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Legislation

Contents

(1) Text with EEA relevance

(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.

(1) Text with EEA relevance

I

(Acts whose publication is obligatory)

COMMISSION REGULATION (EC) No 1641/97

of 18 August 1997

determining the extent to which applications lodged in August 1997 for import licences for certain milk products and products covered by the arrangements provided for in the Europe Agreements concluded by the Community with the Republic of Poland, the Republic of Hungary, the Czech Republic and the Slovak Republic can be accepted

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EEC) No 584/92 of 6 March 1992 laying down detailed rules for the application to milk and milk products of the arrangements provided for in the Europe Agreements between the Community and the Republic of Poland, the Republic of Hungary, the Czech Republic and the Slovak Republic (1), as last amended by Regulation (EC) No 1597/97 (2) and in particular Article 4 (5) thereof,

Whereas applications for import licences lodged for the products referred to in Regulation (EEC) No 584/92 concern quantities greater than those available for certain products; whereas, therefore, reduction percentages should be fixed for certain of the quantities applied for the period 1 July to 30 September 1997,

HAS ADOPTED THIS REGULATION:

Article 1

Applications for import licences for products falling within the CN codes listed in the Annex hereto, lodged pursuant to Regulation (EEC) No 584/92 for the period 1 July to 30 September 1997, shall be accepted, per country of origin, up to the percentages indicated.

Article 2

This Regulation shall enter into force on 19 August 1997.

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

Done at Brussels, 18 August 1997.

For the Commission

Erkki LIIKANEN

Member of the Commission

(1) OJ No L 62, 7. 3. 1992, p. 34.
(2) OJ No L 216, 8. 8. 1997, p. 58.

ANNEX

(tonnes)

Country	Poland			Czech Republic			Slovak Republic			Hungary		
CN code and product	0402 10 19 0402 21 19 0402 21 99	0405 10 11 0405 10 19 0405 10 30 0405 10 50 0405 10 90 0405 20 90	0406	0402 10 19 0402 21 19 0402 21 91	0405 10 11 0405 10 19 0405 10 30 0405 10 50	0406	0402 10 19 0402 21 19 0402 21 91	0405 10 11 0405 10 19 0405 10 30 0405 10 50	0406	0402 10	0406 90 29	0406
in %	0,7	1,2	16,3	0,7	1,—	13,3	0,8	1,2	3,2	100,—	100,—	100,—

COMMISSION REGULATION (EC) No 1642/97

of 18 August 1997

determining the extent to which applications lodged in August 1997 for import certificates for certain cheeses covered by the arrangements provided for in the Europe Agreements concluded by the Community with Bulgaria and Romania can be accepted

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Commission Regulation (EC) No 1588/94 of 30 June 1994 laying down detailed rules for the application to milk and milk products of the arrangements provided for in the Interim Agreements between the Community of the one part, and Bulgaria and Romania of the other part [1], as last amended by Regulation (EC) No 1596/97 [2], and in particular Article 4 (4) thereof,

Whereas applications for import licences lodged for the products referred to in Regulation (EC) No 1588/94 concern quantities greater than those available for certain products; whereas, therefore, reduction percentages should be fixed for certain of the quantities applied for the period 1 July to 30 September 1997,

HAS ADOPTED THIS REGULATION:

Article 1

Applications for import licences for products falling within CN codes listed in the Annex hereto, lodged pursuant to Regulation (EC) No 1588/94 for the period 1 July to 30 September 1997, shall be accepted, per country of origin, up to the percentages indicated.

Article 2

This Regulation shall enter into force on 19 August 1997.

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

Done at Brussels, 18 August 1997.

For the Commission

Erkki LIIKANEN

Member of the Commission

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(1) OJ No L 167, 1. 7. 1994, p. 8.
(2) OJ No L 216, 8. 8. 1997, p. 55.

ANNEX

Reduction in the rate of customs duty: 80 %

Country	CN codes and products	%
Romania	0406	100,000
Bulgaria	0406	36,300

COMMISSION REGULATION (EC) No 1643/97

of 18 August 1997

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 2375/96 [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 19 August 1997.

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

Done at Brussels, 18 August 1997.

For the Commission

Erkki LIIKANEN

Member of the Commission

(1) OJ No L 337, 24. 12. 1994, p. 66.
(2) OJ No L 325, 14. 12. 1996, p. 5.
(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 18 August 1997 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
0709 90 79	052	68,8
	999	68,8
0805 30 30	388	59,7
	524	70,4
	528	61,0
	999	63,7
0806 10 40	052	127,8
	400	188,0
	512	89,4
	600	139,5
	624	181,1
	999	145,2
0808 10 92, 0808 10 94, 0808 10 98	388	72,4
	400	60,5
	508	59,8
	512	35,6
	524	63,4
	528	53,0
	804	64,4
	999	58,4
0808 20 57	052	101,2
	388	46,6
	512	95,4
	528	41,6
	999	71,2
0809 30 41, 0809 30 49	052	106,6
	999	106,6
0809 40 30	052	51,6
	064	61,2
	066	47,6
	624	250,3
	999	102,7

(1) Country nomenclature as fixed by Commission Regulation (EC) No 68/96 (OJ No L 14, 19. 1. 1996, p. 6). Code '999' stands for 'of other origin'.

COMMISSION REGULATION (EC) No 1644/97
of 18 August 1997
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 1599/96 [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], as last amended by Regulation (EC) No 1143/97 [4], 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 1222/97 [5], as last amended by Regulation (EC) No 1618/97 [6];

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 19 August 1997.

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

Done at Brussels, 18 August 1997.

For the Commission

Erkki LIIKANEN

Member of the Commission

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(1) OJ No L 177, 1. 7. 1981, p. 4.
(2) OJ No L 206, 16. 8. 1996, p. 43.
(3) OJ No L 141, 24. 6. 1995, p. 16.
(4) OJ No L 165, 24. 6. 1997, p. 11.
(5) OJ No L 173, 1. 7. 1997, p. 3.
(6) OJ No L 223, 13. 8. 1997, p. 5.

ANNEX

to the Commission Regulation of 18 August 1997 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)	26,90	3,22
1701 11 90 (1)	26,90	8,08
1701 12 10 (1)	26,90	3,08
1701 12 90 (1)	26,90	7,65
1701 91 00 (2)	29,95	10,26
1701 99 10 (2)	29,95	5,74
1701 99 90 (2)	29,95	5,74
1702 90 99 (3)	0,30	0,35

(1) For the standard quality as defined in Article 1 of amended 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.

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 12 February 1997

on the compatibility with the common market of Germany's proposed extension of the investment-allowance and special-depreciation schemes to west Berlin, in so far as these schemes do not concern the agricultural products processing and marketing sector

(Only the German text is authentic)

(Text with EEA relevance)

(97/551/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 93 (2) (1) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 61 (1) thereof,

Having heard the observations of the parties concerned,

Whereas:

I. INTRODUCTION

I.1 INVESTMENT ALLOWANCE

1. By decisions taken in December 1995 [1], amended in March 1996, the Commission approved the renewal of the 10 % investment allowance (gross intensity, relating solely to the purchase price or production cost of fixed-asset items) for two years, until the end of 1998. Under this decision, the 10 % investment allowance may be granted for the purchase/production of assets begun after 30 June 1994 and completed before 1 January 1999 for the purposes of investment projects (including replacement investment) carried out by legally independent firms *(rechtlich selbständige Unternehmen)* in the manufacturing and craft sectors with a workforce not exceeding 250 persons in the former GDR. The 10 % investment allowance is subject to an investment ceiling of DM 5 million per firm per annum.

2. By letter dated 26 July 1995, Germany notified the scheme extending the 10 % investment allowance to west Berlin with effect from 1 January 1996, which was later adopted under the Finance Law 1996. By letter dated 8 December 1995, Germany amended the initial notification, restricting the investment-allowance concession in those parts of west Berlin which are not assisted areas under the joint Federal Government/*Länder* programme for improving regional economic structures to firms *(Betriebe)* whose workforce does not exceed 50 persons. The amendment was adopted under the Law amending the Finance Law *(Jahressteuer-Ergänzungsgesetz)* and entered into force on 1 January 1996.

[1] OJ No C 194, 5. 7. 1996, p. 10.

3. The extension of the 10 % investment allowance to west Berlin concerns investment (i.e. purchase/production of assets) begun after the end of 1995 and completed before 1999.

