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II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 March 2004

on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform

(notified under document number C(2004) 929)

(Only the English text is authentic)

(Text with EEA relevance)

(2005/261/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽¹⁾, and having regard to their comments

Whereas:

(2) On 16 October 2002, the Commission decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the reform (C(2002) 3734). This decision was notified to the United Kingdom on 18 October 2002 (SG(2002) D/232221). After an extension of the deadline, the United Kingdom replied by letter dated 16 December 2002 (A/39214).

(3) The Commission Decision to initiate the formal investigation procedure was published in the *Official Journal of the European Communities*, inviting interested parties to submit their observations ⁽²⁾. Comments were submitted by the Spanish Confederation of Business Organisations (Confederación Española de Organizaciones Empresariales) on 30 December 2002 (A/39469), by the Åland Executive, Finland (Ålands Landskapsstyrelse) on 2 January 2003 (A/30002), by the Spanish Government on 2 and 3 January 2003 (A/30003 and A/30018), and by the Government of Gibraltar on 3 January 2003 (A/30011). These comments were forwarded to the United Kingdom, who replied by letter dated 13 February 2003 (A/31313).

I. PROCEDURE

(1) By letter dated 12 August 2002, registered on 19 August (SG(2002) A/8328), the United Kingdom notified to the Commission, pursuant to Article 88(3) of the EC Treaty, the Government of Gibraltar corporation tax reform (hereinafter the reform).

II. DETAILED DESCRIPTION OF THE MEASURE

(4) The description that follows takes account of the modifications to the reform proposals made by the Government of Gibraltar in response to the opening of the formal State aid investigation procedure. These modifications were set out in the United Kingdom's letter of 16 December 2002. They are summarised in paragraphs 27 to 30 below.

⁽¹⁾ OJ C 300, 4.12.2002, p. 2.

⁽²⁾ See footnote 1.

Objective of the reform

- (5) The stated aim of the reform is to adopt a new general corporate tax scheme that does not involve any element of State aid, to provide legal certainty for companies active in Gibraltar and to ensure sufficient revenue for the Gibraltar Government from company taxation. The reform is also intended to deliver compliance with the EU Code of Conduct for Business Taxation⁽³⁾ (hereinafter the Code of Conduct) and with the OECD Report on Harmful Tax Competition⁽⁴⁾. According to the Government of Gibraltar, an essential element of the reform is the general abolition of taxation on company profits, with the exception of top-up taxes on utilities and financial services activities. The reform proposals are based on the complete elimination of all discrimination between resident and non-resident, or domestic and non-domestic economic activity, i.e. the elimination of so-called ring-fencing provisions. The exempt and qualifying companies legislation will be abolished. Thus the formal distinction between the so-called offshore and onshore economy will be removed.
- (6) The general tax system to be introduced under the Reform will be a payroll tax, a business property occupation tax and a registration fee, applicable to all Gibraltar companies. The Gibraltar Government estimates that its current very limited but essential income from corporate taxes of GBP 13,7 million (about EUR 20 million), representing 9,25 % of total Government revenue, will be largely maintained under the new system based on these three general taxes applicable to all Gibraltar companies. This compares with personal income tax of GBP 53,6 million (about EUR 77 million) representing 36,3 % of revenue. Income from top-up taxes on financial services and utilities activities will be limited, but will likely make up any shortfall in corporate tax revenue under the general system.

Implementation

- (7) The reform will be implemented through:
- the Companies (Payroll Tax) Ordinance,
 - the Companies (Annual Registration Fee) Ordinance,
 - the Rates Ordinance,
 - the Companies (Taxation of Designated Activities) Ordinance.
- (8) The legislation will be implemented by the Gibraltar Government after it is passed by Gibraltar's Parliament (the House of Assembly). As part of the reform, the Companies Taxation and Concessions Ordinance (the

exempt company legislation) and the Income Tax (Qualifying Companies) Regulations (the qualifying company legislation) will be repealed with immediate effect. The income tax ordinance will be amended to repeal or duly amend all provisions which charge companies to income tax.

- (9) The rules will be administered by the Gibraltar Commissioner for Income Tax. All companies in Gibraltar will be required to file public accounts with the Companies Registry in accordance with the 4th and 7th EC Company Law Directives. All companies in Gibraltar with a tax liability will be required to file tax accounts with the Commissioner and stringent measures will also be introduced in order to ensure compliance with such obligations. For the first time in Gibraltar, a tribunal to deal specifically with company taxation matters (to be called the Companies Taxation of Designated Activities Tribunal) will be set up whose purpose will be to exercise such powers relating to appeals and other matters arising from the operation of the new legislation. Such powers will include the power to require a company to make available for inspection by the Tribunal all such books, accounts, employment records or other documents which, in the opinion of the Tribunal, contain or may contain information relating to the subject matter of the proceedings.

Payroll tax and business property occupation tax

- (10) Profits-based taxation will be replaced by a general payroll tax pursuant to which all Gibraltar companies will be liable in the amount of GBP 3 000 per employee each year. Every 'employer' in Gibraltar will be required to pay payroll tax for the total number of its full-time and part-time 'employees' who are 'employed in Gibraltar'. The central terms used will be defined as follows:
- *Employer* is any company incorporated or registered under any law in force in Gibraltar paying emoluments on its own account or making payments to any person in respect of service or services provided by an individual who is deemed to be an employee.
 - *Employee* is any individual to whom emoluments are paid or are payable including directors other than directors who exercise no function other than that of a director and part-time and casual labour.
 - *Employed in Gibraltar* means any employee employed in Gibraltar who works in or from Gibraltar or is based in Gibraltar.

⁽³⁾ OJ C 2, 6.1.1998, p. 1.

⁽⁴⁾ Approved by the OECD Council on 9.4.1998.

- (11) The Gibraltar Government will introduce detailed anti-avoidance rules intended to eliminate all possibility for abuse. This will include introducing the concept of 'deemed employee' and rules targeted at employees who may be carrying out an activity outside Gibraltar. The combined effect of the meaning of the terms 'employees' and 'employed in Gibraltar' will be to cover, essentially, all employees physically present in Gibraltar. According to the United Kingdom, of a total of 14 000 employees in Gibraltar, 10 100 are employed by the private sector.
- (12) All companies occupying property in Gibraltar for business purposes will pay a business property occupation tax at a rate equivalent to a percentage of their liability to the general rates charged on property in Gibraltar (currently expected to be a rate of 100 %).
- (13) Liability to payroll tax together with business property occupation tax will be capped at 15 % of profits. Thus, companies will only pay the payroll tax and the business property occupation tax if they make profit, but in an amount not exceeding 15 % of profits.
- (14) The vast majority of companies in Gibraltar will be subject to the payroll tax and to the business property occupation tax only. According to the Gibraltar Government, it is not possible to estimate the number of companies in Gibraltar that will accrue an estimated payroll tax and business property occupation tax liability of in excess of 15 % of profits and, as a result of the cap, pay tax at a rate corresponding to 15 % of profits as this will vary year-on-year and will depend on the individual circumstances of each company.

Registration fee

- (15) The Gibraltar Government will replace the fees currently paid by companies in Gibraltar (of an amount of approximately GBP 40 per annum) with a registration fee applicable to all Gibraltar companies of GBP 150 per annum for companies not intended to generate income and of GBP 300 per annum for companies intended to generate income.

Taxation of designated activities (top-up or penalty taxes)

- (16) Certain designated activities, namely financial services and utilities, will be subject to an additional top-up or penalty tax on profits generated by such activities. The respective top-up taxes will apply only to profits that can be allocated to such designated activities. The United Kingdom estimates that of approximately 29 000

companies in Gibraltar, 179 will be liable to the top-up tax on financial services activities, whilst 23 will be liable to the top-up tax on utilities activities.

- (17) The definition of 'financial services' company includes, *inter alia*:
- credit institution,
 - moneylender,
 - investment firm, dealer, broker, adviser or manager,
 - life assurance and collective investment scheme intermediary,
 - collective investment scheme operator or trustee,
 - insurance broker, agent or manager,
 - professional trustee,
 - company manager,
 - bureau de change,
 - auditor.

The definition of financial services also includes companies that advise or provide services in respect of finance, law, tax or accounting.

- (18) The definition of 'utilities' activities encompasses the provision of services, equipment or premises for:
- telecommunications (voice telephony, fax communications, data communications and transmissions, callback and call through services),
 - electricity (generation, distribution and supply),
 - water (production, import/export, supply of either potable or salt water),
 - sewage (provision, operation, management, maintenance, repair, replacement, modification, renovation, replacement, renewal of sewers and disposal/treatment of sewage),
 - petroleum (collection, production, import/export, treatment improvement, pumping, storage, distribution and supply of fuel oil).

- (19) Financial services companies will, in addition to the payroll and property taxes, be charged a top-up tax on profits from financial services activities at the rate of 8 % of profit (calculated in accordance with internationally accepted accounting standards). Financial services companies will have their annual liability to payroll tax, business property occupation tax and top-up tax capped, in aggregate, at 15 % of profit.

- (20) Utility companies, in addition to the payroll and property taxes, will be charged a top-up tax on profits from utility activities at the rate of 35 % of profit (calculated in accordance with internationally accepted accounting standards). Such companies will be permitted to deduct payroll tax and business property occupation tax from their liability to top-up tax. Although utilities companies will also have their annual liability to payroll tax and business property occupation tax capped, in aggregate, at 15 % of profit, the operation of the utilities top-up tax will ensure that these companies always pay a tax equal to 35 % of profits.
- (21) Liability to the top-up taxes will be determined on the basis of the relevant activities. The same rules will apply to financial services and to utilities activities. Accordingly, for 'hybrid' companies:
- a company engaged in a utilities activity and in a general activity will have the profits it derives from its utilities activity taxed at 35 %,
 - a company engaged in a financial services activity and in a general activity will have the profits it derives from its financial services activity taxed at 8 %,
 - a company engaged in a utilities activity and in a financial services activity will have the profits it derives from its utilities activity taxed at 35 % and the profits from its financial services activity taxed at 8 %.
- (22) The same distinction will be made in respect of unearned profits, notably, any profits made by a hybrid company from any rents, royalties, premiums, any other profits arising from real property in Gibraltar, dividends, interests or discounts. Such unearned profits will be taxed at the 8 % or 35 % top-up rate to the proportion which the profits and gains from the financial services or utilities activities bears to the whole of the trading profits or gains made by the company.

Other features of the reform

- (23) Under the Rates Ordinance, certain premises are exempt. These exempt premises include courts of justice, churches, cemeteries, public gardens, uninhabitable military defences, civil defence premises, lighthouses and the Gibraltar Museum. Such premises will consequently be exempt from the additional rate, the business property occupation tax. The Gibraltar authorities may also reduce or remit the payment of any general rate where this 'is in the interests of the development of Gibraltar'.
- (24) Both the Companies (Payroll Tax) Ordinance and the Companies (Taxation of Designated Activities) Ordinance

lay down rules for the calculation of profits or gains. These rules are necessary for the application of the cap of 15 % of profits on the liability for Payroll tax and for the purposes of determining the liability to the top-up tax on financial services and activities. Profits are computed in accordance with Accounting Standards in the United Kingdom as modified for use in Gibraltar by the Gibraltar Society of Chartered and Certified Accountancy Bodies.

- (25) For the purposes of determining profits, capital gains and capital losses are excluded.
- (26) For the purposes of determining profits, the following capital allowances, *inter alia*, are deductible:
- in respect of entertainment centres, mills, factories and other premises, 4 % per annum;
 - in respect of plant and machinery, up to GBP 30 000 for the first year in which the expenditure is made (up to GBP 50 000 for computer equipment), and 33 1/3 % of the remainder in subsequent years.

Modifications to the reforms originally notified

- (27) In response to the opening of the formal State aid investigation procedure, the following changes have been made by the Government of Gibraltar to the tax reform proposals.
- (28) The provisions which would cap, at GBP 500 000, the combined liability to payroll tax, business property occupation tax and, where applicable, the 8 % top-up tax on financial services activities, have been removed. The removal of the quantum cap will be accompanied by a lowering of the top-up tax for financial services companies from 8 % of profits to a single but as yet undetermined rate in the range of 4 to 6 %.
- (29) The provision which would exempt certain premises of the Upper Rock of Gibraltar from rates (and consequently from business property occupation tax) has been removed.
- (30) The provisions which would exempt the following classes of income for the purposes of determining profits have been removed:
- any interest received by any chargeable company in respect of any loan made by it to any person for the purpose of financing investment in development projects designed to promote the economic and social development of Gibraltar, where the terms and conditions of such loan have been approved for this purpose, in writing, by the Gibraltar authorities;

- the interest payable on any loan charged on the Consolidated Fund (i.e. Gibraltar Government finances) from the date and to the extent specified by an approval granted by the Gibraltar authorities.

III. GROUNDS FOR INITIATING THE PROCEDURE

(31) In its evaluation of the information submitted by the United Kingdom in the notification, the Commission considered that a number of features of the reform proposals would be liable to confer an advantage on Gibraltar companies. In particular:

- the entire system would grant an advantage to Gibraltar companies compared with UK companies (regional selectivity),
- the requirement to make a profit before incurring any payroll and property tax liability would confer an advantage on unprofitable companies;
- the 15 % cap on liability to payroll and property taxes would confer an advantage on those companies to which it applies,
- the GBP 500 000 cap on liability to payroll and property taxes would confer an advantage on those companies to which it applies,
- some technical features of the reform would be liable to give rise to State aid (certain exemptions from rates/property tax and exemptions for certain specified interest income for the purposes of determining profits).

(32) The Commission also considered that these advantages would be granted via State resources, would affect trade between Member States and would be selective. The Commission also considered that none of the exceptions on the general prohibition on State aid provided for in Articles 87(2) and 87(3) of the EC Treaty applied. On these grounds the Commission had doubts as to the compatibility of the measure with the common market and therefore decided to initiate the formal investigation procedure.

IV. COMMENTS FROM THE UNITED KINGDOM

(33) The observations of the United Kingdom can be summarised as follows.

(34) The Commission's objections to the reform proposals as set out in the decision to open the formal State aid

investigation procedure fall under six headings, all based on specificity:

- the fact that companies are liable to taxes only if they make profits would confer an advantage on unprofitable companies compared with profitable ones,
- the operation of the 15 % profits-based cap would benefit those undertakings to which it applies by reducing their liability to payroll tax, business property occupation tax, and financial services top-up tax, if applicable,
- the operation of the GBP 500 000 quantum cap would benefit those undertakings to which it applies by reducing their liability to payroll tax, business property occupation tax, and financial services top-up tax, if applicable,
- the exemption for certain properties on the Upper Rock confers a tax advantage on undertakings occupying such premises,
- the two provisions exempting interest on certain loans from the calculation of profits for purposes of the corporate tax rules confer an advantage on certain companies,
- several features of the proposed tax scheme result in a lower tax burden for companies in Gibraltar when compared with companies in the United Kingdom and therefore constitute an advantage for the former (regional specificity).

(35) Neither the United Kingdom nor the Government of Gibraltar shares the Commission's doubts as to the possible State aid character of certain elements of the reforms. However, without prejudice to whether the original reform proposals contain any element of state aid, the Government of Gibraltar will:

- drop the GBP 500 000 cap from the planned new tax system,
- remove the provision to exempt from rates (and hence from business property occupation tax) certain properties on the Upper Rock of Gibraltar,
- remove the provision to exempt certain interest income for the purposes of determining profits.

(36) The three remaining objections do not give rise to State aid.

Not taxing unprofitable companies is not State aid

- (37) No selectivity arises from the absence of liability for tax where no profits are made. It is true that neither the payroll tax nor the business property occupation tax is payable if the taxpayer company has no profit. Profit is a *sine qua non* of liability. But it is not the tax base. It is a condition precedent for liability to the tax in question. This is natural, since a tax on a company which makes no profit becomes a tax on the capital of the company. Contrary to what the Commission claims, the 'operative event' under the payroll tax and the business property tax is not profit. The 'operative events' are the profitable employment of an employee and the profitable use of property. It is not the case that payroll or occupation of business premises are secondary factors. The logic of the proposed scheme is dual — employment and occupation constitute the tax base, while profitability constitutes a lower quantitative threshold to liability. Both the tax base and the quantitative limitation are of a general nature, applicable in the same way to all companies regardless of their size or the sector in which they are active.
- (38) Even if the quantitative limitation were selective, it follows from the nature and logic of the planned corporate tax scheme that companies are only taxed if they make money from which to pay the taxes. The Commission has itself conceded in point 25 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation⁽⁵⁾ (hereinafter the Notice) that such selectivity is justified by the nature of the tax system. This is as valid for a tax system which is based on the profitable use of labour and property as it is for a 'pure' profit-based system in which companies that make no profit are not taxed. A parallel cannot be drawn with social security contributions as they serve a different purpose unrelated to whether a company is profitable.

Limiting tax to 15 % of profits is not State aid

- (39) The proposed limitation is not selective. In order to constitute State aid, a tax measure must be selective in favouring certain companies and/or sectors over others. The application of the 15 % cap will depend on the relationship between profit and the number of employees in a given year. This will potentially benefit all companies, whether large or small and in all sectors of the economy, which in a given year reach that level of profit in relation to payroll. A specific group of companies to which the limits on tax liability will apply cannot be

defined and in any case the group will change year-on-year. The rules are generally applicable and available to all Gibraltar companies. The Commission itself explains in point 14 of the Notice that the fact that some firms or some sectors benefit more than others from a tax measure does not necessarily mean that the measure is caught by the State aid rules.

- (40) The Government of Gibraltar has devised a general tax scheme based both on the simple factors of property and payroll, and of the existence of profitability. At the same time, it has decided that it wishes to apply the tax in a regressive way. In effect, there are two bands of tax, based on overall profit. Where the tax bill is below 15 % of overall profits, the full tax is paid. Where the tax bill exceeds 15 % of overall profits, a zero rate is applied as regards the surplus. Such a decision is also fully in line with the freedom of the Government of Gibraltar to devise its tax regime without engaging the State aid rules.
- (41) The Government of Gibraltar wishes to limit the maximum tax bill of companies under the new system. If there are different tax rates in different 'bands' (when the tax base is different in size) one tax rate is always lower than another, and therefore in some sense confers an advantage on the taxpayers who are lucky enough, or who are able to arrange their affairs, to pay the lower of the rates. But this does not create a State aid.
- (42) Even if the 15 % cap confers a specific advantage on the companies to which it applies, such a limit would still be justified by the nature or general scheme of the system of which it is a part. All direct taxes in Gibraltar must find the optimal balance between maximising tax revenue and limiting the maximum liability of individual taxpayers so that it does not exceed their ability to pay. It may therefore be necessary to make the direct taxes regressive at some level. Some limit of this kind is essential because of the specific circumstances of the Gibraltar economy, such as its limited geography and labour. The economy of Gibraltar is small and more vulnerable than most to shocks created by the natural and fair tax competition between jurisdictions. Companies may not be able to afford to leave a large Member State as easily as they can move out of a tiny economy like Gibraltar. Without the tax base being subject to quantitative limitations the principal objective inherent in any tax system — which is to ensure the necessary revenue to meet public expenditure — might be endangered by market fluctuations.

⁽⁵⁾ OJ C 384, 10.12.1998, p. 3.

- (43) Labour in Gibraltar is a scarce taxable asset. However, a tax on labour cannot follow the same progressive principle and logic as a tax on profit. A tax on labour must at the same time take into consideration both the ability of a company to create taxable income and the need to ensure the necessary stability in the workforce. Given the cyclical nature of the economy and corporate profitability, a labour tax that does not contain a regressive element could trigger mass layoffs and instability in times of cyclical market fluctuations or depression. As a very small economy, random variations resulting from overall economic fluctuations can have a much larger proportional effect in Gibraltar than in a larger economy. The internal logic of the proposed payroll tax system therefore justifies capping payroll tax liability in relation to profits.
- (44) In contrast, utilities would have a corporate tax liability of 35 % of profits. This is justified by the nature and logic of the system, as labour stability is ensured because utilities are closely linked to the territory served and, as a direct result of the small size of the Gibraltar market, occupy a natural monopoly or semi-monopoly position making them highly profitable. The same need for a regressive element in the tax applied to utilities does not therefore arise.

Regional specificity

- (45) There is no legal authority for the suggestion that where there are two separate genuinely autonomous tax jurisdictions in one Member State, the rates of tax in the two jurisdictions can be compared, and the lower rate of tax regarded as a State aid merely because it is lower than the other tax rate. This would mean that there would be a State aid every time an autonomous regional tax authority, which is responsible for managing public spending in the region, chooses on the basis of democratically expressed public preferences to cut spending and reduce taxes. The issue has been discussed by the Advocate General⁽⁶⁾ but has never been addressed by the Court as the cases concerned were withdrawn. In one of a series of more recent cases concerning the Basque provinces, the Court of First Instance stated that the contested decision had no effect on the competence of Álava to adopt general tax measures applicable to the whole of the region⁽⁷⁾.
- (46) Such regional variations between autonomous jurisdictions are not State aid within the meaning of Article 87 EC. A State aid measure is only present if State resources are used through a tax foregone. This assessment presupposes that there is a rate of tax for a certain activity that applies across the Member State, which is

not the case where taxation is subject to territorial autonomy, as opposed to being set in a uniform way and then varied according to location. Similarly, the analysis of a selective advantage relies on the assumption that there is a level of tax that would otherwise apply to a certain activity in the relevant territory.

- (47) The State aid criteria assume that the supposed aid may be compared with a standard or normal tax rate. A supposed State aid measure can only be present if it is in some sense an exception to or an exemption from a standard which would otherwise be applicable to the company receiving it. A tax rate to which the recipient of the supposed aid measure would not be subject — not even if the currently applicable rate allegedly constituting aid was abolished — cannot be a valid standard of comparison for the purposes of deciding whether ‘aid’ is present or not. The only possible standard of comparison for the purpose of assessing selectivity is the tax situation which would otherwise apply in the same tax jurisdiction. Where such a regime is devised locally, as in Gibraltar, this is not meaningful.
- (48) The Commission’s position would appear to make it impossible for any tax jurisdiction which did not cover the whole Member State to adopt any tax rate except the one applicable in the other tax jurisdiction in the State. It could not adopt a lower rate, because that would automatically constitute State aid, merely by comparison. But nor could the tax jurisdiction adopt a higher tax rate, because the tax rate in the rest of the State would automatically become State aid. This would make almost every exercise of fiscal autonomy into a measure creating State aid, either in the jurisdiction in question or, still more absurdly, elsewhere in the Member State. Differentiations in direct business taxation frequently exist within Member States as a consequence of the various layers of territorial subdivision even at the lowest municipality levels. In this context, a parallel can be drawn with the WTO Agreement on Subsidies and Countervailing Duties where it is clearly stated that ‘the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy’ for purposes of the rules prohibiting the grant of such subsidies (Article 2.2).
- (49) If the United Kingdom and Spain were to enter into an agreement to establish joint sovereignty over Gibraltar, the Commission’s position on regional specificity would have the nonsensical effect that the prevailing tax rate in Gibraltar would have to equal both the prevailing tax rate in the United Kingdom and the prevailing tax rate in Spain. Otherwise State aid would be present in the jurisdiction applying the lower rate.

⁽⁶⁾ Opinion in Joined Cases C-400/97, C-401/97 and C-402/97, [2000] ECR I-1073.

⁽⁷⁾ Joined Cases T-92/00 and T-103/00, [2002] ECR II-1385, p. 27.

