-fuelled, non refillable pocket lighters originating in Japan being no longer as injurious to them as they were when the complaint was lodged.

C. WITHDRAWAL OF THE COMPLAINT AND TERMINATION OF THE PROCEEDING

(7) Subsequently, by letter of 23 June 1995, the complaining Community producers formally withdrew their complaint concerning imports of parts of gas-fuelled, non-refillable pocket lighters originating in Japan. The Commission considered that a termination in this context would not be against the interest of the Community.

(1) OJ No L 349, 31. 12. 1994, p. 1.
(2) OJ No L 122, 2. 6. 1995, p. 1.
(3) OJ No L 209, 2. 8. 1988, p. 1.
(4) OJ No L 66, 10. 3. 1994, p. 10.
(5) OJ No C 202, 1. 8. 1991, p. 4.

(8) In these circumstances, the anti-dumping proceeding concerning imports of parts of gas-fuelled, non-refillable pocket lighters originating in Japan should be terminated without imposition of protective measures.

(9) The Advisory Committee has been consulted and has raised no objection.

(10) Interested parties were informed of the essential facts and considerations on the basis of which the Commission intended to terminate the proceeding and have been given the opportunity to comment,

HAS DECIDED AS FOLLOWS:

Sole Article

The anti-dumping proceeding concerning imports of parts of gas-fuelled, non-refillable pocket lighters originating in Japan, is hereby terminated.

Done at Brussels, 5 October 1995.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 6 October 1995

adopting the forecast supply balance for banana production, consumption, imports and exports for the Community for 1995

(95/407/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas (1), as last amended by Commission Regulation (EC) No 3290/94 (2) and in particular Article 20 thereof,

Whereas Article 16 of Regulation (EEC) No 404/93 provides for a forecast supply balance to be drawn up each year on the basis of a number of market parameters; whereas the main purpose of the supply balance is to establish the outlook for Community production and consumption and the forecast for imports of traditional ACP bananas, and hence the supply requirements for the Community market and the requisite tariff quota;

Wheras the supply balance should in accordance with Article 16 (3) of Regulation (EEC) No 404/93, take account of the impact of tropical storm Debbie, which seriously affected production in Martinique, Guadeloupe and certain ACP States up to July 1995, and the effects of storms Iris, Luis and Marilyn which struck the region during August and September 1995;

Whereas the supply balance also includes an additional quantity of 353 000 tonnes fixed as part of the transitional measures for the supply of bananas to the Austrian, Finnish and Swedish markets as a result of the accession of those three countries;

Whereas the Management Committee for bananas has not delivered an opinion within the time limit set by its chairman,

HAS ADOPTED THIS DECISION:

Article 1

The forecast supply balance for banana production, consumption, imports and exports for the Community for 1995 shall be as shown in the Annex hereto.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 6 October 1995.

For the Commission

Franz FISCHLER

Member of the Commission

(1) OJ No L 47, 25. 2. 1993, p. 1.
(2) OJ No L 349, 31. 12. 1994, p. 105.

ANNEX

PROVISIONAL BALANCE SHEET FOR BANANAS, 1995

(in tonnes)

EC production	612 000
Traditional ACP imports	648 000
Tariff quota	
— basic tariff quota	2 200 000
— additional quantities Debbie	64 965
— additional quantities, Iris, Luis and Marilyn	90 800
— Additional quantities, accession of Austria, Finland, Sweden	353 000
Gross consumption	3 968 765
Exports	25 000
Net consumption	3 943 765

CORRIGENDA

Corrigendum to Commission Regulation (EC) No 2319/95 of 2 October 1995 establishing the quantities to be allocated to importers from the 1996 Community quantitative quotas on certain products originating in the People's Republic of China

(Official Journal of the European Communities No L 234 of 3 October 1995)

On page 19, Annex III, in the column 'Rate of reduction':

Against entry Glassware of a kind used for kitchen, toilet, etc., CN code 7013:

for: '+ 54,49 %',
read: '– 54,49 %';

and against entry Toys falling within CN code 9503 49:

for: '+ 70,33 %',
read: '– 70,33 %'.