3.1 Since what is involved is aid in the form of tax concessions which are granted in the period 1997 to 1999 in respect of acquisition and production costs (for the purposes of the firm) incurred in the period 1996 to 1998, the budgetary effects (tax revenue shortfalls, i.e. relevant aid budget) largely depend on how economic activities develop and on the volume of investment carried out. The German authorities anticipate the following additional tax revenue shortfalls, in DM million:

Year in which the tax revenue shortfall becomes effective	Tax revenue shortfalls
1997	85
1998	95
1999	105

Overall, the extension of the scheme will make available to firms in west Berlin additional resources estimated at DM 285 million (approximately ECU 150 million).

3.2 The 10 % investment allowance scheme is available in west Berlin to legally independent firms *(rechtlich selbständige Unternehmen)* in manufacturing and the craft sector whose workforce does not exceed:

— 250 persons in the areas assisted under the joint Federal Government/*Länder* programme,

— 50 persons in the other parts of west Berlin.

3.3 Firms meeting the objective eligibility criteria are automatically entitled to the investment allowance.

3.4 The 10 % investment allowance may be combined ('cumulated') with other aid (schemes and *ad hoc* aid), in particular with the special depreciations and, in those parts of west Berlin which are assisted areas under the joint Federal Government/*Länder* programme, with the investment grant provided for under that programme.

The tax authorities responsible for the administration of the investment allowance scheme do not themselves have supervisory machinery available to enable them to monitor whether the investment allowance is being combined with any other aid. For technical tax reasons, the tax authorities are aware only of acquisitions of economic goods carried out by the firm during the relevant year for (various) investment projects which the firm often needs several years to carry out. Consequently, the tax authorities have no overall view of the investment project as such to which combination with other aid might apply.

By contrast, in all cases where the investment allowance is combined with the investment grant available under the joint programme, the supervisory machinery that can be applied under the joint programme ensures that the regional ceilings for individual investment projects are complied with.

In the case of *ad hoc* aid, which requires individual approval by the Commission, the possible combining with other types of aid is covered in the notification.

In the case of cumulation with third schemes, such schemes too provide for cumulation rules, which the German authorities have undertaken to comply with.

In the case of cumulation of the investment allowance with special depreciations, no supervisory mechanism exists that would make it possible to ensure compliance with the rules on cumulation.

3.5 The investment allowance may be granted for replacement investment and thus comprises an operating aid component. On the basis of certain rough estimates, it may be assumed that about one third of eligible investment is replacement investment.

3.6 To the extent that the investment allowance is granted exclusively for initial investment, and given that the investment allowance is available only for capital investment and that the proportion of equipment in the standard basis for granting aid has been set at 65 % of the average volume of investment (Council Resolution of 20 October 1971 concerning the general principles in respect of systems of regional aid ([1])), the net aid intensity of the 10 % investment allowance scheme corresponds to 6,5 %. In cases where the investment is restricted exclusively to equipment, the net aid intensity (gross in some cases) may be as much as 10 % of the specific investment.

([1]) OJ No C 111, 4. 11. 1971, p. 1.

I.2 SPECIAL DEPRECIATIONS

4. By decision taken in March 1996 [1], the Commission approved the renewal/amendment of the special depreciation scheme for investment projects in the new *Länder.*

4.1 According to the original scheme authorized by the Commission by letter dated 30 July 1993, investment (including replacement investment) which is eligible (acquisition and production of equipment and construction goods) and which is carried out before 1 January 1997 (partial production costs incurred by the recipient firm, and advance payments made before that date are also eligible) in the new Länder may be the subject of special depreciations. The special depreciations (amounting to 50 % of the investment costs) may be applied in the year of investment and in the four following years. Accordingly, the special depreciations may be applied for the last time in the year 2000.

4.2 The renewal/amendment authorized by the decision of March 1996 referred to at point 4 concerns the following amendments:

— renewal of the scheme for two years, up to the end of 1998: under the new provisions, investment which is eligible and which is carried out before 1 January 1999 in the new *Länder* may be the subject of special depreciations. The special depreciations may be applied in the year of investment, and in the four following years, the last time being in the year 2002;

— reduction in aid intensity: as from 1 January 1997, the special depreciations may be applied only up to 40 % of the eligible investment costs;

— differentiation of aid intensity: as from 1 January 1997, recipient firms not belonging to the manufacturing sector *(Betriebe in Wirtschaftszweigen außerhalb des verarbeitenden Gewerbes)* may apply special depreciations only up to 20 % of the eligible investment costs; the same applies in the case of buildings used by firms in the manufacturing sector for purposes other than those of the firm (for example, rental).

5. By letter dated 26 July 1995, Germany notified the extension of the special depreciations to west Berlin, that extension being limited, however, to firms employing no more than 250 persons. The extension was later adopted under the Finance Law 1996. By letter dated 8 December 1995, Germany amended the initial notification, restricting eligibility for special depreciations in parts of west Berlin which are not assisted areas under the joint Federal Government/*Länder* programme for the improvement of regional economic structures to firms with a maximum of 50 employees. This amendment was adopted under the Law amending the Finance Law and entered into force on 1 January 1996.

It should be noted in this context that the extension of the scheme of special depreciations applies, in the case of the provisions described at point 4.1, only to investment projects concluded before 1 January 1997 and, in the case of the provisions referred to at point 4.2, for the period after the date mentioned therein.

6. The special depreciations under Paragraph 3 of the Assisted Areas Law already existed between July 1991 and the end of 1994 in west Berlin. Their introduction for that period had been approved by the Commission in 1991, under an agreement between Germany and the Commission on the abolition of specific aid for the promotion of west Berlin, as a transitional measure replacing the scheme of accelerated depreciation in the Promotion of Berlin Law (whose aid intensity was higher), which was valid in accordance with Article 92 (2) (c) of the EC Treaty until the end of June 1991; the special depreciation scheme for west Berlin was abolished at the end of 1994 (last eligible investment: investment carried out in 1994) in accordance with the timetable agreed in 1991 between the German authorities and the Commission.

Under the special depreciation scheme for west Berlin reintroduced by Germany in 1995, special depreciations can be applied in the year of investment and in the four following years — for the first time in 1996, and for the last in 2002. The special depreciations can thus be applied in respect of investment projects completed before 1996, and in particular as regards investment carried out in 1995 that was not eligible for the scheme applicable to investments carried out between July 1991 and the end of 1994.

[1] OJ No C 150, 24. 5. 1996, p. 11.

6.1 Since what is involved is aid in the form of tax concessions for investment costs incurred in 1995 to 1998 (investment between July 1991 and the end of 1994 is eligible for the scheme initially approved), the scale of the tax revenue shortfalls will depend largely on how economic activities develop and on the investment carried out. Germany anticipates that, during the period in which the special depreciations may be applied, the additional tax revenue shortfalls will be as follows, in DM million:

Year in which the tax revenue shortfall becomes effective	Tax revenue shortfalls
1996	40
1997	51
1998	61
1999	11
2000	n.a.
2001 (1)	n.a.
2002 (1)	n.a.

(1) The German authorities do not give any estimate for the period 1999 to 2002.

Overall, the extension of the scheme involves, during the period in which the special depreciations may be applied, additional tax revenue shortfalls of about ECU 120 million. Such tax revenue shortfalls are offset, in subsequent years, by additional tax revenue due to the lower level of depreciations in such years. The volume of aid under the scheme is calculated as the discounted value of all the additional tax revenue and tax revenue shortfalls and is of the order of magnitude of some ECU 10 million.

6.2 Eligibility for the special depreciation scheme in west Berlin extends to firms which meet the criteria set out at points 4.1 and 4.2 of this decision and whose workforce does not exceed:

— 250 persons in the assisted areas under the joint Federal Government/*Länder* programme,

— 50 persons in the other parts of west Berlin.

6.3 Firms which meet the objective eligiblity criteria are automatically entitled to claim the special depreciation.

6.4 The special depreciations may be combined with other aid (schemes and *ad hoc* aid), in particular with the investment allowance and, in those parts of west Berlin which are assisted areas under the joint Federal Government/ *Länder* programme, with the investment grant available under that programme.

The tax authorities, which are responsible for the administration of the special depreciations, have no supervisory machinery available to enable them to monitor whether the special depreciations are being combined with other aid. For technical tax reasons, the tax authorities are aware only of acquisitions of economic goods carried out by the firm during the relevant year for (various) investment projects which the firm often needs several years to carry out. Consequently, the tax authorities have no overall view of the investment project as such to which combination with other aid might apply.