- (50) The Commission appears to suggest that if there are taxes in two separate tax jurisdictions in the same State, even if the formal percentage tax rate is the same, the fact that different exemptions apply or different allowances are given would mean that the companies getting the allowance or exemption would be in receipt of aid if, all other things being equal, they would have paid a higher rate of tax in the other jurisdiction. However, the Commission's theory is inappropriate to the facts of the Gibraltar case. Comparisons between the tax base or tax structure of a company profits tax can sometimes be made with a company profits tax in another jurisdiction. But it is simply impossible to make useful or meaningful comparisons between tax systems that are completely different because the tax base is not the same.
- (51) If maintained, the Commission's reasoning on regional specificity would not respect the fundamental principle of subsidiarity in EU law and could constitute a misuse of its powers. If the Member State concerned can function with two or more autonomous tax jurisdictions competing for corporate tax revenue within its territory without suffering significant distortive effects on competition, it does not under the subsidiarity principle of the EC Treaty become a Community task to intervene in the constitutional arrangements of the Member State. The Commission seems in fact to be seeking to use the State aid rules to pursue tax uniformity within EU Member States.
- (52) The Commission may suggest that a State cannot plead its own national law, even constitutional law, to avoid its obligations under Community law. But this principle is irrelevant to the issue of selectivity. The question of selectivity arises because it is suggested that a given tax provision is more favourable than a more general tax rule which would otherwise apply. This cannot alter the fundamental right of a Member State to organise its tax system so that autonomous tax regions can raise in an independent and non-discriminatory way the necessary revenues to fund public tasks. There can be no State aid on the basis of regional specificity in circumstances where, as in Gibraltar, there is a genuinely autonomous tax jurisdiction which determines its tax system independently, and in which taxes imposed by the other tax jurisdictions in the State are not payable.
- (53) The Commission's position would seriously interfere with the possibilities for Member States to decentralise their powers and thereby establish the necessary fiscal autonomy in the regions to cover the expenditures incurred in the exercise of such decentralised powers. It would make it impossible for any region or tax jurisdiction to increase or reduce its taxes without creating a State aid, either in its own region (if tax was reduced) or elsewhere (if tax was increased). It would be absurd to suggest that the State aid rules should be interpreted in such a way as to make it impossible for a Member State to decentralise taxing powers effectively when it amended its constitution.
- (54) The Commission states that in the absence of a specific company taxation regime in Gibraltar, companies in Gibraltar would be subject to the standard United Kingdom tax regime. This represents a serious misunderstanding of the constitutional position of Gibraltar. The standard United Kingdom tax regime applies in the United Kingdom. It does not apply in other tax jurisdictions. It is not a normal or residual regime which applies in the absence of special provisions. The fact that the United Kingdom is responsible for the foreign relations of Gibraltar does not mean that any provisions of United Kingdom law would ever apply automatically in Gibraltar.
- (55) Gibraltar is an overseas territory of the United Kingdom. It forms part of Her Majesty the Queen's Dominions but is not part of the United Kingdom. Gibraltar is not a region of the United Kingdom in any sense. It has its own constitutional order including its own institutions distinct from those of the United Kingdom. Gibraltar also adopts its own legislation. In respect of defined domestic matters, Gibraltar is autonomous and self-governing. Gibraltar is an economically self-sufficient autonomous tax jurisdiction. It receives no financial assistance from the United Kingdom and United Kingdom tax laws do not apply to Gibraltar. The Gibraltar Government is required to generate sufficient revenue through taxation to finance its expenditure autonomously, and is competent to propose to the Gibraltar legislature and to enforce within Gibraltar corporate taxation laws. The Gibraltar and United Kingdom economies are two entirely distinct and separate economies. Accordingly, Gibraltar is, in every relevant way, totally distinct from the United Kingdom, notably in constitutional, political, legislative, economic, fiscal, revenue-raising and geographical terms.
- (56) In the same way as Gibraltar is not part of the United Kingdom, and indeed for that reason, Gibraltar is not part of the United Kingdom for Community law purposes. Community law applies to Gibraltar by virtue of Article 299(4) of the EC Treaty and not Article 299(1). The following points illustrate Gibraltar's special, separate status and the fact that Gibraltar cannot be considered to be a region of the United Kingdom for State aid purposes:
- the extent of Gibraltar's Community membership is different to that of the United Kingdom's. In particular, Gibraltar does not form part of the only fiscal territory which has been defined at Community level (i.e. the Community VAT territory),

- European Community law is given effect in Gibraltar by virtue of the European Communities Ordinance 1972 — primary legislation passed by Gibraltar's Parliament, and not by virtue of the European Communities Act 1972 which gives effect to Community law within the United Kingdom,
- the Gibraltar legislature implements EC directives within Gibraltar independently of the United Kingdom's own implementation,
- whenever Community law requires the setting up of competent authorities, Gibraltar sets up its own competent authorities, distinct from those set up for the same purpose in the United Kingdom, and
- until the European Court of Human Rights' judgment in the *Matthews* case, Gibraltar was excluded from participation in elections to the European Parliament even though that exclusion was operated by Annex II to the 1976 Act on Direct Elections which was termed as follows: 'The United Kingdom will apply the provisions of this Act only in respect of the United Kingdom.'

General comments

- (57) The Commission appears to fear that Gibraltar's proposed new corporate tax system might perpetuate harmful tax competition. Both the United Kingdom and the Gibraltar Governments believe that the proposed tax reform is compatible with the Code of Conduct on business taxation and the OECD report on harmful tax competition. Harmful tax measures typically involve lack of transparency, lack of exchange of information, and a more favourable tax treatment of non-resident companies compared with resident ones. With the proposed reform Gibraltar will eliminate all such harmful aspects of the current exempt and qualifying companies taxation. Even if Gibraltar were to be considered a favourable tax territory, this concern cannot be addressed through the application of the State aid rules when no State aid is involved.

V. COMMENTS FROM INTERESTED PARTIES

- (58) Observations were received from the Government of Gibraltar, Spain, the Spanish Confederation of Business Organisations and the Åland Executive.

The Government of Gibraltar

- (59) The Government of Gibraltar is aware of, and fully endorses, the arguments put forward by the United

Kingdom⁽⁸⁾. The additional points made by the Government of Gibraltar in its separate observations can be summarised as follows.

- (60) The Gibraltar Government has no power to tax United Kingdom companies. Similarly, the United Kingdom Government has no power to tax Gibraltar companies. Gibraltar's tax laws are enforced exclusively by the Gibraltar authorities.
- (61) The objective of the reform is to implement a corporate tax regime which complies both with the State aid rules and with the Code of Conduct. The reform is also part of the wider aim to secure compliance with international standards for financial regulation and supervision and to obtain good standing in the international financial community. Gibraltar had previously been found to be a 'tax haven' by the International Monetary Fund (IMF), the Financial Action Task Force (FATF) and the OECD. The IMF and FATF Reports on Gibraltar⁽⁹⁾ confirm Gibraltar's compliance with the main international standards on financial regulation and supervision. The Gibraltar Government's commitment to the OECD⁽¹⁰⁾ delivers compliance with the requirements for exchange of information and transparency. Gibraltar's tax reform, as amended, delivers de facto compliance with the EU Code of Conduct. The reform also delivers compliance with the State aid rules. Clearance under State aid rules remains the last obstacle in the way of ensuring that Gibraltar, as required by the international community including the European Union, has now addressed all the perceived evils of a tax haven.
- (62) Two Gibraltar measures, the exempt and qualifying company regimes, were among eleven measures into which the Commission opened formal State aid investigations on 11 July 2001. All 11 were among the large number of fiscal measures identified as harmful by the Code of Conduct Group⁽¹¹⁾. They were singled out under the Commission's powers to enforce State aid rules, sometimes by applying new interpretations of the selectivity criterion, essential to the notion of State aid. The mere fact that a tax regime is listed as harmful under the Code of Conduct does not, however, necessarily mean that it involves State aid (point 30 of the Notice). By proceeding in this way, the Commission has embarked on a strategy which could easily lead to the unwanted consequence for competition policy that tax measures which constitute a significant distortion of competition to the detriment of the effective functioning of the single market are left intact for political reasons

⁽⁸⁾ See paragraphs 33 to 57.

⁽⁹⁾ Published, respectively, in October 2001 and on 22 November 2002.

⁽¹⁰⁾ Public commitment made on 27 February 2002.

⁽¹¹⁾ Report of Code of Conduct Group (Business Taxation) to the Ecofin Council on 4 December 2001 (14467/01 — FISC 249, 27.11.2001).

— the Commission refrains from using appropriate tax harmonisation measures — while less harmful tax systems are being persistently challenged by the Commission in a way that does not respect equality of treatment. In order to achieve a common level of business taxation across the European Union, if that is the objective, the Commission must resort to tax harmonisation measures. Otherwise an abuse of powers may be involved. Point 15 of the Notice confirms that differences between tax systems as such are not regulated by the State aid rules, but should rather be addressed under Articles 95 to 97 EC.

(63) The new system will address the concerns regarding possible harmful tax competition. First, the reform abolishes any distinction between resident and non-resident companies (so-called ring-fencing) which has been at the heart of the Code of Conduct exercise, the OECD Report on Harmful Tax Competition, and the selectivity aspect of the exempt and qualifying companies legislation. The reform applies in a uniform way to all companies registered in Gibraltar. Second, it delivers transparency of the system because all companies will be required to file tax accounts. Finally, financial services companies in Gibraltar will not be exempted from taxation, but will be subject to an extra top-up tax on profits attributable to such activities.

(64) The 15 % profits-based cap and non-taxation of companies making no profit are of general application and do not constitute material selectivity. The simple fact that one company may benefit from a general rule in a given year as compared to another company in the same tax jurisdiction cannot be sufficient to constitute a State aid under the rules of the EC Treaty. This result is clearly not contemplated by the points 13 and 14 of the Notice.

(65) Regional selectivity could arise if there was a tax, applicable throughout the whole State, but regional parliaments or authorities had power to reduce the rate of that tax (or to give exemptions from it) in their regions. Selectivity issues therefore can arise if the taxing powers of the region said to be giving aid are in some sense secondary or supplementary powers to modify a standard or residual regime. This may perhaps be the position in some other Member States, but it is not the position in Gibraltar. The situation is entirely different if the tax jurisdiction said to be giving aid is, and has been at all relevant times, a genuinely autonomous tax jurisdiction which determines its tax system independently under its own budgetary responsibility, and in which taxes imposed by the other tax jurisdictions in the State are not payable.

(66) Without prejudice to whether generally applicable deviations from a national norm adopted by a fully auton-

omous region (in contrast to a region acting by ad hoc delegation of powers) without any link to the central budget would constitute State aid or not, the Gibraltar tax reform is also in that respect fundamentally different. Not only is there a genuine, *sui generis*, autonomy in the territory, but this autonomy is used to devise independently a wholly different and separate system which is not based, in any way, on the United Kingdom scheme or norms. It is thus completely inappropriate and irrelevant to compare the Gibraltar tax rules to the rules which would apply had the same tax subject been based in the United Kingdom.

(67) The Court of First Instance (CFI) has recently reviewed the Commission's decisions to open formal procedures in cases concerning fiscal measures adopted pursuant to some degree of regional autonomy granted to the Basque Provinces under the Spanish constitution. However the Basque Provinces applied their fiscal powers to deviate from the national tax system by granting tax relief from otherwise applicable rules. In its preliminary conclusions that the tax measures in question were selective and could constitute illegal State aid, the Commission did not rely on the fact that they applied only to part of the Spanish territory. The CFI specifically noted in one case⁽¹²⁾ that the Commission's decision to open procedures 'has no effect on the competence of the Territorio Histórico de Álava to adopt general tax measures applicable to the whole of the region concerned'.

(68) The reform is not regional in scope for the purposes of the State aid rules because the fiscal measures in question, which constitute the entire and exclusive corporate tax system, would apply in the same way throughout the relevant tax jurisdiction.

The Åland Executive

(69) The comments of the Åland Executive can be summarised as follows.

(70) In deciding that the reform is likely to constitute State aid, the Commission states that the possible existence of regional selectivity is taken into account in order to reach its conclusions. The Commission cites previous decisions, including the decision to open the formal State aid investigation procedure on captive insurance companies in the Åland Islands. This invitation to submit comments refers to the possible existence of regional specificity. But the reference was dropped from the Commission's final decision. Therefore the Åland case cannot serve as an example of regional specificity or selectivity. The account of previous Commission practice should refer only to the Commission's final decision.

⁽¹²⁾ See footnote 7.

- (71) If a self-governing region has sole power to legislate in matters relating to direct corporate taxation, and that region introduces a tax measure, the measure has to be assessed and authorised in accordance with the same principles that would apply if it were taken by a Member State. The self-governing region is to be regarded as a separate jurisdiction in those areas where legislative power lies with its legislature exclusively. This means that the compatibility of a tax measure with the rules on State aid is to be judged in the same way whether it is taken by a Member State or by a self-governing region. Any other conclusion would make it impossible for a region under self-government to exercise its legislative power in a way that differed from the rest of the Member State. Accordingly, a tax measure that is plainly a general one within a self-governing region is not to be regarded as selective, and does not constitute State aid for purposes of Article 87(1) of the EC Treaty, in so far as the region has exclusive power in tax matters, irrespective of whether the tax charged in the area is different from that in the Member State to which the region belongs. Any other interpretation would jeopardise the region's authority in tax matters.

Spain

- (72) Spain essentially endorses the Commission's preliminary analysis of the reform set out in the invitation to comment ⁽¹³⁾. The additional comments made by Spain can be summarised as follows.
- (73) Gibraltar's tax system is an extremely important issue for Spain, given the geographical contiguity of the two territories and the serious detriment it is causing to Spanish public finances. The unfair competition from Gibraltar can be described as harmful since both under the present system and under the proposed new arrangements the tax burden on businesses and investments is much lower there than in Spain. The reform would continue to be harmful to the Spanish tax system since it would maintain a level of taxation substantially lower in Gibraltar than in Spain, where the standard rate of corporation tax is 35 %, and would differ greatly from the tax system in the United Kingdom, creating a risk that businesses would relocate to Gibraltar in order to benefit from more favourable tax arrangements. It is likely that most firms in Gibraltar would pay less than the maximum liability of 15 %, at least 15 to 20 percentage points lower than in either Spain or the United Kingdom.
- (74) For the 28 800 companies not liable to the top-up taxes on utilities and financial services activities, the proposed tax system is not in fact an overall corporation tax on business profits but a combination of various individual taxes subject to ceilings which render the tax liability either extremely small or non-existent (the reform is referred to as 'zero rate tax' in Gibraltar). Most of these companies can be regarded as letterbox or asset management companies and provided that they generated profits they would be liable to GBP 3 000 per employee per year. Since most of them will have only one employee (an accountant or auditor), usually part-time, they would pay only a maximum of GBP 3 000 per year in tax if they do not occupy property, which is usually the case.
- (75) The introduction of the registration fee would discriminate in tax terms in favour of companies that do not generate profits (GBP 150), such as letterbox or asset management companies, in comparison with active companies (GBP 300). This would be a clear example of maintenance of the status quo in favour of that type of company.
- (76) The financial services sector accounts for 30 % of gross domestic product. The tax on the profits of financial services firms would not constitute a genuine corporation tax since those firms' combined liability by way of payroll tax, business property occupation tax and top-up tax would not exceed 15 % of their profits or GBP 500 000.
- (77) Offshore companies would remain outside the scope of two of the new taxes: around 8 000 companies without any physical presence in Gibraltar would thus be exempt. The reform leaves intact the tax situation of businesses with no staff or premises in Gibraltar.
- (78) Gibraltar is a region which, far from being dependent on aid or incentives designed to boost economic development, enjoys enviable financial health.
- (79) As far as the selective nature of any aid is concerned, the top-up tax on profits would be levied only on companies providing certain financial services and utilities. Such specificity cannot derive from or be justified by the nature or general scheme of the system ⁽¹⁴⁾. Companies in sectors where capital is extremely mobile, which employ very few staff, would basically incur only the payroll tax, and as such their liability would be capped. This would confer an advantage exclusively on such firms, whose costs would be reduced and whose profitability would be increased in relation to their competitors.

⁽¹³⁾ See footnote 1.

⁽¹⁴⁾ This exception was recognised by the Court in Case 173/73 [1974] ECR 709.

(80) The Advocate General of the European Court of Justice maintained ⁽¹⁵⁾ that all measures which involve a competitive advantage, including a financial advantage, 'limited to companies which invest in a particular area of the Member State are attributable to the State in question and cannot therefore, by definition, in the scheme of the fiscal system of the State, be understood as measures of a general nature'. He also took the view that 'the fact that the measures at issue were adopted by regional authorities with exclusive competence under national law' was 'merely a matter of form', and 'not sufficient to justify the preferential treatment reserved to companies which fall within the scope' of regional laws.

(81) Although the stated aim of the planned reform is to adopt a new corporation tax scheme that does not involve any element of State aid, it cannot be exempted from the scope of Article 87 on the grounds that it is a tax measure or pursues company-law objectives. The main effects of the reform would be immediately to distort competitive conditions in the area and to encourage businesses to relocate. The scheme would significantly benefit businesses located in Gibraltar since the effective rate of taxation in that territory would be much lower (or even non-existent) in comparison with the rate applied in the United Kingdom. By establishing a clear reduction in the tax burden for the businesses concerned, such regional selectivity would distort competition and affect trade between Member States.

(82) The technical mechanism of the payroll tax can be regarded as harmful within the meaning of point B of the Code of Conduct, in addition to the fact that the Gibraltar tax regime as it stands creates a tax burden that is significantly lower than that generally imposed in the United Kingdom. The reform would act as a disincentive to substantial economic presence in Gibraltar and would thus be caught by the criterion for regarding tax measures as harmful set out in point B.3 of the Code of Conduct. The United Kingdom has not so far honoured the promises it made under the auspices of the OECD with a view to removing Gibraltar from the list of non-cooperating tax havens.

(83) Gibraltar's economic approach is also harmful to Gibraltar itself, since it has given rise to an economy that lacks sound foundations and is unsustainable in the medium or long term. It has also deprived the neighbouring region, Campo de Gibraltar, of potential development opportunities. Campo de Gibraltar is currently one of Spain's least developed regions. Gibraltar's relative prosperity is due to a large extent to the underdevelopment of the surrounding region.

(84) This tax system is not only discriminatory and unfair but it also encourages tax evasion and money laundering.

Tax evasion stimulated by the possibility of money laundering in Gibraltar is causing serious harm to Spain's public finances, and such money laundering is facilitating the activities of organised criminal gangs. The above-mentioned IMF report stresses that there are no mandatory rules on combating money laundering in Gibraltar.

The Spanish Confederation of Business Organisations

(85) The Spanish Confederation of Business Organisations endorses the Commission's preliminary analysis of the reform set out in the invitation to comment and argues that the reform could seriously harm the interests of Spanish businesses. Its additional comments can be summarised as follows.

(86) The tax burden would be much lower than that incurred by businesses in metropolitan United Kingdom and in Spain: total tax liability in Gibraltar would be capped at 15 %, whereas the rate of taxation in the United Kingdom and in Spain is at least 30 % and can be even higher. Under the new scheme many firms in Gibraltar would pay hardly any tax at all. The costs which beneficiary firms would have to bear would be lower than their competitors. The much lower level of tax in Gibraltar is highly discriminatory and undermines the competitiveness both of Spanish businesses in the area and UK businesses.

(87) The vast majority of businesses established in Gibraltar are very small (usually run by a single person and occupying small premises) and are engaged in asset management activities, so that the only income they generate consists of capital gains deriving from the assets they manage. Given that the basis of the reform is taxation according to the number of the company's employees and the surface area of its premises, as well as the tax exemption of capital gains, most firms established in Gibraltar would not pay any corporation tax.

Comments from the United Kingdom on the third party observations

(88) The United Kingdom supports the observations of the Åland Executive. In commenting on the observations of the Spanish Government and the Spanish Confederation of Business Organisations, the United Kingdom repeated and cross-referred to some of the arguments it had made in its response to the opening of procedure. The additional comments of the United Kingdom can be summarised as follows.

⁽¹⁵⁾ Joined Cases C-400/97, C-401/97 and C-402/97, [2000] ECR I-1073.

- (89) The reform will not cause 'serious damage' to the Spanish Public Exchequer. Underdevelopment in the Campo area does not stem from Gibraltar's fiscal system. The opposite is true, since the region derives a considerable amount of income from Gibraltar. Employment figures for January 2003 show, for instance, that Spanish nationals lawfully employed in Gibraltar represent approximately 18 % of Gibraltar's workforce. Gibraltar thus provides a substantial source of employment and income for Spanish workers coming from the surrounding area, as well as considerable income for the Campo area from Gibraltarians who spend in this region. Spain is also the second largest exporter to Gibraltar. Gibraltar is not as wealthy as implied and is an Objective 2 region for the purposes of the European Regional Development Fund.
- (90) Differences in tax rates and tax bases between Member States and between autonomous tax regions is a sovereign matter not within the scope of Article 87 of the EC Treaty. The purpose of the State aid rules is to attack advantages given by the State or through State resources to certain specific enterprises. Lower tax rates applicable generally within an autonomous tax territory do not satisfy this material specificity requirement and therefore do not constitute State aid. Competition between the tax systems of autonomous tax regions may arise not only from differences in tax rate, but also from differing methods of calculating taxable income. Such differences in method of calculation do not constitute State aid if the tax system is applied in a genuinely non-discriminatory manner inside the autonomous tax territory. It is unclear how the reform could substantially harm the Spanish economy by provoking the relocation of businesses to Gibraltar. The United Kingdom is not aware of any Spanish company that has relocated to Gibraltar in order to benefit from the alleged 'favourable tax system' provided by the present corporate tax regime. Indeed, other EU countries, such as Greece and Ireland, and EU accession countries, such as Estonia, Hungary and Cyprus, also have relatively 'low' general corporate tax rates.
- (91) The criticism of the system as a combination of various taxes is misconceived. The logic of the reformed system is that employment and occupation constitute the tax base, whilst profitability constitutes a lower threshold to liability. The system simply abandons the taxation of profit as the taxable event in the case of companies. The criteria of employment and occupation apply horizontally to all companies in all sectors. They do not benefit, for example, larger companies over smaller companies or vice versa. The dropping of the GBP 500 000 profit tax limit removes all possibility that the reform could benefit larger companies over smaller ones. The fact that the registration fee is GBP 150 for non-profit-making companies and GBP 300 for active companies does not constitute State aid as the difference in registration fee of GBP 150 must be considered to be *de minimis*.
- (92) Although the reform may correctly be described as 'zero-rate profit tax' (due to the choice of employment and occupation, and not profit, as tax bases), to describe it as 'zero rate tax' is wrong. The accurate position is that the essential element of the reform is the general abolition of taxation of company profit (save for a top-up taxation on financial services and utilities activities) and its replacement with a payroll tax payable by all companies.
- (93) Neither of the top-up taxes (on financial services or utilities) constitutes State aid. While material selectivity could be argued, such taxes do not qualify as 'advantages' in comparison with the general norm for the purposes of the definition of aid; their purpose is quite the contrary. For this reason, the claim that non-financial service sectors are not covered by the top-up tax is unfounded.
- (94) The suggestion that the reform represents an advantage for Gibraltar companies over United Kingdom companies is incorrect and represents a misunderstanding of the concept of regional specificity, of the constitutional status of Gibraltar, and of its status for the purposes of the EC Treaty. It is assumed that the Spanish Government does not intend to maintain such an argument, which would prevent any effective decentralisation of taxation powers by Member States, and which could undermine, *inter alia*, the tax autonomy of its Basque provinces. The cases quoted by the Spanish Government ⁽¹⁶⁾, in the context of regional specificity, have no relevance as neither involved situations where the regions concerned had independent autonomy in the fields where relief from the general fiscal system was granted. The tax autonomy referred to in certain Basque cases ⁽¹⁷⁾ is applied to grant tax rebates in relation to the general Spanish tax system, while in Gibraltar's case its autonomy is applied to create a fundamentally different tax system to that of the United Kingdom.
- (95) The allegations relating to, *inter alia*, tax evasion and money laundering are unfounded and irrelevant to the current State aid procedure. It would not therefore be appropriate to make a detailed rebuttal. However, Gibraltar observes high standards of supervision and financial regulation, in both the public and private sectors. The Gibraltar Financial Services Commission is an independent and respected body. This view has been corroborated by several international bodies, which have also commended Gibraltar's actions in combating money

⁽¹⁶⁾ Commission Decision of February 13, 2001, N 147 A/2000 France (Loi d'orientation pour l'Outre-mer) and case 248/84 Germany v Commission [1987] ECR 4013.

⁽¹⁷⁾ Joined cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and others v Commission*, p. 142.

laundering. Gibraltar was one of the first jurisdictions within the EU to implement the EU's Money Laundering Directive on an all-crimes basis. A report of the Financial Action Task Force (FATF), published in November 2002, states that 'Gibraltar has in place a robust arsenal of legislation, regulations and administrative practices to counter money laundering' and is 'close to complete adherence with the FATF 40 Recommendations' ⁽¹⁸⁾. An IMF report from October 2001 judged that Gibraltar was compliant with 66 out of 67 established international standards on financial regulation, and concluded that 'supervision is generally effective and thorough ... Gibraltar ranks as a well-developed supervisor' ⁽¹⁹⁾. Under OECD rules, Gibraltar has been classified as a cooperative tax jurisdiction.

VI. ASSESSMENT

Existence of aid

- (96) In order to be considered to be State aid within the meaning of Article 87(1) of the EC Treaty, a measure must satisfy the four following criteria. First, the measure must afford the beneficiaries an advantage that reduces the costs they normally bear in the course of their business. Second, the advantage must be granted by the State or through State resources. Third, the measure must affect competition and trade between Member States. Finally, the measure must be specific or selective in that it favours certain undertakings or the production of certain goods.
- (97) According to point 16 of the Notice, the main criterion in applying Article 87(1) EC to a tax measure is that it 'provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system should thus first be determined'. However, given that the reform raises issues both of material selectivity and of regional selectivity, the Commission will first examine the regional selectivity aspect. The question of material selectivity of the different components of the reform in the Gibraltar context is examined separately below in paragraphs 128 to 152.

Regional selectivity

- (98) In its decision to open the formal State aid investigation procedure ⁽²⁰⁾, the Commission identified the ways in which the reform as a whole provides for advantages to Gibraltar companies compared with companies in the United Kingdom. Neither the United Kingdom nor the Government of Gibraltar has contested the factual basis of this comparison and it is therefore repeated and refined below.

- (99) Under the United Kingdom corporation tax regime the maximum rate of corporation tax is 30 % of companies' profits. In contrast, under the reform, the maximum rate of corporation tax for all Gibraltar companies except utility companies is 15 %.

- (100) The differences between on the one hand, the United Kingdom corporation tax regime and the company taxation regime in Gibraltar as envisaged by the reform on the other hand, have the consequence that companies operating in the United Kingdom will be taxed at a maximum rate of 30 % of profits whereas companies (other than utility companies) operating in Gibraltar will be taxed at a maximum rate of 15 % of profits. In addition, as described in paragraphs 128 to 152 below, certain types of company will either escape tax or will be taxed at a rate of 5 % of profits. These differences in tax treatment represent an advantage to companies other than utility companies established in Gibraltar compared with companies established in the United Kingdom.

- (101) Further advantages arise to companies in Gibraltar as compared with those in the United Kingdom through other differences in the tax regime. The Commission notes that under the reform, capital gains are excluded from any calculation of profit. In contrast, capital gains are generally chargeable to corporation tax in the United Kingdom. Similarly, the differences in capital allowance give rise to advantages. In contrast to the 33 1/3 % allowance for capital expenditure on plant and machinery, the United Kingdom tax regime provides for an allowance of 25 % of the declining balance and has no generally applicable first year allowances.

- (102) As is evident from the previous paragraphs, the essence of the Commission's view on the regional selectivity of the Gibraltar tax reform proposals is that they provide, in general, for a lower level of taxation than that applicable in the United Kingdom and that this difference amounts to a selective advantage for companies active in Gibraltar. This premise is consistent with point 16 of the Notice. This states '[t]hat the main criterion in applying Article 87(1) to a tax measure' is that it 'provides in favour of certain undertakings in the Member State an exception to the application of the tax system'. As pointed out in point 17 of the Notice, 'the Commission's decision-making practice so far shows that only measures whose scope extends to the entire territory of the State escape the specificity criterion laid down in Article 87(1)' and 'the Treaty itself qualifies as aid measures which are intended to promote the economic

⁽¹⁸⁾ FATF Offshore Group of Banking Supervisors, Mutual Evaluation Report (November 2002), p. 29.

⁽¹⁹⁾ IMF Report (October 2001) 'Gibraltar: Assessment of the Regulation and Supervision of Financial Services', paragraph 9.

⁽²⁰⁾ See footnote 1.

development of a region' ⁽²¹⁾. Even if they were to apply automatically and equally to all economic operators liable for tax in Gibraltar, without introducing any difference in treatment in favour of one or more sectors of activity, which is not the case here, the abovementioned tax reductions 'are intended exclusively for companies situated in a particular region of the Member State in question and constitute for them an advantage which companies intending to carry out similar economic operations in other areas in the same State cannot enjoy' ⁽²²⁾. In this case the abovementioned tax reductions do in fact favour firms taxed in Gibraltar, in comparison with all firms active in the United Kingdom.

scope is limited to part of the territory of the State subject to the rules on aid may constitute selective benefits. It is clear that if the reference context for assessing the territorial selectivity of a measure is the territory in which it applies, measures that benefit all the firms in the territory would by definition become general measures. The settled practice of the Commission, confirmed by the Court of Justice, on the contrary consists of classifying as aid tax schemes applicable in particular regions or territories which are favourable in comparison to the general scheme of a Member State ⁽²³⁾.

(103) The United Kingdom, the Government of Gibraltar and the Åland Executive disagree with the view that the measure is selective, i.e. that it favours 'certain firms or certain products'. They argue that a distinction should be drawn between cases in which the State grants tax benefits of limited scope to part of national territory and cases in which such benefits are granted by an infra-State regional authority for the part of the territory that falls within its jurisdiction: the former are selective because their scope is limited to some of the firms under State jurisdiction, while the latter are general measures since they apply to all firms under the jurisdiction of the regional authority.

(104) The Commission considers first that the element of selectivity in the concept of aid is based on a comparison between the advantageous treatment granted to certain firms and the treatment that applies to other firms in the same reference framework. The definition of this framework takes on added importance in the case of tax measures since the very existence of an advantage can only be established in relation to taxation defined as normal. In theory it follows both from the general scheme of the Treaty, which concerns aid granted by the State or through State resources, and from the fundamental role the central authorities of the Member States play in defining the political and economic environment in which firms operate, thanks to the measures they adopt, the services they provide and possibly the financial transfers they make, that the framework in which such a comparison should be made is the economy of the Member State. In this respect the text of the Treaty itself, which classifies measures intended 'to promote the economic development' of a particular region (Article 87(3)(a) and (c)) as State aid that may be considered to be compatible, indicates that benefits whose

(105) Second, the United Kingdom's argument according to which benefits of limited territorial scope become general measures in the region concerned only because they are established by the regional rather than by the central authority, and that they apply throughout the territory under the region's jurisdiction, cannot be reconciled with the concept of aid. This concept is objective, covering all aid that reduces the charges that are normally borne from the budget of one or more firms in various forms, regardless of its purpose, justification or objective or the status of the public authority that establishes it or whose budget bears the charge. A distinction based solely on the body that decides the measure would remove all effectiveness from Article 87 of the Treaty, which seeks to cover the measures concerned exclusively according to their effects on competition and Community trade ⁽²⁴⁾. Such aid therefore cannot be treated differently from measures which have the same objectives, use the same resources and have the same

⁽²¹⁾ See in particular Commission Decision 93/337/EEC of 10 May 1993 concerning a scheme of tax concessions for investment in the Basque country (OJ L 134, 3.6.1993, p. 25).

⁽²²⁾ Opinion of Mr Advocate General Saggio in Joined Cases C-400/97, C-401/97 and C-402/97 [2000] ECR I-1073.

⁽²³⁾ See in particular, in the case of measures adopted by central authorities, the Commission Decision of 21 May 1997, aid N 847/96, on the creation of priority outermost regions and measures on improved economic access in the French Overseas Territories (OJ C 245, 12.8.1997), the Commission Decision of 16 December 1997, aid N 144/A/96, on the scheme of regional aid to investment and operating aid which amends the economic and tax system of the Canary Islands (OJ C 65, 28.2.1998) and Commission Decision 2002/780/EC of 28 February 2001 on the aid scheme 'Investment allowance 1999', which Germany is planning to implement for certain undertakings in the new *Länder*, including Berlin (OJ L 282, 19.10.2002, p. 15). See also Commission Decision 98/476/EC of 21 January 1998 on tax concessions under Article 52(8) of the German Income Tax Act (*Einkommensteuergesetz*) (OJ L 212, 30.7.1998, p. 50), on which the Court of Justice delivered judgment on 19 September 2000 in Case C-156/98 *Germany v Commission* [2000] ECR I-6857. In the case of measures granted by regional authorities, see Commission Decision 93/337/EEC of 10 May 1993 concerning a scheme of tax concessions for investment in the Basque country and Commission Decision 2003/442/EC of 11 December 2002 on the part of the scheme adapting the national tax system to the specific characteristics of the Autonomous Region of the Azores which concerns reductions in the rates of income and corporation tax (OJ L 150, 18.6.2003, p. 52).

⁽²⁴⁾ Case 173/73 *Italy v Commission* [1974] ECR 713, Case 323/82 *Intermills v Commission* [1984] ECR 3809 and Case C-248/84 *Germany v Commission* [1987] ECR 4013.

effects on trade and competition, according only to the formal criterion of the degree of autonomy of the infra-State authority that establishes it. According to the abovementioned conclusions of Mr Advocate General Saggio in Joined Cases C-400/97, C-401/97 and C-402/97, 'the fact that the measures at issue were adopted by regional authorities with exclusive competence under national law is (...) merely a matter of form, which is not sufficient to justify the preferential treatment reserved to companies which fall under the provincial laws. If this were not the case, the State could easily avoid the application, in part of its own territory, of provisions of Community law on State aid simply by making changes to the internal allocation of competence on certain matters, thus raising the general nature, for that territory, of the measure in question'.

(106) The Commission points out that the use of a purely institutional criterion to differentiate 'aid' from 'general measures' would inevitably lead to differences in treatment in the application of the rules on aid to Member States, according to whether they had adopted a centralised or decentralised model of allocating tax competence (or other competence, such as in the area of social security). If the United Kingdom's argument were accepted, Member States whose internal administrative organisation allowed certain regional authorities below State level to make changes to the general tax system in the form of tax benefits applicable to firms that operated in the respective regions would escape the rules on regional aid in relation to those regions and measures.

(107) The Commission considers that if measures completely identical in their objectives, technique and effects were not subject to the same rules it would be contrary to equal treatment and would create serious distortions in the functioning of the common market. The existence of the rules on aid to regional tax benefits should be based on objective criteria and cannot depend on a purely institutional factor such as the application at a particular time of more or less extensive tax autonomy in favour of an infra-State authority of more or less broad territorial scope. If this technique were generalised it would undermine equality in applying the rules on State aid and therefore render them ineffective.

(108) In the Commission's approach the tax autonomy of the regional authority that grants the benefits has never been considered as a factor that would make it possible not to regard measures as aid. In Decision

93/337/EEC⁽²⁵⁾, recognition that 'the competent institutions in each of the three Basque provinces may, under certain conditions, maintain, establish and regulate the tax system within their territory' did not prevent the Commission from finding that the tax benefits in question created by the three provinces were covered by Article 87(1) and from declaring them incompatible because they did not comply with the rules on regional and sectoral aid⁽²⁶⁾. Other cases concerning measures adopted by the authorities of the Basque provinces were decided on grounds of material selectivity⁽²⁷⁾. The issue of regional selectivity was not addressed by the Community Courts when assessing the validity of such decisions⁽²⁸⁾ since the Commission had not relied upon this criterion in its decision: the comments of United Kingdom and the Government of Gibraltar on territorial competence are therefore not relevant. In subsequent decisions on tax concession schemes implemented by autonomous tax authorities the Commission, while taking the view that the measures examined constituted aid because of their material selectivity, expressly left open the possibility of examining their territorial selectivity⁽²⁹⁾. In a recent decision concerning tax advantages granted by the authorities of the Azores region, the Commission came to the conclusion that the measures at stake were selective although they applied to all undertakings active in that region⁽³⁰⁾.

(109) Lastly, the Commission would stress that classing these measures as aid does not call into question the tax autonomy of Gibraltar, resulting from the relevant constitutional arrangements and practice. It seeks merely to ensure that, in cases where Gibraltar exercises its autonomy by reducing the amount of tax levied at national level, the tax benefits granted thereby comply with the Community rules on regional aid and the other applicable frameworks on the basis of equality throughout Community territory. It is without prejudice to the possibility that such benefits are compatible with the common market.

⁽²⁵⁾ Cited above.

⁽²⁶⁾ See in this respect the judgment of the Court in Joined Cases T-127/99, T-129/99 and T-148/99 *Territorio Histórico de Álava and Others v Commission* [2002] ECR II-1275, paragraph 237.

⁽²⁷⁾ See, for instance, Commission Decision 2000/795/EC of 22 December 1999 on the State aid implemented by Spain for Ramondín SA and Ramondín Cápsulas SA (OJ L 318, 16.12.2000, p. 36).

⁽²⁸⁾ See Joined Cases T-92/00 and T-103/00, cited above, concerning Decision 2000/795/EC.

⁽²⁹⁾ See in particular Commission Decision 2003/28/EC of 20 December 2001 on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Álava (Spain) (OJ L 17, 22.1.2003, p. 20), Commission Decision 2003/86/EC of 20 December 2001 on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Vizcaya (Spain) (OJ L 40, 14.2.2003, p. 11) and Commission Decision 2003/192/EC of 20 December 2001 on a State aid scheme implemented by Spain in 1993 for certain newly established firms in Guipúzcoa (Spain) (OJ L 77, 24.3.2003, p. 1).

⁽³⁰⁾ See Decision 2003/442/EC, cited above.

- (110) Nor can the Commission take the view that the above-mentioned tax reductions are justified by the nature or the general scheme of the tax system, or that because of their economic rationality they are necessary or functional in relation to the effectiveness of that system. In particular, in so far as these reductions do not derive from applying principles such as proportionality or progressive taxation, since on the contrary they generally favour firms in a specific region regardless of their financial situation and cannot be considered to be inherent in the tax system.
- (111) The United Kingdom and the Government of Gibraltar advance a number of arguments in support of their view that the fact that the proposed reform provides in general for lower company taxation in Gibraltar than in the United Kingdom does not of itself give rise to State aid within the meaning of Article 87(1) of the EC Treaty. Those arguments are examined below.
- (112) To suggest that State aid is only present if State resources are used through a tax foregone and that in the Gibraltar case, no tax is foregone as there is no United Kingdom rate of tax for an activity which would also apply in Gibraltar is also an argument about the form of the measure. Equally formalistic, in the sense of Advocate General Saggio, is the argument to the effect that even if the alleged aid measure were abolished, the United Kingdom standard or normal rate would not apply and that therefore any comparison where the tax system is devised locally is not meaningful for the purposes of State aid. Given that the same result can be achieved by different legal techniques — by providing for an explicit derogation to a system that would otherwise apply or by establishing formally separate systems that apply to similar situations — the selectivity of a measure cannot be established solely by reference to a 'but for' test, comparing the situation resulting from the relevant measure with the situation which would exist 'but for' that measure. On the contrary, it is necessary to compare the measure at hand with other measures which apply to similar situations, in this case company taxation in the United Kingdom. Although the assessment of a measure under State aid rules does not depend on the nature of the measures previously in force, it can be noted that the tax system currently applied in Gibraltar largely follows the model of the United Kingdom, with the exception of the advantages granted to the offshore economy.
- (113) In the same way, the arguments of the Gibraltar Government contrasting regional (or secondary) powers to reduce a national tax rate with its own, independent powers over the entire tax system concern the internal competences of the United Kingdom and its territories. In any event, the extent of the tax autonomy conferred upon a given territory cannot be the decisive factor, since this element is at the disposal of Member States, it would be impossible to establish a clear distinction in this respect and this would lead to unequal treatment of similar situations. Such a result would also run against the principle that, in order to assess the State aid character of a given measure, one must have regard to its effects.
- (114) The United Kingdom states that there is no common system of reference to which the Gibraltar companies would be subject in the case that the measure would be abolished. This is a circular reasoning, as the absence of a common system is a consequence of granting fiscal autonomy and the very existence of a specific tax jurisdiction in a given region is the result of a choice made by the relevant Member State. Whenever a central government decides to give up its power to establish a uniform taxation framework for enterprises and allows a sub-national entity to reduce the tax rate or to introduce another taxation system that is more advantageous, the result of this decentralisation of power is a derogation from a common system of reference. De facto, providing directly for a reduction of the tax rate, or granting to a territory the possibility to reduce a common tax rate, or exempting a territory from a common system and granting to it a power to establish a more advantageous taxation system comes to the same result; it allows companies in a certain region to pay lower taxes while State resources are foregone.
- (115) The Commission cannot accept the United Kingdom suggestion that a tax jurisdiction not covering the whole Member State would be prevented from adopting any tax rate except the one applicable in the other tax jurisdiction in the State. As mentioned above, the key to any State aid analysis of tax measures is to establish the common system applicable, in this case, the United Kingdom tax system. In this context it should be noted that the present decision does not concern a mechanism that would allow all local authorities of a particular level (regions, territories or others) to introduce and levy local taxes. On the contrary, the case in point involves a reduction applicable solely in Gibraltar. In any event, the fact that a fiscal advantage constitutes State aid does not mean that it cannot be held compatible with the common market.
- (116) The argument that imposing a higher rate of taxation in a given region would automatically have as a consequence that lower tax rates applied in the rest of the State become State aid has nothing to do with the present case, does not follow from the reasoning of the Commission and is not accurate. In such a case, there would be a common system applied in all regions but one. By definition, such a system would not constitute State aid. Obviously, the derogation resulting from the

higher rate applied in a given region would not constitute an advantage and therefore would not be qualified as State aid either. This shows again that it remains possible for a Member State to grant fiscal autonomy to certain regions without necessarily granting State aid to given companies.

(117) The parallels that the United Kingdom draws with the WTO agreement on subsidies are not relevant, as the legal order within the European Union is quite distinct from any international law provided for by WTO agreements, the regime of State aid control in a single market must obviously be stricter than rules applicable to subsidies laid down in a world agreement and the fact that a measure might not be considered to be a 'specific subsidy' under the Agreement on subsidies cannot cut down the scope of the definition of aid in Article 87(1) of the EC Treaty ⁽³¹⁾.

(118) As for the consequences, in terms of State aid, of any future decision by the United Kingdom to share sovereignty over Gibraltar with Spain, the arguments advanced are purely hypothetical in nature and refer to a situation which, in any event, should be dealt with by specific arrangements concerning the application of EC law. The current facts of the case do not accord with the hypothesis put forward by the United Kingdom and therefore have no relevance in ascertaining the existence, or otherwise, of State aid.

(119) The United Kingdom objects to the comparison made by the Commission of the different exemptions and allowances available in Gibraltar with those in the United Kingdom. The grounds for this objection are that where the tax systems or the tax bases are different, meaningful comparisons cannot be made. However, contrary to that which the United Kingdom asserts, meaningful comparisons can be made as set out in paragraph 100 above. The differences identified constitute further elements of an analysis which demonstrates that when compared with the United Kingdom tax system (the common system applicable), undertakings in Gibraltar in general enjoy a lower fiscal pressure.

(120) The United Kingdom invokes the subsidiarity principle in order to argue that if a Member State can function with two or more autonomous tax jurisdictions competing for corporate tax revenue within its territory without suffering significant distortive effects on competition, it does not under the subsidiarity principle of the EC Treaty become a Community task to intervene in the constitutional arrangements of the Member State. This argument is based both on a false premise that there are no significant distortive effects (or that such effects are contained entirely within the United Kingdom and

Gibraltar without any spillover into other Member States) and on a misunderstanding of the subsidiarity principle. Article 5 of the EC Treaty is quite explicit that the principle of subsidiarity only applies in those areas which do not fall within the Community's exclusive competence. Since the control of State aid is an area of exclusive Commission competence, the subsidiarity principle does not apply. In examining the proposed reforms, including the question of regional selectivity, as in any State aid investigation into fiscal measures, the Commission is not pursuing tax uniformity but is merely fulfilling its Treaty obligation to control State aid.

(121) Contrary to what the United Kingdom asserts, the principle that a Member State cannot plead its own national law to avoid its Community law obligations is indeed relevant to the issue of selectivity. As already established, the way in which a Member State is organised for the purposes of taxation is a matter of form: it cannot plead the existence of autonomous tax regions, however extensive their powers might be, in order to escape the application of the rules on State aid. This does not, nevertheless, interfere with the possibilities of Member States to decentralise their powers. The issue concerns the exercise of those decentralised powers. Member States and the bodies to which powers have been devolved must ensure that Community law, including that on State aid, is upheld. More concretely, where tax powers are devolved but a central reference system remains, Member States must ensure that reductions in tax, insofar as they constitute aid, are compatible with the common market.

(122) The United Kingdom argues, *inter alia*, that Gibraltar: is not part of the United Kingdom; has its own distinct institutions and constitutional order; and is autonomous, self-governing and economically self-sufficient.

(123) The Commission accepts that Gibraltar does not form part of the United Kingdom for domestic law purposes and has distinct institutions, although the United Kingdom authorities retain certain competences and prerogatives, including the power to ensure that measures adopted by Gibraltar in domestic matters do not conflict with the United Kingdom's obligations under the EC Treaty. However, as in the case of other autonomous regions, this fact does not alter the assessment of the measures adopted by the Gibraltar authorities. Gibraltar is part of the Community by virtue of its links with the United Kingdom. All Community rules apply to Gibraltar, subject to the exceptions resulting from Article 28 of the Act of Accession, since the United Kingdom became a Member State and because of this membership. As a consequence, British dependent

⁽³¹⁾ Cases C-351/98 *Spain v Commission* [2002] ECR I-8031, point 44, and C-409/00 *Spain v Commission* [2003] ECR I-1487, point 56.

territories citizens who acquire their citizenship from a connection with Gibraltar are citizens of the Union. These citizens and companies registered in Gibraltar enjoy the rights and freedom recognised by the Treaty, including freedom to provide services, freedom of establishment and free movement of capital, which are relevant for the economic activities of the beneficiaries. The United Kingdom is responsible for ensuring respect for Community law in Gibraltar, which for these purposes is treated as a part of its territory⁽³²⁾. Gibraltar must therefore be considered to form part of the United Kingdom for the purposes of the rules on State aid, including the application of Articles 87 and 88 to fiscal measures.

(124) Whilst it may be true that EC law applies to Gibraltar by virtue of Article 299(4) of the EC Treaty rather than Article 299(1), that fact does not afford Gibraltar special status for the purposes of the application of the rules on State aid in general and on regional State aid in particular. Paragraphs 1, 2 and 4 of Article 299 all provide that the provisions of the Treaty shall apply and no difference can be detected between the legal regime of the different territories enumerated in each paragraph, subject to specific and express derogations. As explained above, the Act of Accession does not exclude Gibraltar from the application of State aid rules. The way in which EU law is given effect in Gibraltar, including the transposition of directives and the establishment of competent authorities, is not relevant for the purposes of establishing whether or not the reform constitutes State aid. The manner in which a Member State gives effect to EU law is purely matter of the internal division of competences within the State. The fact that a measure is adopted at a sub-national level does not in any way affect the application of Article 87 of the EC Treaty⁽³³⁾.

(125) Finally, the fact that the budget of a given territory is self-sufficient is not immediately relevant for the assessment under State aid rules of the measures adopted by the authorities of that territory. Such an assessment must be based on the effects of the measures for the benefiting undertakings and not on the situation of the granting authority. In particular, a small territory like Gibraltar may well become self-sufficient precisely as a result of its ability to apply lower taxes and to attract business, in particular off-shore activities. In any event, it is common ground that Gibraltar depends on the United Kingdom, *inter alia*, for its foreign policy, including membership of the European Union, for its defence and for its monetary policy. It thus benefits from a number of services provided by the United Kingdom. In addition, it appears from the institutional arrangements in place that financial responsibility for Gibraltar falls in the last resort to the United Kingdom.

(126) As for the Åland Executive's comments to the effect that a general tax measure within a self-governing region is

not selective, they rely on similar arguments to those advanced by the United Kingdom and the Government of Gibraltar. The Commission refers to its reasoning developed above, and in particular in paragraphs 104 to 109. The Commission further notes that in the case of Åland Islands captive insurance companies it was able to establish the material selectivity of the measure. It was not therefore necessary for the purposes of reaching a final negative decision on the measure to rely on its regional selectivity.

(127) The Commission therefore concludes that by providing for a system of corporate taxation under which enterprises in Gibraltar are taxed, in general, at a lower rate than those in the United Kingdom, the reform confers a selective advantage on enterprises in Gibraltar.

Material selectivity

The requirement to make a profit before incurring a tax liability

(128) One consequence of the limitation of the combined liability for payroll tax and business property occupation tax to 15 % of profits is that regardless of their payroll and occupation of business property, companies that make no profit are not taxed. This in effect acts as an exemption for unprofitable companies and constitutes an advantage which relieves such companies of the liability for payroll tax and business property occupation tax which would normally be borne by their budgets.

(129) This exemption from the payroll and business property occupation taxes is selective as it applies only to those companies that make no profit. In addition to enterprises in difficulty and those whose principal source of income is derived from capital gains, in any particular year such companies might include, for example, enterprises operating in cyclical business environments, enterprises in the initial stage of their business and companies where profits are eliminated through additional payments to shareholder-employees or to other employees. The Commission cannot accept the United Kingdom's arguments to the effect that the inherent quantitative limitation in the system which exempts unprofitable companies applies in the same way to all companies regardless of their size or sector and is therefore not selective. Although apparently general, certain definable categories of companies benefiting from the exemption from tax can in fact be identified, as will be shown later.

(130) Nor can the Commission accept the United Kingdom's arguments that even if the exemption for unprofitable companies were selective, it is justified by the nature or scheme of the corporate tax system.

⁽³²⁾ Case C-218/02 *Commission v United Kingdom*, judgment of 29 January 2004 not yet reported, point 15 of the grounds and point 1 of the operative part.

⁽³³⁾ Case 248/84 *Germany v Commission* ECR [1987] 4013, p. 17.