By contrast, in all cases where the special depreciations are combined with the investment grant available under the joint Federal Government/ *Länder* programme, the supervisory machinery that can be applied under that programme ensures that the regional ceilings for individual invesmtent projects are complied with.

In the case of *ad hoc* aid, which requires individual approval by the Commission, the possible combining with other types of aid is covered in the notification.

In the case of cumulation with third schemes, the latter also provide for cumulation rules which the German authorities have undertaken to comply with.

In the case of cumulation of the investment allowance with the special depreciations, no supervisory mechanism exists that would make it possible to ensure compliance with the rules on cumulation.

6.5 The special depreciations may be granted for replacement investment and thus comprise an operating aid component. On the basis of rough estimates, it may be assumed that about one third of eligible investment is replacement investment.

6.6 To the extent that the special depreciations are granted exclusively for initial investment, their aid intensity corresponds to 2 % (gross = net) for 1996, and to 1,6 % for subsequent years (0,8 % for enterprises and buildings qualifying for the 20 % rate). It should be noted that the calculation of the aid intensities of the special depreciations, whose result is highly dependent on the reference rate applied, poses a number of methodological problems; these problems were discussed several times by the Commission and Germany. It was agreed in the course of these discussions that an attempt should be made to change the method.

I.3 STATUS OF WEST BERLIN FROM THE REGIONAL AID STANDPOINT

7. By decision taken in 1994 [1], the Commission approved the map of assisted German regions for the territory of the former GDR and west Berlin for the period 1994 to 1996. Under that decision, part of west Berlin was eligible for regional aid in 1996 under Article 92 (3) (c).

By decision taken in December 1996 [2], the Commission approved the map of the German assisted areas for the period 1997 to 1999. In accordance with Aricle 92 (3) (c), it authorized the inclusion of the entire territory of west Berlin as a recipient area.

I.4 INITIATION OF THE PROCEDURE AND RESTRICTION OF THE CURRENT DECISION

8. The Commission decided on 17 July 1996, with regard to the extension of the special depreciation scheme and the investment allowance scheme to west Berlin, to initiate the procedure under Article 93 (2).

The reasons for initiating the procedure were as follows:

(a) Both schemes contain elements of operating aid, which the Commission normally authorizes only in areas which meet the criterion set out in Article 93 (2) (a);

(b) Outside the areas of west Berlin, the two schemes are not compatible with the Community guidelines on State aid for small and medium-sized enterprises (SME guidelines [3]) in that:

— the granting of aid to firms which do not satisfy the definition of small and medium-sized firms (SMEs) contained in the SME guidelines is not ruled out,

— where the two aid measures are combined, an aid intensity of more than 7,5 % cannot be ruled out;

(c) It is possible under the special depreciation scheme to apply special depreciations in the case of investment projects concluded before the start of 1996; in such cases, the aid is not 'essential';

(d) Doubts exist about the compatibility of the provisions of both schemes with the current rules on aid for the processing and marketing of agricultural products.

8.1 With regard to the application of both schemes to west Berlin in the agricultural products processing and marketing sector as defined in the Community guidelines for State aid in connection with investments in the processing and marketing of agricultural products [4], it must be pointed out that on 12 June 1996 the Commission initiated the Article (93) (2) procedure with regard to state aid granted by Germany for investment projects in the agricultural products processing and marketing sector [5]; this procedure also relates specifically to the special depreciations granted under the Assisted Area Law and the tax concessions (investment allowance) granted under the investment Allowance Law. In the procedure, no distinction is made between the different parts of the regions in which both the above schemes can be granted; hence, the initiation of the procedure relates to the application of the two schemes in both the territory of the former GDR and west Berlin.

The Commission regards it as appropriate to divide the decision about the German plan and to decide at a later stage about the compatibility of extending the two schemes to west Berlin in the case of the agricultural products processing and marketing sector. Consequently, this decision does not concern the parts of the plan which relate to the said sector.

9. The initiation of the Article 93 (2) procedure was communicated to Germany by letter dated 1 August 1996. The other Member States and interested parties were informed by publication of the letter in the *Official Journal of the European Communities* [6]. In the letter and the notice in the Official Journal, Germany and the other Member States and interested parties were invited to submit their observations within one month.

[1] OJ No C 373, 29. 12. 1994, p. 3.
[2] State aid No N 613/96, not yet published.
[3] OJ No C 213, 23. 7. 1996, p. 4.
[4] OJ No C 29, 2. 2. 1996, p. 4.
[5] State aid No C 25/96, not yet published.
[6] OJ No C 293, 5. 10. 1996, p. 4.

II. OBSERVATIONS IN CONNECTION WITH THE PROCEDURE

II.1 OBSERVATIONS OF GERMANY

10. Germany communicated its observations late by letter dated 5 November 1996. The matter had been discussed by Germany and the Commission on 26 September and 18 October 1996.

By letter dated 13 January 1997, Germany communicated certain details concerning the suspension of the two schemes for extending the investment allowance and the special depreciations.

In its letter dated 5 November 1996, Germany refers to the difficult economic situation of the city of Berlin, confirming its view that both schemes continue to be essential if firms in Berlin are to adjust to the changed economic environment.

Germany's view of the legal position is that, on the basis of Article 92 (2) (c), the proposed aid is compatible with the common market. However, in the interests of a rapid decision in favour of the economy of Berlin, Germany is not insisting that this question of law should be definitively settled in the present authorization proceedings.

Should the Commission continue to examine the compatibility of the proposed measures with the common market on the basis of Article 92 (3), Germany takes the view that the extension of the investment allowance scheme to firms in the western districts of Berlin can at least be authorized under Article 92 (3). The following reasons are given for this:

10.1 As regards the investment allowance, it would, in Germany's view, be possible — even if administrative difficulties should result and the legal basis possibly be affected — to ensure in the aid application procedure that only firms which completely satisfy the relevant definition in the SME guidelines (small firms outside, medium-sized firms inside the national assisted area) claim aid. When making a claim, firms would have to explain in such a case that they also satisfy the SME definition with regard to the balance-sheet total, turnover and independence criteria.

Such a procedure could not be applied in the case of special depreciations.

10.2 Germany confirms that the inclusion of replacement investment is essential to both schemes. It points out in this respect, however, that in the case of the investment allowance the maximum basis of assessment proposed is DM 5 million per firm per annum.

In Germany's view it can therefore be assumed in each case where aid is granted that, subject to the maximum basis of assessment, the larger part of the assistance will relate to initial investment projects. Given the relatiely low intensity of the assistance, the absolute value of the aid to each firm accounted for by replacement investment is reduced to a very low level.

In general, Germany emphasizes that, as innovation cycles are becoming continually shorter, the concept of replacement investment is losing significance. With accelerating technological progress, particularly where technical plant is concerned, the use of new machines regularly involves new production methods, and these should be regarded as initial investment.

Thus, in Germany's view, the concept of replacement investment is essentially limited today to investment in buildings. In the case of the investment allowance, however, such investment is very largely ruled out (except for installations such as filling-station canopies).

Germany points out in this respect that, in the Berlin economy prior to reunification, economic assistance for firms in the western districts had to be directed in particular at making the city as self-sufficient as possible. This has given Berlin's economy a specific structure, making its products less competitive than could still be assumed a few years ago.

The adaptation of Berlin's economy to the changed environment requires a fundamental renewal of firms' product ranges. As replacement investment is dwindling in importance, it cannot be assumed that in Berlin it is particularly significant.

10.3 With regard to the problem raised by the Commission concerning eligible firms outside the region's assisted areas, Germany refers to its letter of 20 December 1995. According to that letter, only five firms with fewer than 50 employees, whose operations are not currently located in an assisted area for the purposes of the joint Federal Government/*Länder* programme for the improvement of regional economic structures, achieved a turnover of more than DM 10 million.

Moreover, Germany points out that, according to the new map of the German assisted areas for the period 1997 to 1999, the entire urban area of Berlin is to be eligible for assistance.

10.4 Germany confirms that firms processing or marketing agricultural products can apply in Berlin for assistance either under the joint Federal Government/*Länder* programme on the improvement of regional economic structures or under that on the improvement of agricultural structures and coastal defence. As regards the granting of such aid, compliance with the aid ceilings is assured.

Germany also points out that this sector is less important in Berlin than in rural areas and that there have been very few cases of assistance in the past (fewer than ten).

It must be stressed that these explanations are not relevant to the present decision.

10.5 Germany draws attention to the fact that the ceilings on aid which can be granted under the SME guidelines to SMEs outside the region's assisted areas are not attained by the investment allowance alone. Consequently, the problem raised by the Commission of the permitted ceilings under the SME guidelines on assistance for SMEs outside the region's assisted areas possibly being exceeded if investment allowances are cumulated with special depreciations would not arise if the Commission were to authorize the investment allowance only.

10.6 By letter dated 13 January 1997, Germany informed the Commission that the application of the two schemes had been suspended by a letter from the Federal Ministry of Finance dated 2 January 1996 [1] pending approval by the Commission. Reference to this order was again made in the letter of 14 August 1996 in connection with the initiation of the procedure. The first-mentioned letter refers explicitly to the schemes extending the investment allowance and the special depreciations in the following terms:

'Schemes which, pursuant to Article 92 of the EC Treaty, are to be designated as aid may be carried out only after they have been approved by the European Commission (see Article 93 (3), third sentence, of the EC Treaty). This applies irrespective of whether the relevant provisions have entered into force under German law.'

II.2 OBSERVATIONS OF THE OTHER MEMBER STATES AND INTERESTED PARTIES

11. No observations were submitted by other Member States or interested parties.

III. LEGAL ASSESSMENT

III.1 ARTICLE 92 (1) OF THE EC TREATY AND ARTICLE 61 (1) OF THE EEA AGREEMENT

12. Both schemes contain State aid within the meaning of Article 92 (1) of the EC Treaty and Article 61 (1) of the EEA Agreement.

Both schemes

— comprise State aid or aid granted from State resources (granting of a tax concession, financed by revenue from corporation tax or income tax, or by tax revenue shortfalls in the case of special depreciations),

— benefit particular firms (i.e. those carrying out investment in west Berlin and having a particular size) by increasing the return from the investment project assisted and consequently giving the assisted firm greater room for manœuvre than its competitors, thereby distorting or threatening to distort competition,

— affect trade between Member States since aid can be granted to firms which export their products to other Member States or whose products are in competition on the German market with products from other Member States. In both cases, aid may allow the assisted firm to expand its market share on the relevant market and thus contribute to an increase in exports to other Member States and to a reduction in imports from other Member States.

(1) Official Gazette of the Federal Ministry of Finance *(Bundessteuerblatt, BStBl)* 1996, Part I, No 1, p. 2.

13. Both schemes, which can be combined with other aid, have noticeable effects.

— As explained at point 3.6, if the investment allowance is granted exclusively for initial investment, the aid intensity (gross = net) may, in those cases where the investment is restricted entirely to equipment, reach 10 % of the specific investment.

— As indicated at point 6.6, if the special depreciations are granted exclusively for initial investment, the aid intensity corresponds to 2 % (gross = net) for 1996 and to 1,6 % for subsequent years (0,8 % for firms and buildings subject to the 20 % rate).

The volume of resources for both schemes in west Berlin is considerable (see points 3.1 and 6.1).

III.2 ARTICLE 92 (2) AND (3)

14. The aid schemes concerned are financed from the Federal budget but can be applied in part of the national territory only, i.e. in the former GDR and west Berlin. They therefore constitute regional aid, whose compatibility with the common market must first be examined:

— in an initial subsection, with regard to the applicability of the derogation for certain economic areas under Article 92 (3) (a) and (c) and to the compatibility of such aid with the Commission communication of 1988 on the method for the application of Article 92 (3) (a) and (c) to regional aid [1] (1988 method), as amended by the Commission communication of 1990 on the method for the application of Article 92 (3) (a) to regional aid [2] (see point III.2.A),

— in a second subsection — concerning aid for investment carried out in 1996 outside the assisted areas — with regard to the applicability of the derogation for certain economic activities under Article 92 (3) (c) and to the compatibility of aid schemes in question with the SME guidelines (see point III.2.B),

— and in a third subsection, with regard to the applicability of the other derogation conditions in Article 92 (2) and (3) (see subsection III.2.C).

A further subsection discusses the question of the need for the aid with regard to the special depreciation scheme (see point III.2.D).

A final subsection (III.2.E) contains the conclusions concerning the compatibility of the schemes in their current form with the common market.

III.2.A ***Article 92 (3) (a) and (c)***

15. An aid scheme can be regarded as compatible with the common market in accordance with one of these provisions, only if the assisted region is eligible under one of them. In addition, an aid scheme can be regarded as compatible with the common market, only if it satisfies some very definite conditions (e.g. type of aid, maximum intensity).

16. *West Berlin's need for regional aid in accordance with the derogation provisions in Article 92 (3) (a) and (c)*

16.1 **Article 92 (3) (a)**

Under the 1988 method, a region can be considered for the derogation in Article 92 (3) (a) only if the NUTS-II region in which the NUTS-III region lies has, for a period of at least three years, a per capita GDP/PPS which is equal to or less than 75 % of the Community average.

West Berlin is part of the NUTS-III region of Berlin, which is identical with the NUTS-II region. As the Commsision established in its decision of December 1996 on the map of the German assisted areas, the per capita GDP/PPS for Berlin easily exceeds the threshold value of 75 % of the Community average.

Consequently, Berlin is far from satisfying the tests of Article 92 (3) (a). The two aid schemes cannot therefore be approved under the said provision.

16.2 **Article 92 (3) (c)**

16.2.1 Investments for 1996

As explained at point 7, the Commission, on the basis of the 1988 method, approved the map of the German assisted areas for the former GDR and west Berlin region for 1994 to 1996 in its decision of April 1994. Accordingly, part of west Berlin became eligible for regional aid under Article 92 (3) (c) in 1996. The part of

[1] OJ No C 212, 12. 8. 1988, p. 2.
[2] OJ No C 163, 4. 7. 1990, p. 6.

Berlin not included in the map had not been proposed by Germany in the notification of the German assisted areas for 1994 to 1996 and cannot therefore be covered by Article 92 (3) (c) in respect of investment projects for 1996.

It should be stressed that the Commission, in its decision of June 1996 (1) on the increase in aid intensities in the assisted areas of west Berlin for part of 1995 and 1996, approved a regional and cumulation ceiling of 35 % gross for large firms and 45 % gross (maximum 30 % net) for SMEs.

16.2.2 Investments for 1997

In accordance with the 1988 method, the Commission approved the map of the German assisted areas for 1997 to 1999 by decision taken in December 1996, in which it gave approval for the entire urban area of west Berlin to be designated as eligible under Article 92 (3) (c).

The Commission approved a regional and cumulation ceiling of 28 % gross for large firms and 43 % gross for SMEs, which may be raised in exceptional cases to the ceiling applying in the previous period of 35 % gross for large firms and 45 % gross (maximum 30 % net) for SMEs.

16.2.3 In the light of this decision, further examination of the eligibility of west Berlin under Article 92 (3) (c) does not seem necessary.

17. *Compatibility of the two schemes with the Commission's procedural methods in the case of regional aid*

17.1 The explanations in points 17.2 to 17.4.2.2 relate only to the application of the two schemes within the assisted areas of Berlin. Application outside the assisted areas is examined in subsections III.2.B and III.2.C.

17.2 The inclusion of west Berlin in the two schemes relates to the acquisition of assets for investment projects, without distinction between initial investment within the meaning of the principles of coordination set out in the Commission communication on regional aid systems (2) and replacement investment.

The concept of initial investment is defined in the said communication (point 18 (i) of the Annex) as follows:

'Initial investment will be interpreted as investment in fixed assets in the creation of a new establishment, the extension of an existing establishment or in engaging in an activity involving a fundamental change in the product or production process of an existing establishment (by means of rationalization, restructuring or modernization). Investment in fixed assets by way of take-over of a establishment which has closed or which would have closed had such take-over not taken place may also be deemed to be initial investment.'

Investment which does not fall within this definition is replacement investment. Aid for replacement investment, as the Commission established in its decisions of 1995 and 1996 on the extension of the special depreciation and investment allowance schemes to the new *Länder* and when it initiated the present Article 93 (2) procedure, contains operating aid.

17.3 **Initial investment in the assisted areas in accordance with Article 92 (3) (c)**

It is established practice of the Commission, with regard to assisted areas under Article 92 (3) (c), to consider aid schemes for initial investment as compatible with the common market, where:

— their aid intensity does not exceed the regional ceiling authorized for large firms or SMEs,

— in the event of cumulation, compliance with the cumulation ceilings is assured.

17.3.1 With regard to the aid intensities of the two schemes, the first condition is satisfied (see points 3.6 and 6.6).

(1) OJ No C 291, 4. 10. 1996, p. 4.