- (131) While exemption of non-profitable companies is an intrinsic feature of a system based on taxation of profits, this is not the case when the tax is levied on the number of employees or on the business use of property. Such systems have been conceived in a way that establishes an entirely different basis for corporate entities to be taxed. For example, it is in the internal logic of a payroll tax system that each and every employee should result in a corresponding payroll tax liability for the enterprise that employs them. In this sense, the parallel drawn by the Commission with social security contributions is valid, regardless of the fact, as the United Kingdom observes, that their purpose is different from a tax measure. Even if a payroll tax were introduced as a proxy for a profit tax (this is not an argument put forward by the United Kingdom), it would still be within the logic of a payroll tax system for unprofitable companies to be liable to the tax. The use of payroll as a proxy for profitability removes the need to ascertain profits or overcomes difficulties in doing so. This is not the situation in Gibraltar, where under the reform, measurement of company profits is a feature of the rules for both the payroll tax and the top-up tax.
- (132) The United Kingdom states that the system is based on the profitable use of labour and as such coherent. This suggests the existence of a hybrid system, where two different tax bases are used according to the situation of the companies. Under these circumstances, it becomes impossible to detect the nature and general scheme of the system and to apply this justification. In particular, it cannot be considered that any given feature of such a system forms part of the general scheme, since this would amount to accepting an automatic justification for such a system.
- (133) The Commission therefore concludes that the exemption of unprofitable companies from payroll tax and business property occupation tax through the operation of the 15 % cap is selective and, if the other conditions are fulfilled, may constitute State aid to those companies that benefit from it. It cannot be justified by the nature or general scheme of the proposed tax system. This is without prejudice to the assessment of the compatibility of such a measure.
- The 15 % cap on liability to payroll tax and business property occupation tax**
- (134) A second consequence of the limitation of the combined liability for payroll tax and business property occupation tax to 15 % of profits is that profitable companies whose tax liability would otherwise exceed this threshold are relieved of tax they would have to pay in excess of this threshold. This tax reduction constitutes an advantage to those companies that benefit from it by relieving them of a charge that would normally be borne by their budgets.
- (135) The 15 % cap is also selective, as only a limited number of companies will enjoy a reduction in their tax liability through its application. Although the United Kingdom and Gibraltar no longer claim that as few as 10 enterprises will benefit from the cap, it nevertheless limits the scope of application of the payroll tax and the business property tax. The beneficiaries will be labour intensive companies, that is those which, for the tax year in question, have low profits in relation to their number of employees and occupation of business property. The application of a pure payroll and business property tax system might imply a very high level of taxation for such companies.
- (136) The Commission notes the United Kingdom's and Gibraltar's arguments that a specific group of companies cannot be identified and that the rules are generally applicable to all companies in Gibraltar. However, this does not prevent the 15 % cap from being *de facto* selective in the manner described in the previous paragraph. In this respect, the references made to point 14 of the Notice by the United Kingdom and Gibraltar are not relevant since it does not exclude the possibility that apparently general measures may constitute state aid. In particular point 14 covers, for example, tax incentives for specific investment and measures designed to reduce the taxation of labour 'for all firms', which is not the case with the 15 % cap, benefiting only companies that make relatively small profit as compared to their number of employees. In addition, the 15 % cap is not a purely technical measure in the sense of the first indent of point 13 of the Notice. Whilst conventional systems of corporation tax limit the proportion of profits paid in taxes through the setting of the rates of tax (banded systems include a top or maximum tax rate), the equivalent technical measure in a payroll tax system is the rate of tax per employee, in the Gibraltar case, set at a uniform rate of GBP 3 000. The introduction in a payroll and property tax system of a cap linked to a different criterion, namely the level of profits, cannot be compared with the application of variable rates in a progressive system of profit taxation, which is justified by the nature and general scheme of the system (point 24 of the Notice). Nor is the 15 % cap a measure pursuing a general economic policy objective, in the sense of the second indent of point 13 of the Notice, as it does not reduce the tax burden related to certain production costs for the whole economy of Gibraltar, but it only benefits a limited number of undertakings. Furthermore, the cap is not directly linked to the labour or business property costs but rather to the profitability of companies. The latter is an element external to a payroll and business property tax.

(137) The Commission does not accept the United Kingdom's argument that if the 15 % cap is selective, it is justified by the nature and or general scheme of the system of which it is part. There is nothing intrinsic in a system of taxation of the profitable use of labour and property which requires a limit on the proportion of profits which a company must pay as a result of its use of those taxable factors. The inherent logic of such a system is that the more people a company employs and the more property it occupies, the greater the tax liability. The arguments put forward by the United Kingdom are essentially economic in nature. They are not related to the internal logic of the proposed system.

(138) The United Kingdom suggests that the Gibraltar economy is more vulnerable than most to shocks created by tax competition and that companies may not be able to afford to leave a large Member State as easily as they can move out of Gibraltar. However, the Commission notes that little evidence has been adduced to support this hypothesis, which, if true, suggests that the 15 % cap is part of a strategy designed to retain if not attract mobile capital to Gibraltar, which given the physical constraints of the territory, is likely to be targeted at financial and other services. Similarly, the argument that a regressive element is not required in the taxation of utilities, which occupy monopoly or quasi-monopoly positions in the Gibraltar market, indicates that mobile capital is the target of the 15 % cap.

(139) As for the suggestion that without a regressive element, a labour tax could trigger mass layoffs and instability in times of cyclical market fluctuations, the Commission would simply note that this is an inherent feature of such a system. In any event, at GBP 3 000 per employee, the payroll tax would represent only a small proportion of the overall unit labour costs⁽³⁴⁾. Therefore the incentive to shed labour in order to control costs will exist to a similar extent with or without a payroll tax.

(140) The Commission also notes the impact of the 15 % cap on the offshore and onshore sectors of the Gibraltar economy. The offshore sector comprises exempt companies and qualifying companies, the legislation for which will be repealed as part of the reform. Exempt companies tend not to have a physical presence in Gibraltar (no employees or premises) and pay a fixed tax of between GBP 200 and GBP 300 per annum. In contrast, qualifying companies have a physical presence in Gibraltar (they are significant employers) and negotiate their rate of tax with the authorities. The vast majority

of qualifying companies pay corporation tax at a rate of between 2 % and 10 % of profits. The 15 % cap therefore limits any increase that qualifying companies would face on implementation of the reform. In contrast, the onshore economy (other than utilities) would see their rate of tax fall from the current standard corporation tax rate of 35 %. The Government of Gibraltar also appears to admit that the reform as a whole (which includes the 15 % cap) has been designed to suit the particular tax 'needs and preferences' of sectors within the offshore financial services industry⁽³⁵⁾. The Commission also observes that, in dropping the original plan for a GBP 500 000 cap on tax liability, the United Kingdom has indicated that Gibraltar will, as a consequence, reduce the top-up tax on financial services from 8 % to between 4 and 6 %. This suggests that capping tax liability is intended to favour financial services companies, many of which are qualifying companies, the principal source of employment in the Gibraltar 'Finance Centre'.

(141) The Commission therefore concludes that in the circumstances of the present case the 15 % cap is selective and, if the other conditions are fulfilled, may constitute State aid to those companies that benefit from its application. It cannot be justified by the nature or general scheme of the proposed tax system. This is without prejudice to the assessment of the compatibility of such a measure.

The proposed application of the payroll tax and of the business property occupation tax to the Gibraltar economy

(142) Point 13 of the Notice states that '[t]ax measures which are open to all economic agents operating within a Member State are in principle general measures. They must be effectively open to all firms on an equal access basis, and they may not de facto be reduced in scope through, for example, the discretionary power of the State to grant them or through other factors that restrict their practical effect. However, this condition does not restrict the power of Member States to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production. Provided that they apply without distinction to all firms and to the production of all goods, the following measures do not constitute State aid:

— tax measures of a purely technical nature (for example, setting the rate of taxation, depreciation rules and rules on loss carry-overs; provisions to prevent double taxation or tax avoidance),

⁽³⁴⁾ The Gibraltar Government website (www.gibraltar.gov.gi) states that 'wages [in Gibraltar] are broadly in line with the United Kingdom'. Average full-time wages in the United Kingdom are around GBP 24 000 (source: New Earnings Survey 2002, <http://www.statistics.gov.uk/pdfdir/nes1002.pdf>). Labour costs to employers include other costs (e.g. social security contributions).

⁽³⁵⁾ Government of Gibraltar Press Release 008/2003, 14 January 2003.

- measures pursuing general economic policy objectives through a reduction of the tax burden related to certain production costs (research and development (R & D), the environment, training, employment).'

(143) Without prejudice to the considerations with regard to the effects of the reform proposals (as a whole) in paragraphs 147 to 152 or those concerning regional selectivity in paragraphs 98 to 127, a payroll tax under which all undertakings are liable in the amount of a fixed sum per employee per year can at least under certain circumstances be considered as selective when it is applied in the absence of a general system of taxation of company profits and replaces such a system. This is the case when one takes into account the specific features of the Gibraltar economy and in particular the existence of a large offshore sector without any fiscal presence, which would escape any taxation under the payroll and property tax system. Even though such a system formally applies without discrimination to all enterprises, *de facto* it benefits the current 'exempt companies' that do not have any employees in Gibraltar. It constitutes a specific advantage in favour of these undertakings with no real presence in Gibraltar, who as a consequence do not incur corporate tax. This advantage is not effectively open to all firms on an equal basis in the sense of the second sentence of point 13 of the Notice. Indeed, the practical effect of the advantage is restricted to certain enterprises. In addition, the payroll tax proposed by Gibraltar essentially does not constitute a tax measure of a purely technical nature in the sense of the first indent of point 13 of the Notice, because it is not a technical adjustment of a general system, but it concerns the tax base. In this specific case the exemption does not represent a measure pursuing general economic policy in the sense of the second indent of point 13 of the Notice as it does not reduce any production costs, but rather increases the labour costs. The same reasoning applies equally to a business property occupation tax applied in the absence of a general system of taxation of company profits and replacing such a system, under which each undertaking's liability for tax is set at a rate equivalent to the same fixed percentage of its liability to general property rates. Such a measure also advantages the current 'exempt companies' that normally have no physical presence in Gibraltar. Accordingly, the Commission concludes that, in the circumstances of the present case and taking into account the existence of a large offshore economy in Gibraltar the proposed system is materially selective aid.

(144) In addition such a system, targeting only the number of employees or the commercial use of real estate in a context where a large number of companies have no employees and no real estate, does not enjoy the same general character as the taxation of companies' profits, which aim at taxing the result of the economic activity as a whole. It may therefore be considered as selective at least in circumstances such as those in the present case.

This situation is to be distinguished from a system where a payroll tax or a business property tax is added on top of a general profit tax, which ensures a wide taxation of all sectors of the economy, and represents thus a minor aspect of the taxation of enterprises.

The registration fee

(145) Whilst it may be true, as Spain suggests, that the registration fee provisions discriminate in favour of companies that do not generate income, this discrimination is not a source of State aid. As the United Kingdom points out, the GBP 150 (about EUR 225) difference in registration fee between the two classes of company falls well below the *de minimis* threshold⁽³⁶⁾ of EUR 100 000 over a three year period. Provided that all relevant conditions are complied with, the difference in registration fee is therefore *de minimis* and does not constitute State aid.

The top-up taxes on financial services and utilities activities

(146) Spain suggests that the absence of top-up taxation on sectors other than financial services and utilities confers an advantage on companies in such sectors. The Commission does not share this view. Whilst it may be the case that where the State confers a benefit on an identifiable group of companies, this may *prima facie* constitute State aid, the same is not true where the State creates a disadvantage. Where the State imposes an exceptional fiscal burden on companies, such as a penalty tax, it can only be State aid if it can be demonstrated as occasioning a corresponding advantage for identifiable business competitors of those which have to bear the detriment. Contrary to what the United Kingdom suggests, the purpose of the top-up taxes is not relevant in establishing whether they are a source of State aid. Nevertheless, the Commission concludes that the immediate effect of the top-up taxes, taken in isolation, is to create a disadvantage for the companies affected. This conclusion is without prejudice to the consideration of this top-up tax as part of a system which *de facto* foresees different taxation rates for different kinds of undertakings.

The advantages arising for certain sectors of the economy from the proposed tax system as a whole

(147) Table 1 below sets out data⁽³⁷⁾ on various categories of company in Gibraltar and their level of liability for tax, measured on profits, as a result of the proposed reform. It must be noted that, although in some cases the tax liability of any given company will also be determined by the number of employees or by the commercial use of property, the combined effect of the various caps and top-ups amounts to setting different overall level of taxation, measured on profits, for different sectors of the economy.

⁽³⁶⁾ See Commission Regulation (EC) No 69/2001 on *de minimis* aid (OJ L 10, 13.1.2001, p. 30).

⁽³⁷⁾ Figures for the number of companies are approximate. Source: information supplied by the United Kingdom and/or Gibraltar in the course of this investigation and the investigations into exempt and qualifying companies.

Table 1: Data on Gibraltar companies

		Tax rate	
		Current	Post-reform
All companies (breakdown by sector)	29 000		
Financial services	179	0-35 %	5-15 % ⁽³⁾
Utilities	23	35 %	35 %
Other	28 798	0-35 %	0-15 %
All companies (breakdown by income)	29 000		
With income	10 400	0-35 %	0-15 % ⁽¹⁾
No income	18 600	—	—
Companies with income (breakdown by status)	10 400		
Non-exempt	1 400	0-35 %	0-15 % ⁽¹⁾
Exempt	9 000	0 %	0-5 % ⁽²⁾ ⁽³⁾
Non-exempt with income (breakdown by profit)	1 400		
Make profit	540	0-35 %	0-15 % ⁽¹⁾
No profit	500	—	—
Non-exempt with income (breakdown by status)	1 400		
Qualifying	140	2-10 % ⁽⁴⁾	0-15 %
Non-qualifying	1 260	35 % ⁽⁵⁾	0-15 %
Utilities	23	35 %	35 %
Exempt with income (breakdown by sector)	9 000		
Financial services	70	0 %	5 % ⁽²⁾ ⁽³⁾
Non-financial services	8 930	0 %	0 % ⁽²⁾

Notes:

⁽¹⁾ Assuming that the financial services top-up tax would be set at 5 %.⁽²⁾ Ignoring utilities, which would be taxed at 35 %.⁽³⁾ Assuming that exempt companies have no physical presence in Gibraltar and would therefore have no liability for payroll or business property occupation tax.⁽⁴⁾ The majority of qualifying companies. A few have tax rates outside this range.⁽⁵⁾ Assuming they are taxed at the full, standard corporation tax rate.

- (148) Table 1 shows how certain clearly defined sectors in the Gibraltar economy would be affected on implementation of the reform in terms of taxation. Although the Commission acknowledges that under the reform, the formal distinction between the offshore and onshore economy will be abolished, the comparison of taxation serves to illustrate the inherently selective nature of the tax system proposed. Different kinds of companies will be subject to different taxation rates, which is a further element confirming that the proposed system grants selective advantages to those sectors that benefit from lower rates.

(149) The offshore sector in Gibraltar is currently the subject to two parallel State aid investigations into exempt companies and qualifying companies. In this respect, the Commission has considered that by exempting them from tax, the Gibraltar authorities grant State aid to exempt companies⁽³⁸⁾. Similarly, in a decision adopted on the same day as the present one, the Commission has established that by providing for a low rate of tax compared with the standard rate of corporation tax, the Gibraltar authorities grant State aid to qualifying companies⁽³⁹⁾.

(150) It is clear from Table 1 that on implementation of the reform, exempt companies outside the financial services sector will continue to be taxed at an effective rate of zero. The reason for this is that exempt companies tend not to have a physical presence in Gibraltar. Accordingly, they have neither employees nor business premises in Gibraltar and therefore will incur liability neither for the payroll tax nor for the business property occupation tax. Their privileged position of zero tax is preserved by the reform, which in effect, continues to grant them State aid. Exempt companies in the financial services sector will experience the imposition of tax of 5 % on implementation of the reform. However, even if they are taxed for the first time, their privileged position in the Gibraltar economy will be largely maintained since 5 % of profits will be the limit of their tax liability. In contrast, the rest of the Gibraltar economy will be subject to an upper limit of either 15 % or 35 %.

(151) The Commission concludes that the reform perpetuates the existing situation in which exempt companies are the beneficiaries of State aid. More generally, the system provides for different levels of profits taxation in respect to different sectors of the economy and thereby grants a selective advantage to undertakings belonging to the sectors where lower rates apply. For this reason too, the notified scheme is materially selective.

(152) The notified measures therefore entail both a regional and a material selectivity and the latter follows both from a number of specific features of the proposed system and from the analysis of that system as a whole.

Advantage granted by the State or through State resources

(153) The grant of the tax exemptions and reductions assessed in detail in paragraphs 98 to 152 above involves a loss of tax revenue which, according to point 10 of the Notice, is equivalent to the use of State resources in the form of fiscal expenditure. As confirmed by the Court

of Justice, this principle also applies to advantages granted by regional or local bodies of Member States⁽⁴⁰⁾. The argument that no tax revenue is foregone because United Kingdom taxes would not apply to Gibraltar has already been discussed above. It therefore follows that the advantage is granted by the State and through State resources.

Effect on trade and distortion of competition

(154) Gibraltar is an open market economy. Many of the companies established in Gibraltar (and the groups to which they belong) are likely to be active in sectors where there is trade between Member States. This is particularly true in the sector of services, where the relevant provisions of Community law fully apply to Gibraltar. The Court of Justice has repeatedly ruled that when aid granted by the State strengthens the position of an undertaking vis-à-vis other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. For that purpose, it is not necessary for the recipient undertaking itself to export its products. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on Community trade, especially in the case of undertakings established close to the frontier between two Member States. The relatively small amount of aid, or the relatively small size of the undertaking which receives it, does not as such exclude the possibility that intra-Community trade might be affected⁽⁴¹⁾. Therefore to the extent that Gibraltar companies operating in sectors in which there is intra-Community trade benefit from this exemption, it affects trade between Member States, distorting or threatening to distort competition.

General remarks

(155) The United Kingdom, the Government of Gibraltar and Spain each make observations about the compliance of the reform with the criteria set out in the Code of Conduct and with other international norms. However, as observed by the Government of Gibraltar, the assessment of a measure as harmful (or otherwise, as is the case with the reform⁽⁴²⁾) under the Code has no direct

⁽³⁸⁾ Case E7/2002, appropriate measures proposed by letter C(2002) 4481 final of 27 November 2002.

⁽³⁹⁾ Case C-52/2001.

⁽⁴⁰⁾ See Case 284/84 *Germany v Commission* [1987] ECR 4013, point 17.

⁽⁴¹⁾ See Cases 730/79 *Philip Morris v Commission* [1980] ECR 2671, 142/87 *Belgium v Commission* [1990] ECR I-959, Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraphs 40 to 42, and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraphs 84 to 86.

⁽⁴²⁾ See conclusions of the meeting of the Council of Economic and Finance Ministers, 3.6.2003.

bearing on its evaluation for State aid purposes under Article 87 of the EC Treaty. Equally, the allegations made by Spain and rebutted by the United Kingdom relating to tax evasion and money laundering are, as the United Kingdom points out, not relevant to the State aid investigation.

- (156) The Commission rejects the comment from the Government of Gibraltar that in its State aid actions, the Commission has not respected equality of treatment. No specific evidence has been adduced in support of this suggestion. In any event, when investigating possible State aid within the meaning of Article 87 of the EC Treaty, the Commission is obliged to look at each measure solely on its own merits. Although the Government of Gibraltar suggests that measures under Articles 95 to 97 of the EC Treaty constitute the appropriate course of action, the Commission notes that point 15 of the Notice must be read in conjunction with point 6 which clearly refers to possible courses of action in relation to the effects of general tax measures within Member States. Implicit in this suggestion is a demand for Gibraltar to be treated as if it were a Member State in its own right, in the same way that the Åland Executive claims that direct taxation measures adopted by self-governing regions should be assessed as if they were adopted by a Member State. However, there is no basis in the EC Treaty for such a claim.

Compatibility

- (157) Neither the United Kingdom nor the Government of Gibraltar has attempted to argue that if it constitutes aid, the reform can be considered to be compatible with the common market. The Commission therefore maintains its position set out in its assessment of compatibility in the opening of the procedure. That assessment is repeated and refined as follows.
- (158) None of the exceptions under Article 87(2) of the EC Treaty can be applied in this case as the reform is not aimed at the objectives listed in that provision.
- (159) Under Article 87(3)(a), an aid measure is considered compatible with the common market when it is designed to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. Such areas are defined by the United Kingdom's regional aid map for the period 2000 to 2006, as approved by the Commission under State aid number No 265/00⁽⁴³⁾. Since Gibraltar is not such an area, this provision does not apply.

- (160) As regards the exceptions laid down in Article 87(3)(b) and (d), the reform is not intended to promote the execution of an important project of common European interest nor to remedy a serious disturbance in the economy of the United Kingdom, nor is it intended to promote culture or heritage conservation.

- (161) Lastly, it is necessary to examine whether the reform can qualify for the exception laid down in Article 87(3)(c) which states that aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest may be considered to be compatible with the common market.

- (162) The elements of the reform identified as giving rise to an advantage and the reform as a whole when compared with the system of company taxation in the United Kingdom relieve the enterprises concerned of charges that would usually be borne by their budgets in the normal course of their business. This relief is not linked either to investment or to job creation and therefore constitutes operating aid, the benefits of which will cease as soon as it is withdrawn. According to the constant practice of the Commission, such aid cannot be considered to facilitate the development of certain economic activities or of certain economic areas. In addition, Gibraltar is not included in the regional aid map for the United Kingdom⁽⁴⁴⁾.

VII. CONCLUSIONS

- (163) The Commission concludes that the reform constitutes a scheme of State aid within the meaning of Article 87(1) of the EC Treaty. None of the derogations provided for in Article 87(2) or Article 87(3) apply. Therefore the United Kingdom is not authorised to implement the reform.

HAS ADOPTED THIS DECISION:

Article 1

The proposals notified by the United Kingdom for the reform of the system of corporate taxation in Gibraltar constitute a scheme of State aid that is incompatible with the common market.

Those proposals may accordingly not be implemented.

⁽⁴³⁾ OJ C 272, 23.9.2000, p. 43.

⁽⁴⁴⁾ See previous footnote.

Article 2

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 30 March 2004.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION

of 20 April 2004

on the aid implemented by France in favour of the *Coopérative d'exportation du livre français* (CELF)

(notified under document number C(2004) 1361)

(Only the French text is authentic)

(Text with EEA relevance)

(2005/262/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments in accordance with the above Articles ⁽¹⁾, and having regard to those comments,

Whereas:

I. PROCEDURE

- (1) By judgment of 28 February 2002 ⁽²⁾, the Court of First Instance of the European Communities annulled the last sentence of the Article 1 of Commission Decision 1999/133/EC of 10 June 1998 concerning State aid in favour of the *Coopérative d'exportation du livre français* (CELF) ⁽³⁾, which stated that:

'The aid granted to CELF for the handling of small orders of books in the French language constitutes aid within the meaning of Article 92(1) of the EC Treaty. As the French Government failed to notify the aid to the Commission prior to its implementation, the aid has been granted unlawfully. It is, however, compatible aid as it satisfies the conditions for derogation under Article 92(3)(d) of the Treaty' ⁽⁴⁾.

- (2) The judgment followed a long procedure, the principle stages of which are set out below.

A. FIRST STAGE OF THE PROCEDURE

- (3) By letter dated 20 March 1992, the *Société internationale de diffusion et d'édition* (SIDE), which presented

itself as 'a French firm that exports books and has to compete with a publishers' cooperative receiving State aid' ⁽⁵⁾, drew the Commission's attention to aid measures for promotion, transport and marketing granted by the French authorities to CELF, which aid had not been notified to the Commission's services in advance in breach of Article 93(3) (now Article 88(3)) of the Treaty.

- (4) By letter dated 2 April 1992, the Commission pointed out to the French authorities that any plans to grant or alter aid must be notified in advance to its services and asked the said authorities to inform it about the nature and purpose of the aid measures referred to by SIDE.

- (5) By letter dated 29 June 1992, the French authorities confirmed to the Commission the existence of grants to CELF. They explained that the measures were designed to make French literature and language known in non-French-speaking countries and that Celf had been asked to manage three schemes of ad hoc aid designed to facilitate access by readers in far-off places to French books.

- (6) By letter dated 7 August 1992, the Commission confirmed to SIDE the existence of aid to CELF, explained its purpose and informed the company that the measures in question had not been notified. It stated, however, that the disputed aid did not seem likely to adversely affect trade between Member States. SIDE was accordingly asked to submit its comments.

- (7) By letter dated 7 September 1992, SIDE informed the Commission that it intended to object to the discriminatory nature ⁽⁶⁾ of the measures and the consequences for intra-Community trade, without however disputing the cultural objective of the Ministry of Culture, which was to see the spread of the French language and French literature.

⁽¹⁾ OJ C 366, 5.12.1996, p. 7.

⁽²⁾ Case T — 155/98 *Société internationale de diffusion et d'édition* (SIDE) v Commission [2002] ECR II-1179.

⁽³⁾ OJ L 44, 18.2.1999, p. 37.

⁽⁴⁾ The underlined sentence is the one annulled by the Court.

⁽⁵⁾ Extract from the letter from SIDE dated 20 March 1992.

⁽⁶⁾ SIDE mentions in particular that the Ministry of Culture refused it access to the aid granted to CELF.

- (8) Having assessed the disputed measures, the Commission did not endorse SIDE's objections and considered, by Decision dated 18 May 1993 ⁽⁷⁾, that, given the special nature of competition in the book trade and the cultural purpose of the aid schemes in question, the derogation provided for in Article 92(3)(c) (now Article 87(3)(d)) of the Treaty applied to them.
- (9) SIDE, by application dated 2 August 1993, filed an action for annulment of the Decision with the Court. By judgment of 18 September 1995 ⁽⁸⁾, the Court partially granted SIDE's request, annulling the Commission Decision of 18 May 1993 but only as regards certain measures in favour of small orders.
- (10) The Court also upheld the following three aid schemes administered by CELF on behalf of the State:
- (a) subsidies for air freight or airmail;
 - (b) the *Page à page* programme ⁽⁹⁾ (aid for the dissemination of French-language books in the countries of central and eastern Europe);
 - (c) Programme Plus (university textbooks in French for students in sub-Saharan Africa).
- (11) The Court held that the Commission had obtained sufficient information on the three schemes to justify the finding that the impact of their operation on the rules of competition was negligible. The Court pointed out in particular that it was possible for any operator meeting the specific conditions of the schemes to apply to CELF for a grant. It stated that SIDE had not provided any evidence to show that the granting of aid under the three schemes was likely to affect trade between Member States.
- (12) The Court concluded that the Commission was able to adopt a favourable decision concerning the three aid schemes administered by CELF and that it could therefore reject SIDE's arguments as unfounded.
- (13) The Court stated that 'as regards the cultural purpose of the aids at issue, it is common ground that the aim of the French Government is the spread of the French language and French literature'. The Court also found that the information available to the Commission when it adopted its Decision of 18 May 1993, including the facts contained in the letter from SIDE's board, dated 7 September 1992, was capable of supporting its assessment that that aim was a real and proper one. Accordingly, it felt bound to conclude that determining the cultural aim of the aid at issue did not pose any particular difficulties for the Commission and that it was not necessary for it to obtain further information in order to accept that their purpose was cultural.
- (14) As regards the compensation granted exclusively to CELF for small orders, the Court found, however, that the Commission should have thoroughly examined the conditions of competition in the sector concerned before expressing an opinion on the compatibility of the measures with the common market.
- (15) It concluded (paragraph 76 of the judgment) that the Commission should have initiated the inter partes procedure provided for by Article 93(2) (now Article 87(2)) of the Treaty and that the Commission Decision of 18 May 1993 should be dissolved, 'in so far as it concerns the aid granted exclusively to CELF for the purpose of offsetting the extra cost involved in handling small orders of French-language books placed by booksellers established abroad'.

B. SECOND STAGE OF THE PROCEDURE

- (16) By Decision dated 30 July 1996, the Commission decided, in accordance with the Court's judgment of 18 September 1995, to initiate a formal investigation into the aid in question. The decision to initiate was published in the *Official Journal of the European Communities* ⁽¹⁰⁾. Interested third parties were invited to submit their comments, and these were received in December 1996 and January 1997.
- (17) Following this examination, the Commission adopted a new, positive Decision: Decision 1999/133/EC.
- (18) On 28 September 1998, SIDE applied to the Court to annul the last sentence of Article 1 of the Decision 1999/133/EC.
- (19) The seven grounds of annulment cited by SIDE were as follows:
- (a) procedural defect;
 - (b) inadequate reasoning;
 - (c) factual error;
 - (d) manifest error of assessment;

⁽⁷⁾ Decision NN 127/92 Aid to exporters of French books (OJ C 174, 25.6.1993, p. 6).

⁽⁸⁾ Case T-49/93 *Société internationale de diffusion et d'édition (SIDE) v Commission* [1995] ECR II-2501.

⁽⁹⁾ Which subsequently became the programme *A l'est de l'Europe*.

⁽¹⁰⁾ See footnote 1.

- (e) breach of the principle of non-discrimination;
 - (f) breach of former Article 92(3)(d) (now Article 87(3)(d)) of the Treaty;
 - (g) the disputed Decision is inconsistent with former Articles 85 and 86 (now Articles 81 and 82) of the Treaty.
- (20) By judgment dated 28 February 2002, the Court annulled the last sentence of Article 1 of the said Decision on the basis of the 'manifest error of assessment', without considering it necessary to examine the other grounds cited in the action.
- (21) Having stressed the principles stemming from Community case-law on the degree of product interchangeability, the Court considered that the Commission should have carried out the necessary checks to obtain the relevant data to enable it to distinguish the export agency market from that for the export of French-language books in general.
- (22) The Court found that by failing to carry out such a check the Commission committed a manifest error of assessment in selecting the export market for French-language books in general as the reference market, when it was established that the contested aid was intended only for export agencies.
- (23) The Court concluded that under these conditions the Commission was not able to assess appropriately the effects of the contested aid on the relevant market and therefore annuls the last sentence of Article 1 of Decision 1999/133/EC on this basis.
- (24) The French authorities applied to the Court of Justice of the European Communities on 8 September 1998 for Decision 1999/133/EC to be annulled, since it had set aside the application in the case in point of Article 90(2) (now Article 86(2)) of the Treaty. According to France, the disputed aid was intended to offset the costs of a service of general economic interest which had been assigned to CELF by the Ministry of Culture.
- (25) The French Government argued that under Article 92 and Article 93(2) and (3) (now Article 87 and Article 88(2) and (3)) of the Treaty, contrary to an existing aid, a new aid cannot be implemented before it has been declared compatible with the common market, except where the eligible undertaking qualifies for the derogations provided for in Article 90(2). France defended the view that the obligation of suspension was 'necessarily' inapplicable in the case of aid allocated to an undertaking responsible for administering a service of general economic interest.
- (26) The Court, in its judgment of 22 June 2000 ⁽¹¹⁾, rejected the French claim without going into the substance of the case, having stressed the importance of the safeguard mechanism introduced by the last sentence of Article 93(3) (now Article 88(3)) of the Treaty. It stated that the fact that a Member State considers an aid to be compatible with the common market does not entitle it 'to defy the clear provisions of Article 93 of the Treaty'.
- (27) Consequently, the Court rejected the French action and confirmed that the obligation of prior notification and the suspensive effect attaching to it are applied in an inseparable manner, since the fact that an aid may be covered by Article 86 of the EC Treaty has no bearing on the obligation to notify.
- (28) Lastly, SIDE lodged a complaint on 5 October 1999 with the Commission against CELF for restrictive practice and abuse of a dominant position under Articles 81 and 82 of the Treaty. SIDE also mentioned France as responsible under Article 10 of the Treaty, since it had encouraged the said anti-competitive practices.
- (29) This matter is being treated separately by the competent services of the Commission.
- C. THIRD STAGE OF THE PROCEDURE*
- (30) Following the partial annulment of Decision 1999/133/EC, the Commission asked the French authorities and SIDE by letters dated 14 June 2002 to give their views on the reasons for the annulment of the decision and, in particular, on the aspects relating to the relevant market.
- (31) The French authorities were asked to comment in particular on the special features of the CELF offer compared with those of other market operators, including SIDE.
- (32) SIDE was asked to comment in particular on the notion of small orders and to indicate any special feature its offer might have compared with CELF's and those of the other market operators.
- (33) By letter dated 8 July 2002, SIDE asked for an extension in which to reply, which it was granted by letter dated 25 July 2002. The French authorities, which were to meet the Commission's services on 17 July 2002, also asked for an extension for their reply by letter dated 10 July 2002. This was granted by letter dated 1 August 2002.

⁽¹¹⁾ Case C-332/98 *France v Commission* (Aid for the Coopérative d'exportation du livre français (CELF)) [2000] ECR I-4833.

- (34) SIDE sent its reply to the Commission by letter dated 12 August 2002. The French authorities sent their reply by letter dated 17 September 2002.
- (35) Having asked SIDE, by letter dated 19 September 2002, to say whether its reply contained confidential information, and having obtained a negative reply on 30 September 2002, the Commission, by letter dated 17 October 2002, sent SIDE's reply together with its annexes to the French authorities for comment. It also asked them some further questions on this occasion.
- (36) By letter dated 30 October 2002, the Commission also asked SIDE some further questions, to which the company replied by letters dated 31 October 2002 and 9 December 2002. SIDE informed the Commission, by letter dated 23 December 2002, following the Commission's request of 16 December 2002, that its replies contained no confidential information and could be sent to the French authorities for comment.
- (37) In the meantime, since the French authorities had not replied within the time limit, the Commission was obliged to send them a reminder by letter dated 27 November 2002. By letter dated 19 December 2002, the French authorities again requested the Commission for an extension.
- (38) On 9 January 2003, the Commission sent SIDE's reply of 23 December 2002 to the French authorities for comment. By letter dated 17 January 2003, the French authorities replied to the Commission's questions of 17 October 2002.
- (39) By letter dated 4 February 2003, the French authorities asked the Commission for a further extension (concerning the request for comments on SIDE's second reply, dated 23 December 2002). By letter dated 11 February 2003, the Commission granted the requested extension in part. By letter dated 11 March 2003, the French authorities sent their reply to the Commission.
- (40) In the meantime, SIDE was received by the Commission's services at its request and was able to explain its view of the case from the beginning at a meeting held on 4 March 2003.
- II. DESCRIPTION OF THE MEASURES IN QUESTION:
AID AIMED AT MAINTAINING A PARTLY NON-PROFITABLE ACTIVITY**
- (41) The Ministry of Culture decided in 1980, in accordance with the general policy guidelines of the French Government on promoting books and literature in French, to grant aid to export agencies accepting any type of order, irrespective of the amount and whether it was profitable. The measures were introduced to alleviate the effects of market failure and to foster the 'small non-profitable orders' activity in the export agency market.
- (42) The French authorities explain that small bookshops, established in basically non-French-speaking areas, and sometimes difficult of access and/or remote, were experiencing serious supply difficulties, since their orders could not be met by the traditional distribution channels when the quantities of books ordered were insufficient or when the unit price of the books ordered was not high enough to make the service profitable.
- (43) The operating grants in question were intended to encourage firms to approach such customers (bookshops, not final consumers), whom it had not been possible to serve under a 'normal' commercial relationship based solely on profit.
- (44) The aid in question was designed therefore to allow export agencies to meet all orders from booksellers established abroad in basically non-French-speaking areas, irrespective of amount, profitability and destination. The aim was to ensure, as part of France's policy of supporting cultural diversity, the optimum distribution of books in the French language, thus promoting the dissemination of French literature throughout the world.
- (45) The aid mechanism chosen by the French authorities, the Small Orders programme, consisted in an operating grant intended to offset the extra cost of handling small orders of FRF 500 (i.e. approximately EUR 76) or less.
- (46) Two other funding systems, direct aid to booksellers and direct aid to publishers, had been considered but had finally been rejected, as they were thought by the French authorities to be less efficient and more costly. The system challenged by SIDE had seemed the most rational economically and the safest as regards the use of public funds.

- (47) Under the Small Orders programme, the undertaking receiving the grants had to promise to provide the Book and Reading Directorate in the Ministry of Culture with all information concerning the general activity of the firm (overall turnover, financial accounts, provisional budgets, copies of the proceedings validating these figures, the auditor's report where appropriate, and a summary salary scale), and any documents relating to the activity to be subsidised, in particular the grant utilisation account, substantiating that the services giving rise to the grant awarded the previous year had been carried out.
- (48) In practice, only one firm, CELF, had qualified under the Small Orders programme. Every year it had to justify the extra costs incurred by the small orders service in support of its application for a grant for the following year ⁽¹²⁾.
- (49) Specifically, one quarter of the grant awarded the previous year was paid at the start of the year, the balance being awarded in the autumn, after the authorities had examined the provisional budget of the recipient firm and the changes recorded in the first part of the financial year.
- (50) It was agreed that if the amount of aid was not fully utilised, the balance would be deducted from the planned grants for the following year.
- (51) It should be explained that the aid was abolished in 2002 (see Annex I, table showing the trend of aid granted since 1980, in euro).
- by the Ministry of Culture to grant it the aid described in Part II.
- (54) Basically, SIDE is asking the Commission to take a decision putting an end to the distortions of competition which it is suffering from on the market for the export of French-language books, the disturbances complained of being caused by the aid granted exclusively to CELF.
- (55) SIDE states that it refused to be granted the disputed aid, which it had been offered by the Ministry of Culture at a meeting held on 26 September 1996. It explains that it could not accept this late offer, which was made suddenly after the judgment of the Court of First Instance on 18 September 1995. It did not wish to benefit from a programme whose compatibility with Community law might be questioned by the Commission. It also explained that the offer had been made simply to get it to undertake to terminate the proceedings which it had itself initiated.
- (56) SIDE also says it was convinced that the activity of export agent did not require any aid. It therefore challenges the need for the Small Orders programme. However, it no longer rules out all possibility of using it in future, 'so that its business can be run on a level playing field', but only assuming that a mechanism which is clearly compatible with the Treaty rules is adopted by the French authorities.

III. COMMENTS FROM SIDE AND INTERESTED THIRD PARTIES

A. REASONS FOR SIDE'S INTERVENTION

- (52) The object of SIDE ⁽¹³⁾, under Article 2 of its articles of association, is: 'the sale in France and abroad of books, newspapers and magazines and all cultural products, publishing, the setting-up or acquisition and running of any similar business and, more generally, any industrial, commercial or financial operation, whether in movable or immovable assets, that can be linked directly or indirectly to the object of the company or is likely to facilitate its expansion or development'.
- (53) By letter dated 20 March 1992, SIDE lodged a complaint ⁽¹⁴⁾ with the Commission, following a refusal
- (57) SIDE states that 'on the export agency market, operators whose turnover is basically generated by intermediaries such as bookshops and not end-users are regarded as "general" exporters'. The only general agencies, in its view, are CELF and SIDE. It also explains that there are exporting booksellers, who sell direct to end-users.
- (58) At a meeting on 4 March 2003, SIDE informed the Commission that it operates basically in western Europe. It also operates in the markets of eastern Europe, but not widely on account of the programme *A l'est de l'Europe* ⁽¹⁵⁾, from which CELF benefits. It also operates in North America and South-East Asia. It used to operate in Argentina, before the current crisis hit that country. It explained that it did not want to operate in Africa, since there are few interested customers in those territories, particularly in sub-Saharan Africa. It does not operate either in countries not covered by Coface ⁽¹⁶⁾.

⁽¹²⁾ In addition, the Ministry of Culture attended CELF's board meetings and general meetings as an invited observer.

⁽¹³⁾ A family company founded in 1980.

⁽¹⁴⁾ See recital 3.

⁽¹⁵⁾ The Commission states that the programme makes it possible to grant discounts on list prices to booksellers. CELF takes part on the same basis as other operators; export agency is not involved in this case.

⁽¹⁶⁾ Insurance undertaking covering export payment risks. SIDE refuses to deliver to countries that are not covered.

- (59) SIDE disputes the French authorities' argument that large orders are profitable, whereas 'small orders' are not, which is the reason why they have to be subsidised in order to be met. It even adds, lastly, that small orders overall are more profitable to process than larger ones.
- (60) The notions 'small orders' and 'profitability thresholds', it explains, are arguments put forward by the French Government to try and justify the aid granted specifically for the operation of CELF under the cover of aid for processing small orders of French books for abroad, when in fact it is just a simple operating aid.
- (61) SIDE maintains there is no profitability threshold for the type of activity concerned. Economies of scale can of course be achieved when several copies of the same title are ordered at once. This is why its scale of discounts provides for an additional discount of 5 % for each order of 10 copies or more.
- (62) It states that the processing cost and profitability for all orders are the same, since only the number of order lines entered by one person in one day and the quantity of books for each line are significant. The total amount of the invoice issued has no influence on costing the service. A person entering 1 000 lines in one day takes exactly the same time as an order from a customer containing two or 100 lines, the only difference being that the customer has to be identified for each order from a different customer, which only takes a few seconds. The amount of turnover generated during a given period does not depend, therefore, on the number of customers but only on the number of lines entered during that period.
- (63) SIDE also states that, just like CELF, it accepts all orders sent to it whatever their amount, the solvency of the customer being its only selection criterion.
- (64) Some orders, however, may contain requests for works that are not listed and consequently require special searches; this type of order accounts for about 4,5 % of its business.
- (65) SIDE therefore considers that the aid granted to CELF for processing small orders enables that organisation to offer customers particularly attractive discounts, which SIDE cannot do itself.
- (66) Apart from challenging the principle that there are extra costs which justify the aid in question, SIDE highlights certain errors in the data from CELF's cost accounts, produced by the French authorities and used by the Commission in support of Decision 1999/133/EC. Thus it rejects the idea that there are extra costs associated with the tele-transmission of small orders, as identified in Decision 1999/133/EC. It also points out that some of the data taken from CELF's cost accounting, relating to social security contributions, are different to those pertaining to the same item in the firm's financial accounts, and that therefore the CELF accounting data notified by the French authorities are not relevant.
- (67) SIDE explains that it chose to include in its public listings only those publishers which offer the most attractive discounts. It adds that its list of publishers is much more restricted than CELF's, because it is not able to offer attractive discounts for all publishers, unlike CELF, which can do so as a result of the aid it receives and the special relations it maintains with publishers.
- (68) SIDE points out that it suffered a loss, since some of its customers switched from its services to CELF, which, on account of the aid it receives and the accommodating attitude of the publishers, offers particularly attractive discounts⁽¹⁷⁾. It considers that by this means CELF acquired a dominant position on the export agency market.
- (69) It explains that it is now suffering another kind of loss resulting from the changes to the pricing policy of CELF, which it has been applying 'for at least two years terms that discourage small accounts'⁽¹⁸⁾,⁽¹⁹⁾. Now that CELF only receives a symbolic part of the disputed grants, and especially since they were completely abolished in 2002, small accounts are requesting SIDE's services. This new demand causes further loss for the company, 'since the most interesting customers are also those who have a large volume of orders'.
- (70) SIDE concludes that 'the policy thus being conducted by CELF is obviously in total contradiction with its statement that its supposed public service task, which in its view and that of the French Government justifies the aid it receives, obliges it to treat all orders and all customers the same'.

⁽¹⁷⁾ For this purpose, SIDE produces in particular a document entitled 'Determination of the losses suffered by SIDE on account of the grants paid by the Ministry of Culture to CELF between 1 April 1980 and 31 March 1996'.

⁽¹⁸⁾ That is, 2000 to 2002, the period between the start of significant reductions in grants and their abolition.

⁽¹⁹⁾ SIDE produced in particular a letter from CELF dated 18 March 2002, informing a German customer of a change in its general conditions of sale for 'small accounts', the effect of which was an increase in charges.

- (71) In support of its claims, SIDE produces two external reports from 1996, the first by the Fondation nationale des sciences politiques and the second by the Cour des comptes (Court of Auditors).
- (72) The report of the Fondation nationale des sciences politiques, entitled 'La diffusion assistée du livre scientifique et universitaire français' (Assisted marketing of French scientific and academic books) and published in November 1996, concerns a particular segment of the market. According to SIDE, although outside the scope of the present proceedings, the document contains particularly significant information, which should have been taken into account by the Commission in Decision 1999/133/EC when assessing the legality of the aid in question.
- (73) SIDE also produces a report by the Cour des comptes, published in October 1996, criticising generally the policy of the Ministry of Culture on grants and focusing more specifically on certain programmes financed by the Ministry, including programme *Page à page*, administered by CELF.
- (74) SIDE raises other, more specific questions. It objects to a recapitalisation of CELF by the Government in 1980, which it considers tantamount to rescue aid. It believes that CELF was recapitalised a second time in 1993, also a State aid, through the Association pour le développement de l'édition française (ADEF). Finally, it mentions the advantages to CELF of being entrusted with the 'management of public programmes', and a whole set of specific advantages linked to the firm's special relations with the public authorities.
- (77) He also mentions the problems of a possible agreement between CELF and the publishers, the latter in part being members of CELF ⁽²⁴⁾. He objects to a 'manifestly unjust' situation, in which private initiative as represented by wholesale exporters is harmed.
- (78) Hexalivre, a company exporting French books ⁽²⁵⁾, submitted comments on 23 December 1996, also signed by Mr Van Ginneken, its chairman, as a bookseller whose customers are 'institutions' established abroad. It stated that CELF's business, whose object was to supply booksellers abroad, should not in principle interfere with its own. It argues that ultimately the grant in question benefits 'a private company supported by the government and tending as far as possible towards a monopoly'.
- (79) Mr Fenouil, for Lavoisier Tec et Doc, a former collaborator of CELF, publisher and exporting bookseller specialising in scientific and technical works, does not dispute, in comments dated 7 January 1997, the appropriateness of the aid granted to CELF from 1980, and even mentions 'unconditional support up to 1994' ⁽²⁶⁾. However, he does take issue with CELF's diversification ⁽²⁷⁾, which he says was financed by means of the disputed grants. He also states that 50 % of the orders handled by his company are small orders of less than FFR 500. Lastly, Mr Fenouil 'calls for a return to normal conditions of competition in exports, involving the abolition of aid not based on a genuine public service mission or an indisputable cultural objective which cannot be achieved by existing means'.

B. COMMENTS FROM INTERESTED THIRD PARTIES

- (75) Following publication in the *Official Journal of the European Communities* ⁽²⁰⁾ of the initiation decision of 30 July 1996, and even before then, several interested third parties made their views known ⁽²¹⁾.
- (76) Mr Van Ginneken ⁽²²⁾, in his comments of December 1996, explains in his capacity as a wholesale exporter of French books to non-French-speaking countries that 'CELF had already set itself the task ⁽²³⁾ of becoming a profitable exporting wholesaler itself, which conflicted with the object of its foundation, namely as a service organisation'.
- (80) Mr de la Rochefoucauld, for '*Aux amateurs de livres internationaux*', submitted comments dated 2 January 1997. He objects to, and regrets, the fact that CELF can serve foreign libraries and/or institutional customers while receiving grants for meeting the needs of another market. He would like CELF to limit its sales to foreign booksellers only, ignoring all other customers. He considers that the compensatory grant enabled CELF to give its customers an extra discount of three percentage points. For him 'the aid is a hypocrisy', he is 'astonished that the aid can be more than 60 % of the amount of the orders in question'. He concludes that the aid serves to expand CELF's commercial activities, and considers therefore that it should be divided 'between the bookshops concerned in proportion to their turnover in third countries' and that CELF should be prohibited from supplying customers other than booksellers established abroad.

⁽²⁰⁾ See footnote 1.

⁽²¹⁾ It will be noted that two of the intervening third parties were bought up by CELF, Mr Van Ginneken also intervening on behalf of Hexalivre in 1996.

⁽²²⁾ Former multiple representative of CELF, whose relations with the company 'terminated on a sour note'. He was bought up by CELF.

⁽²³⁾ In 1996 to 1997.

⁽²⁴⁾ It will be noted that the Commission was able to establish that CELF's collaborators on average numbered about a hundred, while the market comprises several thousand publishers.

⁽²⁵⁾ Hexalivre was bought in 1998 by a subsidiary of CELF, which itself has since been bought by CELF.

⁽²⁶⁾ Commission's italics.

⁽²⁷⁾ According to Tec et Doc, CELF should limit its activities to the export agency business and not get involved in the export of scientific books.

- (81) The Syndicat national des importateurs et exportateurs de livres (SNIEL) points out in its comments of 31 December 1996 that SIDE's remarks about CELF were not considered sufficiently credible for it to join its court action initially. It does object, however, to the fact that CELF, from 1996, was able to operate in 'areas where it was not originally planned that it should operate' ⁽²⁸⁾, and considers that it developed these activities as a result of the compensatory grants received, which it regards as too high.
- (82) Similarly, SIDE, in its comments of 6 January 1997, stated that '(...) even supposing that small orders are commercially significant, it has become apparent very quickly that CELF has not confined itself to this allegedly non-profitable activity'.
- (83) CELF, which likewise submitted comments as a third party, disputes the complainant's allegations and produces several letters from publishers expressing satisfaction with its services.
- (84) The French authorities state that, in the circumstances, CELF was transformed into a closed-end cooperative society in public limited company form. Its capital was increased from FRF 80 500 to FRF 1 280 500. One half of the recapitalisation was provided by the shareholders, and the other by ADEF ⁽³⁰⁾, an association financed by the State. ADEF was dissolved in 1994; its shares were assigned free of charge to SNE, itself a collaborator of CELF.
- (85) France states that CELF has remained, to this day, a cooperative society in public limited company form, which operates using its own funds. It is a structure that has always been open to all, there being no nationality requirement in order to become a shareholder. The only obligation has always been to have 'an activity somehow linked to the export of French books'. Thus publishers of French-language works established in another Member State can join the cooperative without any problem and benefit from its action ⁽³¹⁾.