(2) OJ No C 31, 3. 2. 1979, p. 9.

17.3.2 Where one of the two schemes is cumulated with other schemes or ad hoc aid (see points 3.4 and 6.4), the following should be borne in mind:

The tax authorities responsible for administering the two schemes in question have no supervisory machinery enabling them to monitor the cumulation of the investment allowance or the special depreciations with other aid. For technical tax reasons, the tax authorities are aware only of acquisitions of economic assets carried out by the firm during the relevant year for (various) investment projects which the firm often needs several years to carry out. Consequently, the tax authorities have no overall view of the actual investment project for which cumulation has been established.

By contrast, in all cases where the investment allowance is cumulated with the investment premium in the joint Federal Government/*Länder* programme, compliance with the regional ceilings by the individual investment projects is assured by the supervisory machinery of the joint programme.

In the case of *ad hoc* aid, which requires individual approval by the Commission, cumulation questions are covered in the notification.

In the case of cumulation with third schemes, it should be emphasized that such schemes also contain cumulation rules, which the German authorities have undertaken to comply with.

In the case of cumulation of the investment allowance with the special depreciations, no supervisory machinery exists that would make it possible to ensure compliance with the rules on cumulation. However, given the low intensity of the two schemes, the cumulation ceilings will not be exceeded if the two measures are combined.

17.3.3 Consequently, the second condition is also satisfied.

17.3.4 In view of the above, the inclusion of the assisted areas of west Berlin in the two schemes in accordance with the derogation for certain economic areas under Article 92 (3) (c) can be regarded as compatible with the common market, provided that the aid relates exclusively to initial investment.

17.4 **Replacement investment in the assisted areas**

17.4.1 In its decisions authorizing the application of the two schemes concerned to investment in the former GDR, the Commission took the view that aid for replacement investment constitutes operating aid. In accordance with its established practice, the Commission authorizes operating aid only in regions which fall within the scope of Article 92 (3) (a). As is clear from the 1988 method, and irrespective of the grant of possible operating aid in the regions previously falling within the scope of Article 92 (3) (a) which have lost that status during a transitional period following the improvement of their socio-economic position, operating aid is reserved, provided it pursues a regional purpose, for those regions where there are particular difficulties and which can invoke this exceptional provision.

17.4.2 Consequently, in accordance with the Commission's established practice, west Berlin cannot receive any operating aid with a regional purpose, since it is not one of the German regions which can invoke this provision (see point 16.1).

The Commission takes the view, therefore, that the inclusion of west Berlin in the two schemes, where they make aid for replacement investment possible, is not compatible with the common market in accordance with Article 92 (3) (c).

In making this assessment, the Commission has taken account of Germany's observations reproduced at point 10.2. Its view in this respect is as follows:

17.4.2.1 The special depreciation scheme: As Germany itself conceded in its observations, the special depreciation scheme offers the possibility of granting replacement aid for investment in equipment and buildings and contains operating aid. There is no maximum basis of assessment for the eligible costs (in some cases, both equipment and buildings). In addition, replacement investment is becoming increasingly important in investment projects involving new production methods, so that the granting of amounts which are much higher than the *de minimis* threshold as operating aid cannot be ruled out.

17.4.2.2 The investment allowance scheme: The first aspect to be pointed out here is that eligible costs under the scheme have been subjected to a ceiling of DM 5 million per year per firm, i.e. to aid (10 %) of DM 500 000 per year per firm. Since the scheme does not distinguish between initial investment and replacement investment, operating aid of at most DM 500 000 per year per firm can be granted under it.

However, reference should be made to the German submission according to which most of the assistance relates to initial investment (see point 10.2). According to these explanations, the concept of initial investment is currently limited in particular to buildings and, as far as investment in equipment is concerned, is losing in importance as innovation cycles become continually shorter.

Despite the submission of the German authorities, the Commission cannot rule out the possibility that replacement investment is being assisted with the investment allowance; Germany could not provide statistical evidence for its hypothesis. The Commission notes in this respect that the investment allowance relates to the acquisition/production of the assets necessary for the investment projects and not to the investment projects as such. Consequently, even if, at the moment, industry in west Berlin is in particular undertaking initial investment which requires comprehensive conversion of a product or process, it seems quite impossible to conclude that the necessary routine replacement of certain equipment in existing production is not taking place and that the aid in question is not being used for this.

III.2.B ***The exemption for certain economic activities under Article 92 (3) (c) with regard to investment in 1996 outside the assisted areas***

18. This point relates to the compatibility of the aid schemes in question for investment in 1996 outside the assisted areas. Here, too, a distinction should be made in the assessment between initial investment and replacement investment.

18.1 **Initial investment**

18.1.1 It should be pointed out here that, under the SME guidelines and in accordance with the Commission's established decision-making practice, outside the assisted areas only SMEs as defined in the Community guidelines on state aid for small and medium-sized enterprises (point 3.2) may receive aid for productive investment, up to an intensity of 7,5 % gross for medium-sized firms and 15 % gross for small firms (see point 4.2.1). The same ceilings apply in the case of cumulation.

18.1.2 Compatibility of the definition of 'beneficiary' in the two schemes with the definition of an SME in the SME guidelines

It should be emphasized here that, at present, both schemes can be used outside the assisted regions by legally independent manufacturing or craft sector firms which do not employ more than 50 persons, such firms having an automatic right to the investment allowance and to the special depreciations. This restriction is not compatible with the definition of an SME in the SME guidelines, although the 'number of employees' criterion (not more than 250) is certainly met, since the 'turnover' (maximum ECU 40 million) and 'balance sheet total' (ECU 27 million) criteria, and in particular the 'independence' criterion (in principle, an enterprise is considered independent if not more than 25 % of its capital or voting rights is held by a firm, or held jointly by several firms, falling outside the definition of an SME) are not fulfilled.

Since the three definition criteria in the SME guidelines, i.e. the number of employees, the turnover or balance sheet total and the independence criterion, are cumulative, the definition of the beneficiaries in both schemes is not compatible with the SME guidelines. Accordingly, for both schemes, the non-regional aspect of Article 92 (3) (c) cannot be asserted. Germany's explanation that only five of the eligible firms have a turnover of more than DM 10 million does not alter this assessment at all, especially since no figures are available for the independence criterion.

With a view to a conditional decision, Germany's explanation that in the case of the investment allowance it can assure compliance with the Community definition should admittedly be noted. But it must be emphasized that, according to the German authorities, such limitation is not possible in the case of the special depreciation scheme.

18.1.3 Compatibility of the aid intensities of the two schemes with the ceilings on intensity in the SME guidelines

18.1.3.1 With regard to the investment allowance, attention is drawn to the following:

In so far as the investment allowance is granted exclusively for initial investment, and since it promotes only investment in equipment and the proportion of equipment in the basis of assessment of an investment is set at 65 % of the typical investment volume, the net aid intensity of the 10 % investment allowance is equivalent to 6,5 %. Naturally, in those cases where the investment is restricted exclusively to equipment, the net aid intensity (gross in some cases) may be as much as 10 % of the specific investment.

Where in individual cases the aid intensity exceeds 7,5 % (gross) of the specific investment project (complete basis of assessment), it should be emphasized that such an excess (maximum = DM 375 000, or ECU 200 000, over three years) can be authorized only if the following three conditions are met:

— compliance with the *de minimis* criteria,

— the assisted firm is not involved in trade between Member States, which in the context of the notification of individual applications would have to be demonstrated, and

— the granting of aid is restricted to small firms.

The amount of the excess (maximum = ECU 200 000 over three years) may be more, though, than the *de minimis* amount of ECU 100 000. The investment allowance scheme does not provide that, where appropriate, exceeding the ceiling of 7,5 % will be authorized only if the *de minimis* provisions — as last defined by the Commission notice on the *de minimis* rule for State aid (1) — are fully complied with.

Moreover, the scheme does not provide for individual notification for special cases where a firm is not involved in trade between Member States.

Lastly, the scheme is not limited to small firms, since it can be used for firms with more than 49 employees and a turnover of more than ECU 7 million or an overall balance sheet total of over ECU 5 million which do not satisfy the independence criterion. Since the three definition criteria in the SME guidelines, i.e. total number of employees, turnover or balance sheet total and independence, are cumulative, the definition of beneficiaries in the scheme is incompatible with the definition of SMEs in the SME guidelines.

Consequently, since the ceiling is exceeded in the case of firms which do not match the definition of a small enterprise, the non-regional derogation for certain economic activities under Article 92 (3) (c) cannot be invoked for the scheme as it stands.