IV. COMMENTS FROM THE FRENCH AUTHORITIES

- (84) The French authorities state that for a long time small orders were handled by the companies Hachette and Messageries du Livre. These firms acted as distributors for numerous publishing houses which did not have suitable distribution structures for ad hoc small orders and/or did not want to develop them.
- (85) CELF, bringing together various operators in the publishing world, was set up in 1977, initially in the form of an open-end cooperative, to offset the perceived failure of the export agency market at a time when Hachette and Messageries du livre had decided to abandon that activity as unprofitable ⁽²⁹⁾. Its capital, initially FRF 50 000, was increased subsequently to FRF 80 500. From 1979, CELF encountered substantial financial difficulties, which were expected however, since the two companies which previously administered the activity had preferred to withdraw from a market they considered unprofitable. The profession, publishers, the Syndicat national de l'édition (SNE) and the public authorities considered that CELF's activity should be maintained in any event, to ensure the optimum marketing of French-language books abroad. Since no other operator seemed prepared to provide the service, it was decided in 1980 that CELF would be restructured and recapitalised.
- (86) CELF's object, under Article 3 of its articles of association, is to 'process directly orders for abroad ⁽³²⁾ and the overseas territories and departments of books, brochures and any communication media and, more generally, to perform any operations aimed in particular at increasing the promotion of French culture throughout the world, using the above media. To this end, the cooperative will carry out all industrial, commercial or financial operations to achieve its object. Given the particular object of the cooperative, no natural or legal person may become or remain a shareholder, if they do not carry on a business somehow linked to the abovementioned export operations'.
- (87) The French authorities explain that, at 6 November 2002, CELF had 76 cooperative shareholders, who are mainly, though not entirely, publishers. Each shareholder has one vote at the general meeting, irrespective of the size of its stake. The interprofessional nature of the company has provided a guarantee of transparency, concern for the collective interest and the sound administration of the grant awarded.

⁽²⁸⁾ Small orders, according to SNIEL, account for 6 % of CELF's business, which means, according to this union, that 'CELF conducted 94 % of its business in areas where it was not originally planned that it should operate'.

⁽²⁹⁾ A letter from the Syndicat national de l'édition dated 18 July 1980 submitted by the complainant confirms this.

⁽³⁰⁾ The association brought together a number of publishers whose aims were to increase the presence of French books abroad and to support investment for exporting publishers. It received assistance from the State through the Book and Reading Directorate in the Ministry of Culture.

⁽³¹⁾ Only one foreign firm is currently a member of CELF: Casterman, whose registered office is in Belgium. It is a French subsidiary of Flammarion, itself a subsidiary of the Italian company Rizzoli.

⁽³²⁾ Prior to a discussion at the general meeting on 29 June 1994, CELF's articles of association referred explicitly to "small orders". What was then Article II stated that "the Cooperative's object is to process directly or facilitate the processing of small orders for abroad and the overseas territories and departments, (...)".

- (90) The main players in the marketing of books are as follows:
- (a) publishers, which 'produce' the books;
 - (b) marketers, whether integrated into publishing houses or not, which ensure the commercial promotion of books to retailers or certain large institutional users;
 - (c) distributors, whether integrated or not into publishing houses, which ensure the logistics of the publishers' marketing; they receive their orders from booksellers, certain large institutional users or diversified intermediaries and obtain their supplies from publishers;
 - (d) wholesalers, which are not always involved in the distribution channels and who are intermediaries between distributors and retailers or certain large institutional users;
 - (e) export agencies, which deal only with retailers and not the end-user.
- (91) France explains that on-line bookshops must now be included among the players present on the market and must also be considered as potential competitors of the export agencies. It is, however, unable to supply data on the market shares held by these new entrants ⁽³³⁾.
- (92) The French authorities explain that the variety of the players present on the market must make it possible to market and promote books to all types of public, irrespective in principle of their geographic location, since the Small Orders programme has provided an appropriate remedy for the deficiencies of the complex mechanism for marketing books.
- (93) The French authorities transmitted certain information on the global market for the export of French-language books. This illustrates CELF's commercial policy, which gives preference, in line with its articles of association and the commitments given to the French authorities, to those areas where publishers are not very present.
- (94) Thus Table 1 shows that CELF is not very active in those areas where publishers are very active and that, conversely, it is active in those areas where publishers are not very active.

Table 1

Comparative geographic distribution of the turnover of French language publishing and CELF, and CELF's share of the global market for the export of French language books			
Regions concerned	Publishing	CELF	CELF's share
European Community	38,2 %	20,23 %	0,97 %
North America	17,4 %	6,03 %	0,64 %
Non-Community Europe	16 %	1,11 %	0,13 %
Overseas departments and territories	8,4 %	0,87 %	0,19 %
Asia	3,7 %	19,9 %	9,95 %
French-speaking Africa	5,5 %	11,58 %	3,85 %
Maghreb	4,4 %	28,43 %	11,84 %
Near and Middle East	2,3 %	1,09 %	0,87 %
Eastern Europe	2 %	2,21 %	2,03 %
Latin America	1,5 %	7,6 %	9 %
West Indies	0,32 %	0,7 %	4,27 %
Non-French-speaking Africa	0,16 %	0,21 %	2,47 %
	100 %	100 %	

⁽³³⁾ Market not identifiable from customs statistics.

- (95) The French authorities point out that the Small Orders programme was not designed as an aid specifically for CELF, but as a scheme of support for the marketing of French-language books, it being possible to use the channels of other operators that might respond to the same type of order.
- (96) They explain that the structural change to CELF, which occurred in 1980, was accompanied by a decision to grant aid under the Small Orders programme. They confirm that, in practice, CELF was the only general operator to receive the grants in question ⁽³⁴⁾, since no other operator (apart from SIDE, 12 years after the launch of the programme) applied, even when the programme was known to the profession.
- (97) France does not dispute that the Ministry of Culture refused to grant the aid to SIDE ⁽³⁵⁾ in 1991, since the firm did not meet the conditions of transparency required to qualify for the said aid and refused to be bound by the constraints inherent in their award. Furthermore, France points out that the Ministry of Culture approached SIDE in 1996 to offer it the aid, but the company refused it.
- (98) The French authorities point out that one of the objectives of French cultural policy is to ensure the marketing of French-language works throughout the world. This objective must be understood as a public service task. Which is why the French authorities maintain that the Commission should analyse the measures in question under Article 86(2) of the Treaty.
- (99) France points out that CELF was set up, and then allocated the disputed grants, at a time when the economic operators responsible for this activity had decided to withdraw from the market. If the disputed measures had not been put into effect, the marketing of French-language books to small bookshops established in often remote areas, where demand is slight in terms of turnover and volume, would have clearly been penalised.
- (100) The French authorities consequently decided to implement the disputed programme, so that all orders can be met, including non-profitable orders for French-language works, under the same conditions as for larger orders.
- (101) France asserts that the Ministry of Culture provided 'its assistance for the operational costs of CELF's public service associated with small orders' and that consequently CELF was entrusted with a genuine public service task.
- (102) In support of their claim, the French authorities sent the Commission several instruments:
- (a) Decree No 82-394 of 10 May 1982 on the organisation of the Ministry of Culture stresses its role in the 'influence of French culture and French art in the free dialogue of world cultures';
 - (b) Decree No 93-797 of 16 April 1993 on the powers of the Minister for Culture and the French-speaking World, which provides that 'the Minister for Culture and the French-speaking world (...) shall implement, jointly with the other Ministers concerned, the measures introduced by the Government to ensure the influence of French culture and the French language in the world';
 - (c) the orders on the organisation of the Book and Reading Directorate, the latest of which dates from 1996, based on the said decrees, which set out the tasks of the Ministry of Culture in relation to the export of books.
- (103) The French authorities state that it is on the basis of these instruments that the Book and Reading Directorate concluded annual agreements with the partners responsible for implementing measures arising out of the Government's cultural policy. The agreements define the aims of the collaboration between the Ministry and the bodies it subsidises, and the obligations of the parties.
- (104) The French authorities explain that, every year, the Ministry of Culture concluded with CELF ⁽³⁶⁾ an agreement entrusting it with the performance of a public service task which consisted in 'meeting any order for French-language works from foreign bookshops, irrespective of the amount'.
- (105) The French authorities also explain that, however the reference market is defined, SIDE and CELF are not in competition for low-volume orders.
- (106) In particular they highlight the contradiction in SIDE's case: while claiming to work with the same type of customers as CELF and that it treats all its customers in the same way 'irrespective of the amount of their orders', SIDE gives a discount of less than five percentage points on orders of less than 10 copies.
- (107) They consider that the significant 'penalty' which SIDE applies to low-volume orders of less than 10 copies is evidence that small orders are not a priority target for the company, unlike orders which allow it to achieve considerable economies of scale, such as those placed by institutional customers.

⁽³⁴⁾ Some firms, Servedit for French-speaking Africa from 1988 to 1993, and the Ecole des Loisirs, in 1995, for the countries of the Mediterranean basin, managed to qualify for aid of the same kind but in specialist sectors.

⁽³⁵⁾ The only other company to have applied.

⁽³⁶⁾ Until 2001, since the grant was abolished from 2002.

- (108) The fundamental difference in commercial strategy is clear in particular from the average number of books per line and per invoice, which is much higher for SIDE than for CELF.
- (109) The French authorities state that CELF must be able to offer its customers a comprehensive list of publishers in return for the aid granted to it, even if this is not compensated as such by the aid from the Small Orders programme, since the policy objective of the Ministry of Culture is to market books in French as widely as possible. They point out that hundreds of publishers on CELF's list are in fact very small publishers, associations or miscellaneous bodies which are almost unheard of⁽³⁷⁾ and whose publishing activity is not likely to generate large, profitable orders. By offering such an expanded list of publishers, CELF is promoting diversity. It must accordingly be sourced from a very large number of suppliers for amounts which are often very small, which in turn forces it to manage numerous small publisher accounts without this being compensated by aid of any sort.
- (110) Small publisher accounts are economically less profitable, since unlike large publishers they don't offer very favourable terms. For its part, SIDE applies a commercial policy that gives priority to the more popular publishers, which are likely to generate large orders. The French authorities explain that, consequently, a distinction should be drawn between 'small accounts' and 'small orders'. The notion 'small orders' suits the description of the disputed 'programme' of course, but it does not sufficiently capture the counterpart of 'small customer accounts', namely 'small supplier accounts'.
- (111) The award of grants is of course based on the extra costs generated by small orders, but the beneficiary operator is also subject to obligations which are not, properly speaking, 'compensated'.
- (112) The French authorities state that compensatory aid was allocated to CELF to offset the additional expenses generated by small orders, the threshold for which had been set empirically at FRF 500. The threshold was a reference figure which did not mean that each order between FRF 0 and 500 had to be at the breakeven point. Some orders of FRF 500 might be profitable, others not. It all depended on the number of titles and books included, the nature of the books, the reliability of the order placed, depending on whether the customer was eligible or not for the Coface guarantee, and the means of and time required for payment.
- (113) The French authorities explain that what was certain, however, was that the FRF 0 to 500 order market was not profitable overall and would not, in principle, have been covered by an operator which had taken only economic criteria into account. They base this argument on a cost analysis for the reference year 1994.
- (114) As tables 2a and 2b show, the French authorities explain that in recent years, and in particular since they started to run down their financial commitment in 1996 to 1997, CELF has been forced to diversify by developing a profitable customer base made up of large bookshop accounts and institutional customers such as libraries, universities and cultural centres. At the same time, while 'small account' turnover and the number of customers have declined, there has been an increase in CELF's turnover overall. The French authorities confirm consequently that processing small orders has acted as a brake on CELF's business.

Composition of CELF's turnover

Table 2a — Example of Germany

GERMANY			
3,4 % of CELF's turnover represents 27,2 % of active small customer accounts			
	1999	2000	2001
Turnover	FRF 2 331 713	FRF 2 548 430	FRF 2 906 533
Number of customers	593	561	444
Turnover < FRF 5 000	480	462	344
Turnover < FRF 10 000	47	35	38
Turnover + FRF100 000	0	2	4

⁽³⁷⁾ For example, Ensemble baroque Limoge; monastère Sainte Madeleine.

Table 2b — European Community

Customer accounts, European Community			
	1999	2000	2001
Turnover	FRF 15 253 754	FRF 14 241 785	FRF 14 436 006
Number of active customers	1 567	1 440	1 249
Turnover < FRF 5 000	1 059	950	782
Turnover < FRF 10 000	162	154	139
Turnover + FRF 100 000	19	15	18

V. ASSESSMENT

- (115) CELF and SIDE are two competing undertakings established in France which are active, in particular, as agencies for the export of French-language books⁽³⁸⁾. This activity consists in the marketing of books in French⁽³⁹⁾ in order to meet orders from small retailers (small bookshops or institutions such as libraries or universities), principally in non-French-speaking countries and areas. For areas such as Belgium, Canada and French-speaking Switzerland, books are marketed by the publishers themselves or through distribution networks, the volume of the market being sufficiently large for firms to invest in integrated distribution networks. This type of service makes it possible to ensure the optimum marketing of many works.
- (116) SIDE and the French authorities are agreed that the agent collates individual small orders which it would be too expensive for publishers and traditional distributors to handle. This service enables customers, whether they are booksellers or institutions, to avoid having to contact a multitude of suppliers.
- (117) At the same time, the orders are sent to the publishers and/or distributors, which thus have a single point of delivery: the agent. Through this type of service, therefore, they also save time and money by not having to maintain relations with several customers, which are assumed to be very scattered geographically.
- (118) Export agents are thus essential service providers for channels exporting books to countries where demand is irregular, fragmented and/or low-volume. Using the services of an export agent is therefore often the only way for a buyer (never the final customer) established in a non-French-speaking country to place and receive its orders. The service of the agent makes it possible to reduce the fixed costs associated with processing each order.

- (119) In the case in point, it is established that the French authorities implemented the disputed Small Orders programme in order to assist, within the export agency market, small orders of less than or equal to FRF 500, regarded in principle as non-profitable. It is appropriate to examine, therefore, whether this programme, which was not notified and of which CELF was in practice the only beneficiary, was compatible with the Treaty.

A. APPLICABILITY OF ARTICLE 87 OF THE TREATY

1. THE MEASURES IN QUESTION ARE AID WITHIN THE MEANING OF ARTICLE 87(1) OF THE TREATY

- (120) Article 87(1) of the Treaty lays down that 'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.
- (121) The measure in question gives CELF an advantage, since it is a grant designed to reduce the cost of small orders. This point, moreover, was never disputed by the French authorities.
- (122) It is financed from budgetary resources administered by the Book and Reading Directorate in the Ministry of Culture, i.e. from State resources.
- (123) It is intended for book agents and, in practice, has only benefited CELF. It is therefore selective.
- (124) As to whether the measure affects trade between Member States and distorts competition, the Commission has taken account of the following.

⁽³⁸⁾ CELF is an agent only for books in French; this is not the case with SIDE, which also handles books in foreign languages.

⁽³⁹⁾ Contrary to that of SIDE, CELF's activity is exclusively devoted to exports.

- (125) The aid is granted to French agents who export books in the French language principally to non-French-speaking countries. The French agents are therefore competing, at least potentially, with other agents for the export of French-language books established in other French-speaking countries of the Community (principally Belgium and Luxembourg). It should be mentioned, however, that given the considerable difference between the volume of French-language books exported to non-French-speaking countries from France and the volume exported from Belgium and Luxembourg, the distortion of competition on the market as a result of aid is by nature very limited.
- (126) The aid may also give rise to a distortion of competition and affect trade by having induced effects on the other activities of CELF. However, these seem confined to marketing abroad, and CELF's website ⁽⁴⁰⁾ clearly states that the company does not sell in France or to individuals. The aid in question was granted to CELF under the Small Orders programme, which was designed to ensure that all orders from foreign bookshops located in non-French-speaking territories can be met, irrespective of the amount. The Commission notes that the disputed mechanism was able to benefit buyers and publishers of French-language books, since the former could enjoy affordable prices and the latter's sales were facilitated. Such an effect on trade, however, is extremely indirect and, all things considered, very limited, given the low substitutability between books in French and other languages.
- (127) In these circumstances, the aid granted to CELF is State aid within the meaning of Article 87(1) of the Treaty, since it meets the four conditions of aid. It should also be mentioned, however, that the impact on trade and the distortion of competition as a result of the measure are very small.
- (128) It must be stressed that Member States are obliged to inform the Commission, in sufficient time, of any plans to grant aid, in accordance with Article 88(3) of the Treaty.
- (129) The French Government did not notify the programme in question or the aid to CELF for processing small orders, before it granted them. The aid was thus granted unlawfully.
- (130) Moreover, since the Court of First Instance partly annulled the Commission Decision of 18 May 1993, and subsequently Decision 1999/133/EC, which authorised the aid granted to CELF, the aid which was granted to CELF for processing small orders is still unlawful.
- (131) It should now be examined whether one of the derogations provided for in Article 87(2) and (3) was applicable in this case, so that the measure in question could have been exempted from the general prohibition in Article 87(1).
2. ASSESSMENT OF THE MEASURES IN THE LIGHT OF ARTICLE 87(2) AND (3) OF THE TREATY
- (132) The Commission notes that the derogations in Article 87(2) of the Treaty are not applicable in this case, since the measures in question were manifestly not intended to achieve the objectives defined therein. Nor did the aid satisfy the tests for the derogation in Article 87(3)(a) of the Treaty, since it was not intended to promote the development of areas eligible for the provision. The derogation provided for in Article 87(3)(b) concerning the promotion of the execution of an important project of common European interest cannot be applied in this case either, since the measure in question was not intended to promote that type of project. Since the aid was not intended either to remedy a serious disturbance in the French economy, the derogation in the second part of Article 87(3)(b) is not applicable either in the case in point. Lastly, Article 87(3)(c), concerning the facilitation of the development of certain economic activities or certain economic areas cannot be relied on, since the aid did not pursue regional or horizontal objectives and the Commission considers that the provision cannot be used in this case for sectoral purposes.
- (133) However, under Article 87(3)(d), 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest' may be considered to be compatible with the common market.
- (134) It is established that the cultural objective of the aid in question, recognised early on by the complainant ⁽⁴¹⁾ was acknowledged by the Commission in its Decision of 18 May 1993, confirmed by the Court of First Instance in its judgment of 18 September 1995, confirmed again in Decision 1999/133/EC, and not called into question in the CFI's annulment decision of 28 February 2002.
- (135) This objective is clearly affirmed by the French Government, which wanted to conduct a proactive policy aimed at promoting the worldwide marketing of French-language works. The desire is part of an increasing trend to safeguard and encourage cultural diversity at international level.

⁽⁴⁰⁾ www.CELF.fr.

⁽⁴¹⁾ Letter from SIDE's board to the Commission dated 7 September 1992.

- (136) The Commission has already expressed its views on this topic in its communication to the Council and the European Parliament entitled: 'Towards an international instrument on cultural diversity' ⁽⁴²⁾. It considers that cultural diversity has become one of the major issues of the international debate taking place among international and regional organisations, which makes it possible to answer growing concerns of civil society and governments regarding the preservation of cultural diversity as a common heritage of populations.
- (137) The preservation and promotion of cultural diversity are among the founding principles of the European model. They are incorporated in the Treaty, in Article 151(1), which states: 'The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore', or again in Article 151(4), which states: 'The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures'.
- (138) The Treaty requires the Community and the Member States to promote cultural diversity in their international relations as a contribution to a world order based on sustainable development, peaceful coexistence and dialogue between cultures. By fostering and financially supporting the marketing of French-language works, the French authorities have implemented a cultural policy which meets the objectives laid down in the Treaty.
- (139) Accordingly, the Commission considers that the aid which was granted to CELF by the French authorities for marketing French-language works, irrespective of the amount of the order, was pursuing a cultural objective as understood in the Treaty.
- parties states that it had applied to the Ministry of Culture for the aid in question.
- (142) It is clear from several of the third-party comments that the mechanism of assistance set up by the French authorities was not, at least initially, called into question by those members of the profession who expressed their views.
- (143) The Commission would also observe that the complainant, like the third parties, was fully aware of the aid which CELF had been granted since it was set up in 1980. It was only in 1991 ⁽⁴³⁾ that SIDE asked the Ministry of Culture to grant it the aid as well, the Commission being informed of the case only several months later, in March 1992.
- (144) The Commission notes that the third-party comments are basically critical of CELF's policy of diversification ⁽⁴⁴⁾. CELF is accused of having gone, over a period of time and with the complicity of the publishers that granted it preferential discounts, into markets other than that for which it was originally set up, i.e. the small orders market.
- (145) It is clear from the documents supplied that, when it was set up, CELF served bookshops only. It is only later, during the 1990s, that it started to canvas other types of customer. However, nothing indicates that CELF financed the diversification of its business from the disputed grants, indeed the opposite is the case, since the purpose and effect of the grants was to compensate only the extra costs generated by small orders, as is shown in recital 198 et seq.

3. COMPATIBILITY OF THE AID WITH COMMUNITY LAW

- (140) Under Article 87(3)(d) of the Treaty, aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest may be compatible with the common market.
- a. Preliminary remarks by the Commission on the comments of third parties**
- (141) The Commission notes that the third parties which expressed their views, following publication of the decision to initiate the proceeding, are not, except for SIDE and CELF, export agents but rather providers of specialist 'wholesale' services. None of the intervening third
- (146) Some third parties, exporting wholesalers or exporting booksellers, point out that the aid was not appropriate for satisfying demand, though no relevant information in support of these claims was produced.
- (147) Lastly, some third parties claimed that CELF benefited from the privileged relations it maintained with certain public organisations, such as France édition. Hexalivre, in particular, criticised the attitude of France édition, which, it said, had given CELF special treatment by allowing it access to its stand at international fairs, which it refuses to do for Hexalivre.
- (148) The Commission has been able to establish, as the documents communicated by the French authorities testify, that CELF, which is a member of France édition, paid both for the space rental on France édition's stand and for the catalogues it ordered from that organisation. In any event, as the French authorities have noted, this type of relation in no way concerns the public authorities.

⁽⁴²⁾ COM(2003) 520 final.

⁽⁴³⁾ Letters from SIDE, dated 22 May and 4 June 1991.

⁽⁴⁴⁾ See recital 81.

- (149) However, as these factors did not figure in the decision to initiate proceedings of 30 July 1996, they have no bearing on the 'small orders' problem. Consequently, the Commission will not give an opinion on this question in the present proceedings.
- (150) The French authorities are also accused of favouring CELF through public procurement. These claims relate in particular to the assistance granted for implementing the 'Nouveautés' programme administered by the Ministry for Foreign Affairs and the impact of orders placed by associations linked to that Ministry and the Ministry for Cooperation (such as the Association pour le développement de la pensée française (ADPF) and the Association pour le développement de l'enseignement et de la culture en Afrique et à Madagascar (Audecam).
- (151) As these factors did not figure in the decision to initiate the proceeding of 30 July 1996, they have no bearing on the problem of small orders. Consequently, the Commission will not give an opinion on this question in the present proceedings.
- (152) Lastly, SIDE objects to 'the complex bundle of aid benefiting not only CELF but also various organisations bringing together, like CELF, publishers and public authorities in the greatest obscurity' and the cultural policy of the public authorities generally.
- (153) In support of its claims, SIDE produces in particular a report by the Cour des comptes from November 1996. The Commission notes that the report basically contains general criticisms of the way cultural aid was awarded in France. It contains nothing about the aid granted to CELF for the processing of small orders. CELF is mentioned, but only in connection with the programme *Page à page* and the Programme Plus operation, which were approved by the Court of First Instance in its judgment of 18 September 1995 ⁽⁴⁵⁾.
- (154) In the circumstances, the Commission considers that the conclusions of the Cour des comptes' report are not likely to help its assessment in these proceedings. In any event, SIDE's general criticisms of French cultural aid policy were not included in the decision to initiate proceedings of 30 July 1996 with regard to the Small Orders programme. Consequently, the Commission will not give its views on this question in these proceedings.

b. Reply concerning SIDE's related claims

- (155) In the first stage of the aid procedure, SIDE raised certain specific questions about the recapitalisation of

CELF and the advantages it would receive from 'administering public programmes'. SIDE also challenged a whole series of specific advantages, linked to the preferential relations which CELF allegedly maintains with the public authorities.

Recapitalisation of CELF in 1980

- (156) It will be noted that CELF's capital was raised in 1980 from FRF 80 500 to FRF 1 280 500. The operation was financed by ADEF to the tune of 50 % and by the (private) shareholders of CELF, also to the tune of 50 %.
- (157) The main objective of ADEF, which brought a number of publishers together, was to promote the presence of French books abroad and to support investments made by publishers or exporters. The Association received a public grant from the Ministry of Culture.
- (158) Having analysed the documentation submitted by the French authorities, the Commission has reached the conclusion that the disputed capital increase did not constitute State aid but simply the acquisition of a holding. It is not, and cannot be, disputed that private investors participated in setting up the company in its present form. The Ministry of Culture, did not contribute to CELF's capital, and ADEF, an association that is admittedly financed in part by the state, always acted like a private investor in a market economy. ADEF's subscription fully satisfies point 3(2)(iii) of the Commission's notice on the application of Articles 92 and 93 of the EEC Treaty to public authorities' holdings ⁽⁴⁶⁾. Accordingly, the transaction contained no element of State aid within the meaning of Article 87(1) of the EC Treaty.
- (159) Moreover, the recapitalisation had already taken place more than 10 years before SIDE sent its first letter to the Commission, dated 20 March 1992, and before the Commission asked the French authorities for information by letter dated 2 April 1992. Consequently, and in accordance with Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ⁽⁴⁷⁾, the Commission could not, if appropriate, order the recovery of the capital increase, even if State aid were involved.

Recapitalisation of CELF via ADEF in 1993

- (160) SIDE also objects to aid which was granted to CELF in 1993 via a sale of shares in ADEF to SNE, which is a collaborator of CELF.

⁽⁴⁵⁾ See recital 10.

⁽⁴⁶⁾ Bulletin of the European Communities, 9-1984.

⁽⁴⁷⁾ OJ L 83, 27.3.1999, p. 1.

- (161) In its comments of 5 December 2003, SIDE remarked to the Commission that, in accordance with the written evidence it had deposited at the hearing on 4 July 2001, the Commission should give its opinion on the aid which, according to SIDE, had been granted to CELF when ADEF was wound up in June 1993.
- (162) The Commission notes that this point was not covered by the decision to initiate proceedings of 30 July 1996. Consequently, it will not give its opinion on the question under the present proceedings.

Advantages to CELF associated with the 'administration of public programmes'

- (163) SIDE explains that CELF has been able to maintain its presence in the market and continue to grant the same type of discount to its customers after the abolition of the Small Orders programme, since it continues to receive many public grants through programmes such as *A l'est de l'Europe*, which superseded the programme *Page à page*, or Programme Plus, to which constantly increasing funds are allocated.
- (164) It should be pointed out that these programmes, which had already been approved by the Commission in its decision of 18 May 1993, were also confirmed by the CFI in its judgment of 18 September 1995 ⁽⁴⁸⁾.
- (165) It follows that these aspects were not reported in the decision to initiate proceedings of 30 July 1986. Consequently, the Commission will not give an opinion on this question in the present proceedings.
- c. ***The aid for small orders was not such as to adversely affect trading conditions and competition in the Community to an extent that is contrary to the common interest***
- (i) *A mechanism intended to promote an activity abandoned by the publishing trade*
- (166) The Small Orders programme was designed in 1980 by the Ministry of Culture, at a time when the industry (Groupe Hachette and Messageries du livre) wanted to quit the export agency market. The disputed mechanism was introduced to encourage operators to become involved in the market, so that all orders for French-language books from bookshops in non-French-speaking areas could be met.
- (167) The Commission finds firstly, in agreement with some of the comments from third parties intervening in the proceedings, that the Small Orders programme, which was in fact launched when CELF was set up in its current form, was known to practitioners, which at least initially welcomed it ⁽⁴⁹⁾, or at the very least did not call it into question, without however applying for it themselves.
- (168) SIDE maintains, for its part, that the Small Orders programme was reserved exclusively for CELF. The rejection it received from the Ministry of Culture in 1991, in its view, confirmed this. At the same time, SIDE did not dispute that its application for aid was justified by its own refusal to accept the transparency requirement for eligibility.
- (169) In 1996, following the annulment of the Commission Decision of 18 May 1993, the Ministry of Culture, wanting to put an end to the proceedings, pointed out to SIDE that the scheme of aid for small orders was not reserved for CELF. By letter dated 3 September 1996, the Ministry offered the company a meeting to examine whether it was able to provide, in the same conditions of transparency, the same services as CELF.
- (170) At a meeting held on 26 September 1996, SIDE's managers refused the proposal which was made to them. They told the Ministry of Culture that they refused to benefit from a programme whose compatibility with Community law could be called into question by the Commission.
- (171) In support of its claims, SIDE produces a report by the Fondation Nationale des Sciences Politiques, basically criticising the decision of the French authorities not to pay grants direct to booksellers. The Commission would point out in this respect that national authorities are free to choose the form of subsidy which seems to them to be best suited to the objectives they are pursuing, subject to respecting the relevant Community law. In any event, the Commission stresses that the document produced is not relevant and notes that its authors themselves take a critical view of their own assessment ⁽⁵⁰⁾.
- (172) Lastly, SIDE maintains that the aid was inappropriate. The Commission would emphasise in this respect that the beneficiaries of the aid were obliged to process all orders of less than FRF 500. This ensured that French-language books could reach all bookshops, including the smallest in far-off countries, even if they only needed a few books, often published by different publishers. This was not guaranteed by SIDE, which, as has already been stated, did not supply all countries.
- (173) In light of the above, the Commission finds that the Small Orders programme was, in principle, accessible to any firm applying, provided it accepted the conditions according to which the aid was granted. It also notes that, from 1996, SIDE made it clear that it did not want to qualify for the programme. In the circumstances, the Commission considers that the disputed aid was not discriminatory and that it was necessary for the achievement of the objectives pursued by the French authorities.

⁽⁴⁸⁾ See recital 10.

⁽⁴⁹⁾ At least until 1991. See recital 79 et seq.

⁽⁵⁰⁾ Page 163 of the report transmitted by SIDE.

(174) In any event, the Commission considers that, even assuming the aid in question could have been regarded until 1996 as being exclusively reserved for CELF, it was for the French authorities to assess what measures were the most appropriate and useful for optimum attainment of the objective pursued, since the aid did not exceed what was necessary for achieving that objective, as will be shown below.

(ii) *Examination by the Commission, based on the figures supplied by the French authorities and the complainant*

The export agency market for French-language books

(175) As part of their export agency activity, CELF and SIDE distribute books in non-French-speaking countries and territories. In French-speaking countries, such as Belgium, Canada and Switzerland, the local market is covered by large publishers through their subsidiaries or representatives.

(176) The export agency has only a very marginal role, therefore, in the markets which are the main outlets for books in French, i.e. the three countries mentioned above.

(177) It is established that CELF was set up, at the end of the 1970s, to remedy the failures of a market abandoned by firms in the industry because it was not profitable, and that the disputed aid was intended to support a manifestly non-profitable segment of the agents' activity.

(178) In Decision 1999/133/EC, the Commission defined the market on which it had examined the effects of the disputed aid as being the market for the export of French-language books 'in general'. The Court of First Instance, following the arguments developed by SIDE, criticised that analysis and considered that the Commission had made a manifest error of assessment in that the export of French-language books and the export agency business for French-language books were not substitutable, but distinct markets, the latter being a submarket of the former.

(179) Without questioning the CFI's assessment, the Commission would observe that the evidence produced during the examination of the case, both by the SIDE⁽⁵¹⁾ and by the national authorities, shows that the mechanisms for marketing French-language books abroad are very

varied⁽⁵²⁾, complimentary, and sometimes substitutable, since export agency is one of several existing systems.

(180) The Commission notes that SIDE and the French authorities appear to agree that it is not always easy to define exactly the various markets in the book marketing sector.

(181) SIDE states in its most recent comments that general agents like itself and CELF are present on the national market in question. Other operators, which it defines in some cases as agents and in others as exporting bookshops⁽⁵³⁾, also sell, marginally, direct to end-users and would be competing very marginally with the two general agents.

(182) The French authorities share SIDE's analysis in part, while stating that the exporting booksellers to whom the complainant refers are in reality specialised agents. They have added to the list of potential competitors a number of bookshops which meet, even on an occasional basis, orders from foreign booksellers. France explains that on-line book shops should now be included among the competitors of the general agents, which the Commission considers to be relevant, even if accurate volume data for this segment, which has been created by the use of new technology, are still unavailable.

(183) It should be noted that SIDE sent the Commission certain figures purporting to show the 'dominant position' of CELF⁽⁵⁴⁾ on the submarket concerned.

(184) As was pointed out in recital 29, the Commission will not give its opinion in this decision about SIDE's complaint based on Articles 81 and 82 of the Treaty, since this question is the subject of a separate examination. It should be noted in this respect that a preliminary letter conveying the Commission's preliminary intention to reject the complaint was sent to SIDE on 7 August 2003.

(185) However, without prejudging the final position it takes in the other half of the dossier, the Commission would point out that CELF, an interprofessional firm, was set up, which on the basis in particular of third parties' comments is not disputed, to remedy the failings of a market abandoned by the industry. Thus it is not surprising that the market shares held by the firm are very large.

⁽⁵²⁾ See recital 90.

⁽⁵³⁾ Letters dated 7 September 1992 and 9 December 2002 relating to Aux amateurs du livre international.

⁽⁵⁴⁾ CELF's share of the market is alleged to have risen from 86,60 % in 1992 to 92,75 % in 2001, which would mean that the amount of aid has no effect on CELF's position, since the aid it was granted fell steadily after 1996 to 1997.

⁽⁵¹⁾ SIDE itself refers, in several of its written comments, to aid for the export of books.

(186) The Commission considers that CELF's position on the market in question, still has no direct bearing on the granting of the aid. The Commission is solely concerned to check the compatibility of the aid on the export agency market under Article 87(3)(d) of the Treaty.

Relevance of the notion 'small orders' in connection with the export agency business

(187) The book export agency business consists in meeting orders that are not very large. The market was abandoned at the end of the 1970s by publishers and traditional distributors because it was not profitable enough. In any event, therefore, the export agency business concerns small orders.

(188) SIDE and the French authorities agree as to the definition of the service involved. However, their positions diverge when it comes to identifying, on the export agency market, 'lesser' orders (e.g. an order for an inexpensive work by an African bookshop), which generate extra costs so that the service cannot be profitable.

(189) The Ministry of Culture fixed the amount for 'small orders' which should be subsidised at a threshold of FRF 500 (EUR 76,22). The French authorities have always explained that certain orders of less than FRF 500 might be profitable, whereas others, above that amount, might not be. The objective was to find an economically acceptable solution, so that operators would want to assume orders that had been abandoned because they were not profitable enough.

(190) The Commission asked the complainant and the French authorities to explain the problems of the business's profitability. In particular it asked them to describe the different tasks which the service involved, so as to deter-

mine, where appropriate, the origin of the extra costs to be compensated.

(191) The French authorities and SIDE agree overall as to what constitutes the processing of orders, described in Annex III by SIDE and not disputed by the French authorities.

(192) Their differences, therefore relate basically to the profitability of the services. For SIDE, all orders are profitable, irrespective of their nature. For the French authorities, some services are clearly not profitable, which justifies the aid granted.

(193) In this respect, the Commission notes certain statements of SIDE, which, taken together, may seem contradictory. As with the following: 'the best customers are those with a large volume of orders' and 'small orders are overall more profitable to process than larger ones'.

(194) The Commission noted that SIDE and CELF did not seem to be talking necessarily about the same type of customer. More specifically, SIDE is interested in the institutional customer, while CELF gives priority to booksellers. SIDE disputes this point. However, it did not want to provide the Commission, as it was asked to, with clarification of its types of customer. The complainant has simply observed, in its written comments, that between 1991 and 2002 it had 1 308 customers and that it served the same type of customer as CELF.

(195) To check the relevance of the contradictory comments supplied, the Commission has drawn up the following comparative tables 3a, 3b and 3c on the basis of data supplied by SIDE and the French authorities:

Table 3a

(in EUR)

1999	SIDE	CELF small orders	CELF without small orders	CELF Total
Turnover	818 297	329 204	10 027 299	10 358 503
Number of invoices	2 187	9 688	13 210	22 898
Number of lines	27 470 / 27 978	21 978	263 080	285 058
Number of books	88 163	26 996	575 593	602 589

(in EUR)

1999	SIDE	CELf small orders	CELf without small orders	CELf Total
Number of customers ⁽⁵⁵⁾	Not disclosed	2 171	718	2 889
Average number of lines per invoice	13,07	2,26	20	12
Average number of books per line	3,21	1,22	2	2
Average number of copies per invoice	40,84	2,79	44	28
Average price of each copy sold	9,09	12,19	17	17
Average value of a line	29,17	14,98	38	38
Average value of a customer account	Not disclosed	151,84	13 968	3 585

Table 3b

2000	SIDE	CELf small orders	CELf without small orders	CELf Total
Turnover	1 021 831	301 604,53	11 151 915	11 480 519
Number of invoices	2 069	8 763	12 565	21 448
Number of lines	29 006	20 387	258 124	278 511
Number of books	102 229	25 229	586 643	610 872
Number of customers	Not disclosed	2 007	631	2 638
Average number of lines per invoice	14,97	2,32	20	13
Average number of books per line	3,52	1,24	2	2
Average number of copies per invoice	52,75	2,87	46	28
Average price of each copy sold	9,87	11,95	19	19
Average value of a line	29,17	14,79	43	41
Average value of a customer account	Not disclosed	15 028	17 684	4 344

Table 3c

2001	SIDE	CELf small orders	CELf without small orders	CELf Total
Turnover	905 077	275 068	12 817 252	13 092 330
Number of invoices	2 137	7 702	12 195	19 897
Number of lines per invoice	23 990	17 681	256 019	273 700
Number of books	105 518	21 853	590 278	512 129
Number of clients	Not disclosed	1 659	835	2 494

⁽⁵⁵⁾ The Commission regrets that SIDE did not want to produce any data about the number of its customers and the average value of a customer account.

2001	SIDE	CELF small orders	CELF without small orders	CELF Total
Average number of lines per invoice	11,23	2,30	21	14
Average number of books per line	4,27	1,24	2	2
Average number of copies per invoice	47,97	2,84	48	31
Average price of each copy sold	8,66	12,59	22	21
Average value of line	37,73	15,56	50	48
Average value of a customer account	Not disclosed	16 580	15 360	5 250

(196) The Commission finds that the figures in tables 3a, 3b and 3c show that, while CELF, disregarding what it considers 'small orders', sells an average number of books per invoice comparable to SIDE's (44 as against 41 in 1999, 46 as against 43 in 2000 and 48 as against 48 in 2001), it also meets a large number of particularly small orders (less than three books on average, with an average value of approximately EUR 35): 9 688 orders in 1999, 8 763 in 2000 and 7 702 in 2001. It follows that, overall (the column headed CELF Total) the number of books per order is clearly much lower for CELF than for SIDE: 28 as against 41 in 1999, 28 as against 53 in 2000 and 31 as against 48 in 2001.

(197) It is apparent from the foregoing, that CELF's business is characterised in particular by a large number of very small orders (fewer than three books on average and about EUR 35), which clearly distinguishes it from SIDE and possibly justified granting the aid in question.

Examination of the factors giving rise to the aid: the extra costs associated with the Small Orders programme

(198) Having established the relevance of small orders as a criterion for justifying the granting of the aid, the

Commission analysed the cost accounting data supplied by the French authorities. The accounting figures justify the extra costs incurred by CELF in the small orders segment. The information communicated by the French authorities to the Commission concern 1994, a year in which CELF received a grant of FRF 2 000 000 (EUR 304 900) from the Ministry of Culture.

(199) The Commission's examination concerns the cost accounting information on the costs of small orders with a value of less than FRF 500. The Commission noted the explanations provided by the French authorities, which indicate that the FRF 500 threshold chosen for defining a 'small order' was determined empirically⁽⁵⁶⁾.

(200) The French authorities suggested that it could be shown that the processing of small orders clearly involve evident extra costs. The evidence for this is a cost analysis based on the information for reference year 1994 in the following table.

Type of order	Small orders	Other	Total
Turnover (*)	2 419 006	48 148 971	50 102 869
Number of invoices	9 725	10 947	20 672
Number of books	24 933	442 740	467 673

(*) In French francs.

(201) As described in detail in Annex III, processing an order requires that several tasks be carried out:

(a) receipt of the bookseller's form;

(b) coding the order;

(c) inputting the order;

(d) dispatch of the order to the publisher;

(e) receipt of the books;

(f) allocation of space (compartment) to each customer for storage of the books ordered;

(g) packaging.

⁽⁵⁶⁾ See recitals 112 and 113.

(202) The analytical approach of the accounts makes it possible to record all the flows relating to the above operations. An invoice of FRF 100 generates as much work, in principle, as an invoice for FRF 10 000.

(203) The French authorities' explanations enabled the Commission to estimate the costs and allocate them to the tasks associated with processing an order. The profitability of an order depends, in particular, on the type and number of books concerned, the accuracy of the information supplied on the order form and the difficulty of executing the order, it being possible to consider 20 % of CELF's orders and 4,5 % of SIDE's as difficult to carry out⁽⁵⁷⁾. In addition, orders with a value of less than FRF 500 concern, in 67 % of cases, publishing houses of a craft industry type⁽⁵⁸⁾. Lastly, processing small orders involves administering a large number of small accounts.

(204) Costs will be higher for small orders, since the operator handling them will have to repeat the same physical operations for each order, irrespective of the amount. A firm processing several small orders will have to provide an organisation that can cope with the greater number of separate processing stages and, hence, the extra costs involved.

(205) The French authorities explain that a coefficient was applied to each type of operation. To this end, account was taken of the various tasks involved in each of the operations as described in Annex IV.

(206) On the basis of the information supplied by France, the Commission is able to conclude that for 1994 the costs of processing small orders were FRF 4 446 706. Turnover in orders of less than FRF 500 was FRF 2 419 006. The aid for the same year amounted to FRF 2 000 000. The operating loss was consequently, FRF 27 700.

Turnover	FRF 2 419 006
Grants	FRF 2 000 000
Total income	FRF 4 419 006
Processing costs	– FRF 4 446 706
Operating result	– FRF 27 700

(207) As a result, the Commission concludes that the aid of FRF 2 000 000 did not overcompensate the costs of processing of small orders.

(208) To check the relevance of the information supplied for the reference year 1994, the Commission asked the French authorities to supply further information

concerning the processing of small orders by CELF for other periods. The supporting documents and explanations sent by France for other financial years show that the structure of small orders (turnover compared with the number of small orders, the quantity of books ordered, the number of invoices relating thereto, and the number of customers and order lines) remained stable from one year to another. In the circumstances, the Commission considers that the data for 1994 can reasonably serve as a reference for the Commission's assessment.

(209) The Commission was also able to verify from the agreements it was sent that any excess amount was deducted from the aid paid the following year. It was not possible therefore for the aid to finance other commercial activities of CELF, contrary to the claims of SIDE and several intervening third parties.

(210) The aid was allocated annually on the basis of accounting information supplied by CELF, including grant utilisation accounts, justifying the extra costs incurred through the Small Orders programme; the aid, therefore, was not liable to be used for other purposes than those for which it was granted.

Assessment of the errors identified by SIDE

(211) In its most recent comments, SIDE informed the Commission that the accounting information supplied by the French authorities to the Commission, in the second stage of the proceedings, as evidence of extra costs contained certain errors. The French authorities were informed of this and submitted the appropriate explanations to the Commission.

(212) SIDE observed that the French authorities had switched the percentages of tele-transmitted orders with those for orders sent in on paper. The Commission was able to verify that the financial incidence of the switch amounted to EUR 0,24 per book for the cost of a small order. The difference is not such as to call into question the compensation mechanism presented by France.

(213) As regards the variations in turnover which SIDE identified in the first accounting information produced by France, the Commission confirms that the French authorities themselves made the necessary corrections as soon as the proceeding was initiated in 1996, and that consequently the claims made in SIDE's most recent comments are without foundation.

⁽⁵⁷⁾ Percentages communicated by the French authorities in CELF's case, and by SIDE itself.

⁽⁵⁸⁾ In principle, large publishing houses generate bigger orders; these often involve the marketing of works intended for the general public, which are generally sold in large quantities.

- (214) The variation in the other figures is explained by the fact that, in one case, reference is made to the proceeds of selling the books alone (FRF 2 284 536), whereas, in the other, the figure communicated (FRF 2 535 818) is the proceeds for the books and incidental services (packing, insurance and transport).
- (215) SIDE also thought that it could identify certain 'distortions' between the financial accounting and the cost accounting of wages and salaries. The French authorities stated that these differences are due to the fact that certain taxes are not included in the social security contributions given in the tax forms but are levied directly on the wages. The Commission was able to check the accuracy of this explanation from the accounting documents sent to it.
- (216) The Commission considers, therefore, that SIDE's additional comments, on the inaccuracy of the accounting data transmitted by the French authorities when the proceedings were initiated in 1996, do not call into question the Commission's assessment of the relevance of the accounting data justifying the compensation for the extra costs generated by small orders.

Additional constraints on CELF

- (217) The Commission found, on the basis of the analysis of the documents produced by the complainant itself, that CELF's list was much larger than SIDE's ((3 000 publishers offered by CELF, as opposed to 200 offered by SIDE).
- (218) The Commission took note of this factor (which is not taken into account in the calculation of the extra costs) and observes that CELF's wider list meets the requirements of the Ministry of Culture that French-language books should be marketed as widely as possible. The list offered by SIDE which stipulates, however, that it can meet all types of demand, does not take account, quite legitimately, of this cultural objective.
- (219) The French authorities add that CELF was often forced to take financial risks. Thus it continued to provide its services in certain high-risk countries such as Algeria or, more recently, Argentina. It was also able to provide services in certain countries not covered by the Coface guarantee.
- (220) SIDE sticks quite legitimately with its commercial choices and states that it does not want to operate in difficult areas such as sub-Saharan Africa or in countries not covered by Coface. It states that these are decisions that are part of a firm's commercial development strategy and that, for its part, it has made other choices.

- (iii) *Examination by the Commission of the customer transfers objected to by SIDE*

Transfers of customers from SIDE to CELF

- (221) The Commission found that SIDE's claims concerning customer transfers were without foundation, on the basis of an analysis of the explanations and documents produced by SIDE itself.
- (222) Thus the Commission asked SIDE to justify the customer transfers from which it claimed to have suffered as a result of the advantageous discounts which 'only CELF' was able to offer due to the aid it had received. SIDE accordingly produced a very long document ⁽⁵⁹⁾, whose data could not be used by the Commission in the form presented, in particular because the said transfers were not absolutely apparent from it. The Commission asked SIDE for further explanations on this point, and the firm was able in particular ⁽⁶⁰⁾ to state that one customer, the Librairie Française de Milan, had gradually switched its custom to CELF in 1987 to 1988, since CELF had offered it more attractive discounts.
- (223) The French authorities pointed out in reply that the Italian market was known for its competitive nature and that, in addition, the increase in CELF's turnover from the said bookshop only became significant in 1999, i.e. well after the period mentioned by SIDE.
- (224) The Commission found that the other examples quoted by SIDE were not more relevant ⁽⁶¹⁾. Thus one of the bookshops cited by SIDE, Grupodis in Madrid, was never a major customer of CELF's, and the Japanese bookshops cited are in fact large-account customers who are not concerned by the small orders segment of the market.
- (225) The list of discounts communicated by SIDE did not show that the discounts it offers are less attractive than those offered by CELF. Thus, of the 28 publishers which SIDE selected to illustrate its claim, the Commission finds that SIDE offers more attractive discounts in 16 cases, as opposed to 12 for CELF ⁽⁶²⁾. The difference is even greater, if one takes into account the extra five percentage points discount granted by SIDE for orders of more than 10 copies per title, since in that case CELF offers better discounts for only six publishers as opposed to 22 by SIDE.
- (226) The Commission considers, therefore, that customer transfers from SIDE to CELF, due supposedly to the more attractive discounts offered by CELF to its customers as a result of the aid it had received, cannot be established in reality.

⁽⁵⁹⁾ 'Détermination des préjudices subis par la SIDE du fait des subventions versées par le ministère de la culture au CELF entre le 1er avril 1980 et le 31 mars 1996'. (Determining the losses suffered by SIDE on account of the grants paid by the Ministry of Culture to CELF between 1 April 1980 and 31 March 1996).

⁽⁶⁰⁾ Five other examples are given by SIDE.

⁽⁶¹⁾ The French authorities do not endorse the other examples given by SIDE.