With a view to a conditional decision, though, Germany's explanation that, with regard to the investment allowance, compliance with the Community definition of a small enterprise can be ensured is noted.

18.1.3.2 With regard to special depreciations, attention is drawn to the following:

As explained at point 6.6, the aid intensity in the case of special depreciations, in so far as these are granted exclusively for initial investment, corresponds to 2 % (gross = net) for 1996 and 1,6 % for the subsequent years (0,8 % for firms and buildings subject to the 20 % rate).

18.1.3.3 Consequently, the aid intensity of the scheme is not greater than the ceilings in the SME guidelines.

18.1.4 Compatibility of the cumulation rules of the two schemes with the cumulation ceilings in the SME guidelines

The intensity ceilings in the SME guidelines constitute cumulation ceilings. Consequently, cumulation of aid for productive investment outside the assisted areas of Berlin can be authorized up to an intensity of 15 % (gross) for small firms and 7,5 % for medium-sized firms.

It should be emphasized in this respect that the two schemes can be cumulated with other aid (schemes and ad hoc measures) and in particular with each other.

As already mentioned, the tax authorities responsible for administering the investment allowance schemes examined have no supervisory machinery enabling them to monitor the cumulation of the investment allowance or the special depreciations with other aid.

By contrast, in the case of ad hoc aid, which requires individual approval by the Commission, cumulation questions are covered in the notification.

In the case of cumulation with third schemes, such schemes also contain cumulation provisions, which the German authorities have undertaken to comply with.

In the case of cumulation of the investment allowance with the special depreciations, there is no supervisory machinery that would make it possible to ensure compliance with the rules on cumulation.

(1) OJ No C 68, 6. 3. 1996, p. 9.

Consequently, the analysis carried out at point 18.1.3.1 in respect of the aid intensity of the investment allowance applies *mutatis mutandis* in the case of cumulation.

For this reason, since the cumulation ceiling for firms which do not satisfy the definition of a small enterprise is exceeded, the non-regional aspect of Article 92 (3) (c) cannot be invoked for the scheme as it stands (which excludes neither large nor medium-sized firms).

However, with a view to a conditional decision, Germany's repeated explanation that, in the case of the investment allowance, compliance with the Community definition of a small enterprise can be ensured is noted.

It can therefore be stated that, should the Commission take a conditional decision prohibiting the application of the special depreciation scheme outside the region's assisted areas and limiting the investment allowance to small firms inside them, the investment allowance would fully satisfy the tests of the SME guidelines, in particular since it would comply with the maximum rates of assistance and the cumulation ceilings of 15 % gross for small firms provided for in those guidelines.

18.2 **Replacement investment**

The analysis, at point 17.4, of compatibility of the aid for replacement investment in assisted areas covered by the derogation for certain economic areas under Article 92 (3) (c) applies *mutatis mutandis* to those areas which are not covered by the derogations for certain economic areas under Article 92 (3) (a) or (c).

In addition, the Commission has referred, at point 4.1 of the SME guidelines, to the exceptional character of operating aid in the regions falling within the scope of Article 92 (3) (a) and has established in more detail that the derogation for certain economic activities under Article 92 (3) (c) cannot be invoked in the case of aid which has 'the sole effect of continuously or periodically reducing the costs which the enterprise would normally have to bear, while otherwise leaving the *status quo* untouched, as in the case of operating aid ...'.

Consequently, the Commission takes the view that the inclusion in the two schemes, in so far as these relate to aid for replacement investment, of the parts of west Berlin not identified as assisted areas is not compatible with the common market under the derogation for certain economic activities in Article 92 (3) (c).

III.2.C ***The other derogations under Article 92 (2) and (3)***

19. *Article 92 (2) (a) and (b), and (3) (b) and (d)*

None of the said derogation provisions can be invoked for the extension of the two schemes, since:

— the schemes comprise no aid of a social character within the meaning of Article 92 (2) (a),

— they do not make good damage caused by natural disasters or exceptional occurrences within the meaning of Article 92 (2) (b),

— they are not designed to promote the execution of an important project of common European interest or to remedy as serious disturbance in the economy of a Member State within the meaning of Article 92 (3) (b); the situation of west Berlin, which was examined very thoroughly in connection with the approval of the increase in the aid intensities for west Berlin, cannot be described as a serious disturbance in the economic life of the Federal Republic of Germany,

— they are not intended to promote culture and heritage conservation within the meaning of Article 92 (3) (d).

Consequently, possible approval cannot be based on any of the four derogation provisions in question.

20. *Article 92 (2) (c)*

Under Article 92 (2) (c), 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division' is compatible with the common market.

The Commission notes Germany's view that the aid in question is compatible with the common market on the basis of Article 92 (2) (c). It also notes that Germany is not insisting that this question of law should be definitively settled in the present authorization proceedings.

The Commission takes the view that Germany has only mentioned Article 92 (2) (c) and does not expressly rely on it. In addition, Germany has not sent the Commission sufficient information which would have enabled it to establish whether the conditions for the application of Article 92 (2) (c) are met, i.e. whether west Berlin is (still) affected by the division of Germany, whether the current economic disadvantages are caused by that division and whether the State aid in question is necessary to compensate for any such economic disadvantages. The Commission points out that the Court of Justice held in Case C-364/90 *Italy* v. *Commission* [1] 'that a Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission. In pursuance of that duty, it must in particular provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled'.

The Commission takes the view that the problems currently facing west Berlin have no causal connection with the division of Germany after 1945.

21. The Commission therefore considers that none of the derogation provisions examined under this point is applicable.

III.2.D *Need for aid in the case of special depreciations for 1995*

22.1 As already explained at point 6, the special depreciations in the year of investment and in the following four years — for the first time in 1996 and for the last in 2002 — can be used as part of the special depreciations for west Berlin reintroduced by Germany in 1995. Thus the special depreciations can be used for investment projects concluded before 1996 and in particular for investment projects carried out in 1995 that were not eligible for the scheme applicable to investment projects carried out between July 1991 and the end of 1994.

(1) [1993] ECR I-2097.

22.2 The special depreciations authorized on the basis of the extension of the scheme in question cannot produce their incentive effect in respect of investment made in 1995. Consequently, the special depreciations for investment made in 1995 are not essential for achieving the desired goal of raising the level of investment and have no causal connection with initial investment. They result only in an improvement of the firm's financial situation and are hence to be treated as operating aid.

As already mentioned (see point 17.4), the Commission authorizes operating aid only on an exceptional basis and under certain conditions in regions that fall within the scope of Article 92 (3) (a). West Berlin has no claim to this status, so that the special depreciations for investment made in 1995, even if used for initial investment, cannot be considered as compatible with the common market.

22.3 Finally, it should be pointed out that it is apparently technically feasible to amend the scheme so that special depreciations for investment made in 1995 are excluded.

III.2.E *Compatibility of the schemes in their current form with the common market*

23. In view of the foregoing, it has to be concluded that the inclusion of west Berlin in the two schemes in the form envisaged for by Germany cannot be regarded as compatible with the common market. None of the derogation provisions of Article 92 is applicable.

In particular, the two schemes provide for operating aid which, in the Commission's opinion, is not compatible with the common market outside the assisted areas within the meaning of Article 92 (3) (a). In addition, the schemes make it possible, outside the assisted areas, to grant aid for investment by large firms, which the Commission regards as incompatible with the common market in areas that do not fall within the scope of Article 92 (3) (a) or (c). Even if the granting of aid outside the assisted areas is limited to SMEs, the maximum intensity for medium-sized firms laid down by the SME guidelines may be exceeded in the case of the investment allowance; moreover, where aid is cumulated, the cumulation ceiling for medium-sized firms laid down by the SME guidelines may be exceeded.

IV. POSSIBLE WAYS OF MAKING THE PROPOSED MEASURE COMPATIBLE WITH THE COMMON MARKET

24. It is necessary to examine how far the compatibility of the extension of the two schemes with the common market can be restored by a conditional decision. The following points should be considered in this respect:

24.1 As far as the special depreciation scheme inside and outside the assisted areas for investment made in 1995 is concerned, it is not possible to make it compatible with the common market. Consequently, investment made in 1995 is to be excluded from the scheme. This appears to be technically feasible.

24.2 In so far as replacement investment can be assisted, the application of the two schemes inside and outside the assisted areas of west Berlin is incompatible. Therefore, the use of the aid should be restricted to initial investment, and aid for replacement investment should be excluded. The Commission takes the view that such exclusion is not technically impossible, though it concedes that it does create administrative difficulties in the case of tax aid administered by the tax authorities. The Commission considers in this respect that the administrative difficulties which arise in the event of a deliberate decision by the authorities of a Member State with regard to the procedures for granting aid compared with the normal treatment of aid under other administrative circumstances should not result in preferential treatment of the aid in question.

24.3 The application of the two schemes to the investments made in 1996 by large firms outside the assisted areas is incompatible with the common market. Consequently, the application of the two schemes to investment made in 1996 outside the assisted areas should be restricted to investment by SMEs. This means in particular that in the years following 1996 large firms must not claim any special depreciations on the basis of the scheme in question for investment which they made in 1996.

The Commission notes that, in Germany's view, a limitation of the aid to SMEs is possible in the case of investment allowances but not in the case of the special depreciation scheme.

This means that the extension of the special depreciations to the parts of west Berlin not identified as assisted areas must be declared incompatible with the common market.

24.4 The application of the investment allowance to investment made in 1996 outside the assisted areas by medium-sized firms is incompatible with the common market, in so far as such firms can obtain an aid intensity (inclusive of cumulation) greater than 7,5 % gross. The Commission notes that the tax authorities are unable to ensure compliance with this threshold of 7,5 % gross, since the 10 % investment allowance (on equipment) may reach an aid intensity of 10 % in certain cases. Consequently, the application of the investment allowance to investment made in 1996 outside the assisted areas should be restricted to investment by small firms within the meaning of the SME guidelines, for which an aid intensity (in the event of cumulation as well) of 15 % maximum is admissible.

The Commission notes that, in Germany's view, it is possible to restrict the granting of aid to small firms in the case of the investment allowance.

24.5 Consequently, if the special depreciation scheme is prohibited, the application of the investment allowance outside the assisted areas can be reconciled with the common market.

25. Accordingly, the following may be declared compatible with the common market:

(a) in respect of investment begun after 31 December 1995 in an area which was an assisted area at the time the investment was made:

— the investment allowance on the acquisition/production of equipment for initial investment,

— the special depreciations on the acquisition/production of equipment and construction goods for initial investment already started;

(b) in respect of investment begun after 31 December 1995 in an area which was not an assisted area at the time the investment was made:

— the investment allowance on the acquisition/production of equipment for initial investment by small firms.

26. The two schemes may be regarded as compatible with the common market, provided that the usual cumulation rules and sectoral rules are observed.

In this connection the Commission would point out that the provisions on the cumulation of State aid should apply to both schemes, whether the cumulation concerns State aid for different purposes ([1]) or for the same purposes under schemes at the same or different levels (central, regional and/or local).

The Commission has satisfied itself that the aid, in the event of cumulation, exceeds neither the intensity of 15 % gross for investment outside assisted areas nor, inside the assisted areas, the maximum admissible intensities for regional aid in west Berlin, i.e. 35 % gross for large firms and 45 % gross (not more than 30 % net) for small and medium-sized firms.

The Commission also points out that in the application of this scheme the current Community rules for certain economic sectors, e.g. the sectors governed by the ECSC Treaty, transport, fisheries and agriculture, are to be observed.

V. FURTHER ASPECTS

27. *Repayment of unlawfully granted aid*

As mentioned at point 10.6, Germany suspended the application of the two schemes in question by letter from the Federal Ministry of Finance dated 2 January 1996.

Consequently, it would appear that — unless an administrative error has occured — no aid has already been paid under these schemes.

If aid deemed to be incompatible under this decision has already been paid, the Commission considers that its recovery would be appropriate.

Except in duly substantiated exceptional cases, the Commission usually requires the repayment of unlawfully received incompatible aid. It is not aware of any reason why this should not be so in the present case.

28. *Entry into force of this decision*

The aid schemes in question came into force on 1 January 1996. By circular dated 2 January 1996 their application was suspended. As it has consistently held, the Commission must ensure that aid which is incompatible with the common market cannot produce its effects or that the advantages which may have resulted from it are completely neutralized.

This means that the aid schemes in question may be declared compatible with the common market only if the conditions associated with the present decision became effective on the day the two extension schemes came into force, i.e. 1 January 1996.

In the event of a conditional decision, the Commission must allow the Member State an appropriate period in which to make the aid in question compatible with the common market. Such a period must be longer in the case of an aid scheme than in the case of an individual aid, since amendments to national provisions are often necessary. In the present case, the Commission regards a period of six months as sufficient for the purpose.

The Commission also takes the view that, if they are not to be reconciled with this decision, the extension schemes examined here should be abolished within the same period,

HAS ADOPTED THIS DECISION:

Article 1

1. The extension of the investment allowance scheme to west Berlin and the extension of the special depreciation scheme to west Berlin constitute unlawful State aid, since they were introduced contrary to the provisions of Article 93 (3).

2. The extension of the investment allowance scheme to west Berlin and the extension of the special depreciation scheme to west Berlin are, in so far as the agricultural products processing and marketing sector is not concerned by the two schemes, compatible with the common market under the following conditions:

(a) the granting of the investment allowance is limited to equipment for initial investment begun after 31 December 1995;

(b) the granting of the investment allowance is restricted to small firms within the meaning of the Community guidelines on State aid for small and medium-sized enterprises, where the investment involved is carried out in a region which is not an assisted area at the start of the investment;

(c) the special depreciations are limited to equipment and construction goods for initial investment started after 31 December 1995;

(d) the special depreciations are limited to investment which is carried out in an area which is an assisted area at the start of the investment;

([1]) OJ No C 3, 5. 1. 1985, p. 2.

(e) the application of these schemes is subject to the provisions on the cumulation of State aid, be it the cumulation of aid for different purposes or the cumulation of aid for the same purpose under schemes adopted at the same or at different levels (central, regional and/or local). In the event of cumulation, the aid must not exceed either the intensity of 15 % gross for investment outside the assisted areas or, inside the assisted areas, the maximum admissible intensities for regional aid in west Berlin, i.e. 35 % gross for large firms and 45 % gross (not more than 30 % net) for small and medium-sized firms;

(f) in the application of the aid schemes, the Community rules for certain economic sectors are to be observed, e.g. the sectors falling under the ECSC Treaty, transport, fisheries and agriculture;

(g) Germany shall submit to the Commission an annual report on the application of the schemes.

Article 2

1. Within six months after the notification of this Decision, Germany shall amend the schemes extending the investment allowance and the special depreciations to west Berlin, in so far as they do not concern the agricultural products processing and marketing sector, so as to bring them into conformity with this Decision with effect from 1 January 1996.

2. If Germany finds it is unable to amend the schemes extending the investment allowance and the special depreciations to west Berlin so as to bring them into conformity with this Decision with effect from 1 January 1996, it shall abolish them with effect from 1 January 1996.

Article 3

If, in so far as the agricultural products processing and marketing sector is not concerned, taxable persons have received, under the two extension schemes in question, a temporary or definitive tax advantage under conditions which, inasmuch as they are not in accordance with Article 1 or Article 2, are incompatible with the common market, Germany shall ensure that the tax decisions granted are annulled within eight months after notification of this Decision and that any advantages arising from them, including any interest payments, shall be deprived of all their effects.

Article 4

Germany shall inform the Commission within two months after the notification of this Decision of the measures which are to be taken in order to comply with this Decision.

It shall inform the Commission within eight months after the notification of this Decision of the measures which it has taken in order to comply with this Decision.

Article 5

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 12 February 1997.

For the Commission

Karel VAN MIERT

Member of the Commission

COMMISSION DECISION

of 11 August 1997

on marking and use of pigmeat in application of Article 9 of Council Directive 80/217/EEC concerning Belgium

(Text with EEA relevance)

(97/552/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 80/217/EEC of 22 January 1980 introducing Community measures for the control of classical swine fever [1], as last amended by Council Decision 93/384/EEC [2], and in particular Article 9 (6) (g) thereof,

Whereas in June and July 1997 outbreaks of classical swine fever in Belgium were declared by the Belgian veterinary authorities in Tongeren;

Whereas in accordance with Article 9 (1) of Directive 80/217/EEC a surveillance zone was immediately established around outbreak sites;

Whereas all pig holdings in the surveillance zones have been subject to a weekly inspection by a veterinarian. During this inspection samples for laboratory examination are collected if deemed necessary. No evidence of classical swine fever in the zone has been detected;

Whereas the provisions for the use of a health mark on fresh meat are given in Council Directive 64/433/EEC on health conditions for the production and marketing of fresh meat [3] as last amended by Directive 95/23/EC [4];

Whereas Belgium has submitted a request for the adoption of a specific solution concerning marking and use of pigmeat coming from pigs kept on holdings situated in established surveillance zones and slaughtered subject to a specific authorization issued by the competent authority;

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

1. Without prejudice for the provisions of Directive 80/217/EEC, in particular, Article 9 paragraph 6, Belgium is authorized to apply the mark described in Article 3 (1) (A) (e) of Council Directive 64/433/EEC to pigmeat obtained from pigs originating from holdings situated in a surveillance zone in Belgium established in accordance with the provisions of Article 9 (1) of Council Directive 80/217/EEC on the condition that the pigs in question:

(a) originate from a holding to which, following the epidemiological inquiry, no contact has been established with an infected holding,

(b) originate from a holding which for a period of at least 3 weeks has been subject to a weekly inspection by a veterinarian. The inspection has included all pigs kept on the holding,

(c) have been subject to protection measures established in accordance with the provisions of Article 9 (6) (f) and (g) of Directive 80/217/EEC,

(d) have been included in a programme for monitoring body temperature and clinical examination. The programme shall be carried out as given in Annex I,

(e) have been slaughtered within 12 hours of arrival at the slaughterhouse.

2. Belgium shall ensure that a certificate as given in Annex II is issued in respect of meat referred to in paragraph 1.

Article 2

Pigmeat which complies with the conditions of Article 1 (1) and enters into intra-Community trade must be accompanied by the certificate referred to in Article 1 (2).

Article 3

Belgium shall ensure that abattoirs designated to receive the pigs referred to in Article 1 (1) do not on the same day accept pigs for slaughter other than the pigs in question.

(1) OJ No L 47, 21. 2. 1980, p. 11.
(2) OJ No L 166, 8. 7. 1993, p. 34.
(3) OJ No 121, 29. 7. 1964, p. 2012/64.
(4) OJ No L 243, 11. 10. 1995, p. 7.

Article 4

Belgium shall provide Member States and the Commission with:

(a) the name and location of slaughterhouses designated to receive pigs for slaughter referred to in Article 1 (1);

(b) a monthly report which contains information on:
- the area to which the provisions of Article 1 apply,
- number of pigs slaughtered at the designated slaughterhouses,
- identification system and movement controls applied to slaughter pigs, as required in accordance with Article 9 (6) (f) (i) of Council Directive 80/217/EEC,
- instructions issued concerning the application of the programme for monitoring body temperature referred to in Annex I.

Article 5

This Decision is applicable until 1 September 1997.

Article 6

This Decision is addressed to the Member States.

Done at Brussels, 11 August 1997.

For the Commission

Hans VAN DEN BROEK

Member of the Commission

ANNEX I

MONITORING OF BODY TEMPERATURE

The programme for monitoring body temperature and clinical examination referred to in Article 1 (1) (d) shall include the following:

1. Within the 24-hour period before loading a consignment of pigs intended for slaughter, the official veterinary authority shall ensure that the body temperature of a number of pigs of the said consignment is monitored by inserting a thermometer into the rectum. The number of pigs to be monitored for temperature shall be as given below:

Number of pigs in consignment	Number of pigs to be monitored
0 - 25	all
26 - 30	26
31 - 40	31
41 - 50	35
51 - 100	45
101 - 200	51
200 +	60

   At the time of examination, the following information shall be recorded for each pig on a table issued by the competent veterinary authorities: number of eartags, time of examination and temperature.

   In cases where the examination shows a temperature of 40 °C or above, the official veterinarian shall immediately be informed. He shall initiate a disease investigation and take into account the provisions of Article 4 of Council Directive 80/217/EEC introducing Community measures for the control of classical swine fever.

2. Shortly (0 to 3 hours) before loading of the consignment examined as described in 1 above, a clinical examination shall be carried out by an official veterinarian designated by the competent veterinary authorities.

3. At the time of loading of the consignment of pigs examined as described in points 1 and 2, the official veterinarian shall issue a health document, which shall accompany the consignment to the designated slaughterhouse.

4. At the slaughterhouse of designation the results of the temperature monitoring shall be made available to the official veterinarian who performs the *ante mortem* examination.

ANNEX II

CERTIFICATE

for fresh meat referred to in Article 1 (1) of Commission Decision 97/552/EC

No [1]: ....

Place of loading: ....

Ministry: ....

Department: ....

I. **Identification of meat**

Meat of pigs

Nature of cuts: ....

Number of cuts or packages: ....

Net weight: ....

II. **Origin of meat**

Address and veterinary approval number of the approved slaughterhouse:

....

....

III. **Destination of meat**

The meat will be sent

from ....

(place of loading)

to ....

(place of destination)

by the following means of transport [2]: ....

Name and address of consignee: ....

....

....

(1) Serial number issued by the official veterinarian.

(2) In the case of rail trucks and lorries, state the registration number and in the case of boats name and, where necessary, the number of the container.

IV. **Health attestation**

I, the undersigned official veterinarian, certify that the meat described above was obtained under the conditions governing production and control laid down in Directive 64/433/EEC and is in conformity with the provisions of Commission Decision 97/552/EC on marking and use of pigmeat in application of Article 9 of Directive 80/217/EEC.

Done at ...., on ....

....

(name and signature of the official veterinarian)

COMMISSION DECISION

of 13 August 1997

amending Decisions 97/515/EC, 97/513/EC, 97/516/EC and 97/517/EC concerning protective measures with regard to certain products of animal origin originating in India, Bangladesh and Madagascar

(Text with EEA relevance)

(97/553/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 organisation of veterinary checks on products entering the Community from third countries (1), as last amended by Directive 96/43/EC (2), and in particular Article 19 (7) thereof,

Whereas the Commission, in adopting Decisions 97/515/EC (3), 97/513/EC (4), 97/516/EC (5) and 97/517/EC (6), has established measures in order to ensure that possibly hazardous products of animal origin cannot enter the Community; whereas these measures tend to suspend all imports of fishery products from India, Bangladesh and Madagascar, as well as of other products of animal origin from Madagascar;

Whereas these measures include an opportunity for products which have been despatched to the Community before the entry into force of these requirements and presented for importation into the Community before 15 August 1997, to gain entry to the Community on condition that they are systematically submitted to a microbiological examination upon arrival;

Whereas it is necessary to extend this delay, whilst ensuring a high level of consumer protection;

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

HAS ADOPTED THIS DECISION:

Article 1

In Article 2 of Decisions 97/515/EC, 97/513/EC, 97/516/EC and 97/517/EC, the words 'before 15 August 1997' are replaced by the words 'before 15 September 1997'.

Article 2

The Member States shall alter the measures they apply in trade in order to bring them into line with this Decision. They shall immediately inform the Commission thereof.

Article 3

This Decision is addressed to the Member States.

Done at Brussels, 13 August 1997.

For the Commission

Franz FISCHLER

Member of the Commission

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(1) OJ No L 373, 31. 12. 1990, p. 1.
(2) OJ No L 162, 1. 7. 1996, p. 1.
(3) OJ No L 214, 6. 8. 1997, p. 52.
(4) OJ No L 214, 6. 8. 1997, p. 46.
(5) OJ No L 214, 6. 8. 1997, p. 53.
(6) OJ No L 214, 6. 8. 1997, p. 54.

CORRIGENDA

Corrigendum to Council Regulation (EC) No 534/97 of 17 March 1997 amending Regulation (EEC) No 1442/88 on the granting, for the 1988/1989 to 1997/1998 wine years, of permanent abandonment premiums in respect of wine-growing areas

(Official Journal of the European Communities No L 83 of 25 March 1997)

On page 2, in point 1 of Article 1, first line:

for: '1. In the second subparagraph ...',

read: '1. In point (a) of the second subparagraph ...'.

Corrigendum to Council Regulation (EC) No 702/97 of 14 April 1997 opening and providing for the administration of autonomous Community tariff quotas for certain fishery products

(Official Journal of the European Communities No L 104 of 22 April 1997)

On page 10 in the Annex against Order Nos 09.2785 and 09.2786, fourth column:

for: '... (*Ommastrephes* spp. — excluding *Sagittatus*, *Nototodarus* spp. —, *Sepioteuthis* spp.) ...',

read: '... (*Ommastrephes* spp. — excluding *Sagittatus* —, *Nototodarus* spp., *Sepioteuthis* spp.) ...'.