⁽⁶²⁾ SIDE's initial presentation on the discounts referred to the list of discounts granted by CELF on the public price in France (inclusive of all tax), whereas export sales are made on the basis of a price exclusive of tax. It is on the basis of a list of prices corrected accordingly that the comparison is now made.

Transfer of customers from CELF to SIDE

- (227) As was noted in recital 69, in a letter dated 12 August 2002 to the Commission, SIDE claims that CELF had been applying dissuasive conditions for small accounts for at least two years. SIDE points out that 'this policy also only increases the distortion of competition suffered by SIDE, since in the circumstances some former customers of CELF's which have small accounts are now turning to SIDE (...). However, for SIDE, obviously, the best customers are those which have a large volume of orders (...)'.
- (228) The Commission finds, firstly, that the pricing changes objected to ⁽⁶³⁾ occurred during the period when the aid in question had been abolished and/or very significantly reduced, i.e. when CELF had to find alternative solutions in order to continue to try to meet the small orders which it was sent.
- (229) The Commission compared ⁽⁶⁴⁾ the figures on the two undertakings and finds that there is nothing in them to confirm the remarks of SIDE concerning the recent customer transfers to which it objects. The Commission finds no increase in the number of invoices drawn up by SIDE: they were 2 187 in 1999, and 2 137 in 2000. As to the number of customers, the Commission would point out that it cannot make a comparison because it was not able to obtain data from SIDE.
- (230) The Commission cannot identify, either, any factors which show that the number of small orders met by

SIDE has increased now that CELF no longer receives any aid. On the contrary, the figures supplied by SIDE show that the average number of books per invoice increased from 40,31 in 1999 to 49,38 in 2001, whereas the shift in customers from CELF to SIDE, if confirmed, would have resulted in a decline in the average number of books per invoice.

- (231) The Commission notes, finally, that the average number of books sold per line by SIDE is again greater than the average sold by CELF, for the whole of its activity, not just small orders. Consequently, the abolition of the aid did not involve redeploying customers from CELF to SIDE.
- (232) In any event, in the analysis of State aid, only distortions of competition caused by that aid are relevant, not the effects of reducing and/or abolishing the aid, regarded as negative by SIDE.

Conclusions of the Commission regarding customer transfers

- (233) In light of the data communicated by SIDE and the French authorities, the Commission considers that the only visible consequences of abolishing the aid are a reduction in the turnover from small orders met by CELF and a significant reduction in the number of its customers (-17,34 % between 1999 and 2001), as table 5 below shows:

Table 5 — Trend of activity in small orders and small accounts
Information supplied by the French authorities

Year	Turnover small orders (euros)	Trend	Number of customers	Trend
1999	329 204		2 171	
2000	301 605	- 8,38 %	2 007	-7,55 %
2001	275 068	- 8,80 %	1 659	-17,34 %

- (234) The Commission also considers that SIDE's comments contradict its own statements to the effect that only the number of lines inputted by the service provider ought to be taken into consideration, and that the total amount of the order has no effect in terms of profitability. If this were the case, SIDE would have no reason to think that the alleged transfer of CELF customers to its services (which, moreover, is not clear from the figures provided) increases the distortion of competition suffered by SIDE ⁽⁶⁵⁾. Furthermore, the Commission notes that SIDE would seem to contradict itself, when it states in a note dated 9 December 2002, that '(...) small orders are overall more profitable to process than large orders'.

⁽⁶³⁾ CELF's pricing changes are not disputed by France, which stated that CELF had had to suddenly review its 'small accounts' prices following the reduction of the aid.

⁽⁶⁴⁾ See also tables 3a, 3b and 3cC.

⁽⁶⁵⁾ Commenting on this point, SIDE explained that 'clearly, the best customers are those which have a large volume of orders — not because the others would not be profitable, but simply because, like any commercial firm, it is always preferable to have customers that generate a large volume of business'.

- (235) Table 6, compiled by the Commission from data communicated by the French authorities and by SIDE, shows that there is no automatic link between the variation in SIDE's turnover and the variation in the grants received.

Table 6

Reference year	Aid granted to CELF	Variation in SIDE's turnover	Aid
1990	304 900	—	—
1991	373 500	+	+
1992	422 280	-	+
1993	382 650	+	-
1994	304 900	-	-
1995	304 900	-	=
1996	304 900	-	=
1997	243 920	-	-
1998	182 940	+	-
1999	121 960	-	-
2000	60 980	+	-
2001	38 110	-	-
2002	0	-	0

- (236) The figures supplied by CELF and by SIDE enabled the Commission to establish that the level of aid granted to CELF had no automatic impact on the business and results of SIDE, the only other general agent in the market ⁽⁶⁶⁾. For instance, over several years, SIDE's turnover fell even though the aid granted to CELF was declining.
- (237) The Commission observed that a visible, significant consequence of abolishing the aid to CELF on the market was a fall in its small orders turnover and a decline in the number of its small accounts.
- (238) The Commission finds, on the basis of the figures supplied, that, without the aid, some of the orders no longer appear to be met by CELF, though SIDE does not benefit from the observed disaffection.
- (239) The Commission also observes that for the period 1994 to 2001, the grants awarded did not cover the entire deficit under the Small Orders programme and accounted for a relatively small proportion of CELF's total turnover: from 3,95 % in 1994 to 0,29 % in 2001 ⁽⁶⁷⁾.
- (240) In light of all the factors examined above, it is clear that the disputed aid concerns a very marginal share of the export agency business, which would obviously not have been performed without the aid in question. The Commission has also established that the aid granted by France did not over-compensate the costs inherent in the activity in question.
- (241) The Commission would also point out, as was mentioned in recital 132 et seq., that the effect on trade and the distortion of competition at Community level are very limited in this particular case. These factors have to be taken into account by the Commission when it assesses the compatibility of the aid with Article 87(3) of the Treaty, as the Court of First Instance clearly stated in *Ladbroke Racing Ltd* ⁽⁶⁸⁾.
- (242) Consequently, the aid granted to CELF under the Small Orders programme was not such as to affect competition and trade to an extent contrary to the common interest. The action taken by the French authorities was proportional to the objective pursued, and simply made it possible for some of the demand, which would not otherwise have been met, to be met by the service provider without worrying about profitability.

⁽⁶⁶⁾ For the record, the Commission would point out that ad hoc aid of the same type as that at issue was paid to two other firms: Servedit and l'École des Loisirs.

⁽⁶⁷⁾ See also Annex II in this respect.

⁽⁶⁸⁾ Case T-67/94 [1998] ECR II — 1, in particular paragraphs 150 to 162.

B. APPLICABILITY OF ARTICLE 86(2) OF THE TREATY

1. POSITION OF THE FRENCH AUTHORITIES

(243) The French authorities argue, as they did in 1998⁽⁶⁹⁾ that CELF was entrusted with a public service task and that, consequently, the disputed measures must be assessed in the light of Article 86(2) of the Treaty, which states that 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

(244) In this connection, the French authorities submitted several instruments⁽⁷⁰⁾ which, in their view, confirm that the task entrusted to CELF was a service of general economic interest.

(245) The French authorities stated, on the basis of these instruments, that the Book and Reading Directorate had concluded with CELF, until 2001, annual agreements defining the objectives of the collaboration between the Ministry and CELF and the respective obligations of the parties.

(246) The French authorities submitted several of these agreements. Article 1 of the first of these, dated 25 April 1991, specifies that 'the Ministry shall provide its assistance for the combining of small orders of books by CELF intended for abroad (...)'. Another agreement, dated 23 October 1997, mentions, it would seem, for the first time, that 'the Ministry shall provide its assistance for the operating costs of CELF's public service associated with small orders'. The agreements concluded subsequently, until 2001, are identical except for the amount of aid granted.

2. ASSESSMENT BY THE COMMISSION

(247) The Commission has already concluded in this Decision that the aid granted to CELF is State aid within the meaning of Article 87(1) of the Treaty and that it is compatible with the common market under Article 87(3)(d). Consequently, in accordance with the

case law of the Court of Justice⁽⁷¹⁾, there is no need for the Commission to assess further the subsidised activities of CELF in the light of Article 86(2) of the Treaty. The Court confirmed this position in its judgment of 22 June 2000⁽⁷²⁾, the Court having concluded that even aid justified on the basis of Article 86(2) must be notified to the Commission. It is therefore not necessary to determine whether the aid to CELF is also justified under Article 86(2) of the Treaty.

(248) The Commission notes that, in the meantime, in *Altmark*⁽⁷³⁾ the Court clarified the conditions in which a grant to an undertaking responsible for administering a service of general economic interest does not constitute State aid. The Commission finds that in the case in point these conditions are not satisfied. It considers, first, that the condition set out in paragraph 89 of *Altmark* has not been met, since the legal basis of the aid does not expressly concern CELF. It also considers that paragraph 90 of the said judgment, which concerns the establishment in advance of the parameters on the basis of which the compensation is calculated, has not been observed either, even if overall the aid has not exceeded the amount necessary to compensate for the costs of processing small orders.

VI. CONCLUSION

(249) In view of the above, it is clear that the aid in question meets the requirements of Article 87(3)(d) of the Treaty, in that it is proportional to the cultural objective pursued. The Commission found that the aid was not such as to affect trade and competition in the Community to an extent contrary to the common interest,

HAS ADOPTED THIS DECISION:

Article 1

The aid to the Coopérative d'exportation du livre français (CELF) for processing small orders of French-language books, implemented by France between 1980 and 2001, is aid that is caught by Article 87(1) of the EC Treaty. Since France failed to notify the aid to the Commission before implementing it, the aid was granted unlawfully. It is, however, compatible with the common market under Article 87(3)(d) of the Treaty.

⁽⁶⁹⁾ See recital 24.

⁽⁷⁰⁾ See recital 102.

⁽⁷¹⁾ Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* [1994] ECR I-877.

⁽⁷²⁾ See recital 24 et seq.

⁽⁷³⁾ Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 20 April 2004.

For the Commission

Mario MONTI

Member of the Commission

ANNEX I

Table showing the trend of aid granted since 1980, in euro

1980	91 470
1981	91 470
1982	205 510
1983	164 640
1984	137 200
1985	141 780
1986	248 490
1987	214 950
1988	213 430
1989	259 160
1990	304 900
1991	373 500
1992	422 280
1993	382 650
1994	304 900
1995	304 900
1996	304 900
1997	243 920
1998	182 940
1999	121 960
2000	60 980
2001	38 110
2002	0

ANNEX II

Decline in the compensation for CELF's expenses*Information supplied by the French authorities*

Year	Amount of aid (euro)	Total charges	Percentage covered
1994	304 900	683 788	44,59 %
1995	304 900	697 177	43,73 %
1996	304 900	624 206	48,85 %
1997	243 920	680 023	35,87 %
1998	182 940	664 783	22,63 %
1999	121 960	635 577	19,19 %
2000	60 980	572 670	10,65 %
2001	38 110	509 048	7,49 %
2002	0	0	0

ANNEX III

Processing orders*Information extracted from SIDE's comments*

New customer

- (a) Dispatch to the buyer of a file containing:
 - the general conditions of sale (e-mail, fax or mail)
 - request to open an account (e-mail, fax or mail)
- (b) After receipt of the request to open an account, check on the customer's solvency at Coface
- (c) If there is no problem, an account is opened for the customer
- (d) If there is a problem, the customer can only be served 'pro forma', (i.e. after payment of an estimate)

Customer holds an account

- (a) Identification of the customer (in particular from his account number)
 - Inputting of the item ordered (searching among 640 000 titles, including books, audio cassettes, audio CDs and CD-ROMs)
 - Inputting: once the item has been identified, the quantity, order date and customer reference are keyed in, and the inputting validated
 - If other order lines have to be inputted, the operation is repeated
 - The method of dispatching orders can be altered to suit the customer's wishes
 - (b) If the work ordered is not in the database
 - The item is inputted manually:
 - the title, name of author, ISBN, publisher and supplier are given
 - (c) Each order for a book automatically generates a 'supplier' order
 - (d) Special software automatically transmits orders to suppliers who have the right equipment and are, hence, listed
 - (e) Order forms are then printed automatically and sent by fax, mail or messenger to the suppliers concerned
-

ANNEX IV

Breakdown of CELF's cost-accounting items — 1994*based on information supplied by the French authorities*

Figures (Francs and euro)

	FRF	EUR
Cost of purchasing books	2 068 293	315 309
— Purchase	2 026 011	308 863
— Transport and messengers	42 282	6 446
Staff costs	1 670 963	254 737
— Reception (of works), direct labour	217 641	33 179
— Packaging, direct labour	53 409	8 142
— Sales department, direct labour		
— Area 1	149 770	22 832
— Area 2	157 627	24 030
— Area 3	49 390	7 529
— Wages and salaries, General Services	1 022 285	155 846
— Wages and salaries, Marketing	20 841	3 177
Overheads	518 926	79 110
— Packaging consumed	14 770	2 252
— Administrative supplies	183 784	28 018
— Freight out	148 056	22 571
— Commission on sales	36 540	5 570
— Telephone, telex	29 103	4 437
— Collection charges	26 294	4 008
— Loan repayment insurance	20 929	3 191
— Depreciation of tangible fixed assets	20 609	3 142
— Other	38 841	5 921
Individual, indirect fixed charges	188 524	28 740
— Trade tax	14 064	2 144
— Charges to provisions	51 890	7 911
— External services	66 828	10 188
— Exceptional charges	46 733	7 124
— Other	9 009	1 373
Total cost	4 446 706	677 896

Exchange rate: EUR 1 = FRF 6,55957

Comments and explanations

1. *Purchasing and transport (including messengers) costs.* The cost was calculated taking into account the total cost of these activities allocated according to the number of books, i.e. FFR 38 795 874 (EUR 5 914 393). This amount is divided by the number of books to obtain the unit cost per book. The total number of books sold by CELF in 1994 was 467 673, so the unit cost per book is FFR 82,95 (EUR 12,65). To determine what was the purchasing and transport cost to be allocated to small orders, the unit cost per book is multiplied by the number of 'small orders' books, giving a total of FFR 2 068 293 (EUR 315 309).

2. *Staff costs.* A coefficient of 3 (based on the number of books) was applied to this item, as the reception of small orders gives rise to difficulties peculiar to this category. The reception of works from large publishers or distributors is computerised using the EAN code, which makes recognition of the work by optical scanning possible. Conversely, works published by small publishers often do not contain a bar code, which means that manual recognition is necessary.

Large publishers delivered to Parisian customers for a contribution to the transport costs fixed by the trade association, which is FFR 0,75/kg, whereas the price paid messengers is FFR 6,5/kg for the packages used for works from small distributors. As invoices to foreign booksellers are flat-rate, that source of supply means a reduction in margins.

Giving small orders a coefficient of 3 thus makes it possible to include an appropriate charge for their processing in the cost accounting.

3. *Packaging.* The direct labour is taken into account on the basis of the number of books.

4. *Sales department.* The cost of direct labour was calculated by applying a coefficient of 3, since small orders involve more onerous processing as regards sales administration. The differences of treatment make it possible to include the appropriate charge for their processing in the cost accounting.

Additional explanations on coding the order. If there are difficulties with coding orders, further work is needed. The work has to be carried out irrespective of the amount of the order.

In addition, research is required before an order can be inputted: ISBN, publishers' catalogues, various data bases, check on the availability (or not) of the work, check on the match between order and publisher. Difficulties associated with the quality of the order form, in particular in identifying the order, will give rise to extra costs. Such difficulties often occur in the case of small orders. Large bookshops, which have a considerable turnover with CELF, are generally large-scale firms that use high-performance tools to enable them to rationalise their management, and in particular to transmit standardised orders, i.e. ones containing clear identification features. Among CELF's customers are numerous small bookshops, whose activity does not always allow modern international business resources to be used. Thus orders coming from this type of establishment are sometimes difficult to decipher and only include some of the information necessary for meeting the order, which means extra work and, hence, extra cost.

5. *Wages and salaries, general services* (management, IT, switchboard, accounting, marketing, cleaning). The costs are allocated according to the number of books, except for accounting where the criterion is the number of invoices.

6. *Overheads (packaging consumed, freight out and depreciation of tangible fixed assets).* Costs are calculated on the basis of number of books.

7. *Overheads (administrative supplies).* Costs are calculated on the basis of the number of invoices.

8. *Overheads (commission on sales and loan repayment insurance).* Costs are calculated on the basis of turnover.

9. *Overheads (telephone, telex and collection charges).* A coefficient of 2,5 is applied, since telephone costs vary in accordance with many factors, in particular customer replies and publisher searches. These costs concern several operations, including reception of the order form from the bookseller, coding the order, inputting the order and accounting, whose purpose is to record all the flows relating to the operations described.

10. *Trade tax and charges to provisions.* Costs are calculated on the basis of turnover. *External services* (e.g. rents, travel and promotion costs, etc.) and exceptional charges. Costs are calculated on the basis of the number of books.

COMMISSION DECISION

of 4 March 2005

authorising Member States to adopt certain derogations pursuant to Directive 94/55/EC with regard to the transport of dangerous goods by road*(notified under document number C(2005) 440)***(Text with EEA relevance)**

(2005/263/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road ⁽¹⁾, and in particular Article 6(9) thereof,

Whereas:

(1) Pursuant to Article 6(9) of Directive 94/55/EC, Member States must give the Commission an advance notification on their derogations for the first time by 31 December 2002 or until two years after the last date of application of the amended versions of the Annexes to the Directive.

(2) Certain Member States had notified the Commission by 31 December 2002 of their wish to adopt derogations from Directive 94/55/EC. By Decision 2003/635/EC of 20 August 2003 authorising Member States pursuant to Directive 94/55/EC to adopt certain derogations with regard to the transport of dangerous goods by road ⁽²⁾, the Commission authorised the adoption by the Member States of the derogations listed in Annexes I and II to that Decision.

(3) Commission Directive 2003/28/EC ⁽³⁾ amended Annexes A and B to Directive 94/55/EC. By virtue of Directive 2003/28/EC Member States had to bring into force national legislation no later than 1 July 2003, the last date of application referred to in Article 6(9) of Directive 94/55/EC being 30 June 2003.

(4) A few Member States notified their wish to adopt derogations. The Commission has examined the notifications for compliance with the conditions laid down in Article 6(9) of Directive 94/55/EC and has approved them. Those Member States should therefore be authorised to adopt the derogations in question.

(5) By the same occasion, it is considered desirable to assemble all the derogations authorised to date in a single decision. Decision 2003/635/EC should therefore be repealed and replaced.

(6) To make sure that the situation of the derogations is updated regularly, the Commission shall propose a comprehensive update of all existing derogations at least every five years.

(7) The measures provided for in this Decision are in accordance with the opinion of the Committee on the transport of dangerous goods, set up by Article 9 of Directive 94/55/EC,

HAS ADOPTED THIS DECISION:

Article 1

Member States listed in Annex I are authorised to implement the derogations set out in Annex I regarding the transportation by road within their territory of small quantities of certain dangerous goods.

These derogations shall be applied without discrimination.

Article 2

Member States listed in Annex II are authorised to implement the derogations set out in Annex II regarding to local transport limited to their territory.

These derogations shall be applied without discrimination.

Article 3

Decision 2003/635/EC is repealed.

References to the repealed Decision shall be construed as references to this Decision.

⁽¹⁾ OJ L 319, 12.12.1994, p. 7. Directive as last amended by Commission Directive 2004/111/EC (OJ L 365, 10.12.2004, p. 25).

⁽²⁾ OJ L 221, 4.9.2003, p. 17.

⁽³⁾ OJ L 90, 8.4.2003, p. 45.

Article 4

This Decision is addressed to the Member States.

Done at Brussels, 4 March 2005.

For the Commission

Jacques BARROT

Vice-President

ANNEX I

Derogations for Member States on small quantities of certain dangerous goods

BELGIUM

RO-SQ 1.1

Subject: Class 1 — Small quantities.

Reference to the Annex to Directive 94/55/EC (hereinafter referred to as the Directive): 1.1.3.6.

Content of the Annex to the Directive: Marginal 1.1.3.6. limits to 20 kg the quantity of mining explosives which can be transported in an ordinary vehicle.

Reference to the national legislation: Royal Decree of 23 September 1958 on explosives, as amended by Royal Decree of 14 May 2000.

Content of the national legislation: Article 111. Operators of depots remote from supply points may be authorised to transport 25 kg of dynamite or powerful explosives and 300 detonators at the most in ordinary motor vehicles, subject to conditions to be set by the explosives service.

RO-SQ 1.2

Subject: Transport of uncleaned empty containers having contained products of different classes.

Reference to the Annex to the Directive: 5.4.1.1.6.

Reference to the national legislation: Derogation 6-97.

Content of the national legislation: Indication on the transport document 'uncleaned empty packages having contained products of different classes'.

Comments: Derogation registered by the European Commission as No 21 (under Art. 6.10).

DENMARK

RO-SQ 2.1

Subject: Road transport of packagings containing wastes or residues of dangerous substances collected from households and certain enterprises for the purpose of disposal.

Reference to the Annex to the Directive: Part 2, 4.1.4, 4.1.10, 5.2, 5.4. and 8.2.

Content of the Annex to the Directive: Principles for classification. Mixed packing provisions. Marking and labelling provisions. Transport document.

Reference to the national legislation: Bekendtgørelse nr. 729 of 15. august 2001 om vejtransport of farligt gods § 4, stk. 3.

Content of the national legislation: Inner packagings containing waste or residues of chemicals collected from households and certain enterprises may be packed together in certain UN-approved outer packagings. The contents of each inner packaging must not exceed 5 kg or 5 litre. Derogations from the provisions concerning classification, marking and labelling, documentation and training.

Comments: It is not possible to carry out an accurate classification and apply all ADR provisions when wastes or residual amounts of chemicals are collected from households and certain enterprises for the purpose of disposal. The waste is typically contained in packagings which have been sold in retail sale.

RO-SQ 2.2

Subject: Road transport containing packagings of explosive substances and packagings of detonators on the same vehicle.

Reference to the Annex to the Directive: 7.5.2.2.

Content of the Annex to the Directive: Mixed packing provisions.

Reference to the national legislation: Bekendtgørelse nr. 729 of 15. august 2001 om vejtransport of farligt gods § 4, stk. 1.

Content of the national legislation: According to § 4, stk. 1, the rules in ADR must be observed when transporting dangerous goods by road.

Comments: There is a practical need for being able to pack explosive substances together with detonators the same vehicle when transporting these goods from where they are stored and to the workplace and back again.

When the Danish legislation concerning transport of dangerous goods is amended the Danish authorities will allow such transports on the following conditions:

- (1) Not more than 25 kg explosive substances under group D are being transported.
- (2) Not more than 200 pieces of detonators under group B are being transported.
- (3) Detonators and explosive substances must be packed separately in UN-certified packaging in accordance with the rules in Directive 2000/61/EC amending Directive 94/55/EC.
- (4) The distance between packaging that contains detonators and packaging that contains explosive substances must be at least 1 meter. This distance has to be observed even after a sudden application of the brakes. Packaging containing explosive substances and packaging containing detonators must be placed in a way that makes it possible quickly to remove them from the vehicle.
- (5) All other rules concerning transport of dangerous goods by road must be observed.

GERMANY

RO-SQ 3.1

Subject: Mixed packing and mixed loading of car parts with classification 1.4G together with certain dangerous goods (n4).

Reference to the Annex to the Directive: 4.1.10. and 7.5.2.1.

Content of the Annex to the Directive: Provisions on mixed packing and mixed loading.

Reference to the national legislation: Gefahrgut-Ausnahmereverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 28.

Content of the national legislation: UN 0431 and UN 0503 may be loaded together with certain dangerous goods (products related to car manufacturing) in certain amounts, listed in the exemption. The value 1 000 (comparable with 1.1.3.6.4) shall not be exceeded.

Comments: The exemption is needed to provide fast delivery of safety car parts depending on the local demand. Due to the wide variety of the product range storage of these products by local garages is not common.

RO-SQ 3.2

Subject: Exemption from requirement to carry a transport document and a shippers declaration for certain quantities of dangerous goods as defined in 1.1.3.6. (n1).

Reference to the Annex to the Directive: 5.4.1.1.1. and 5.4.1.1.6.

Content of the Annex to the Directive: Contents of the transport document.

Reference to the national legislation: Gefahrgut-Ausnahmereverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 18.

Content of the national legislation: For all classes except class 7: no transport document needed, if the quantity of the goods transported is not exceeding the quantities given in 1.1.3.6.

Comments: The information provided by the marking and labelling of packages is considered sufficient for national transports, as a transport document is not always appropriate where local distribution is involved.

Derogation is registered by the European Commission as No 22 (under Article 6.10)

RO-SQ 3.3. (Revoked)

RO-SQ 3.4

Subject: Transportation of measurement standards and fuel pumps (empty, non-cleaned).

Reference to the Annex to the Directive: Provisions for UN numbers 1202, 1203 und 1223.

Content of the Annex to the Directive: Packaging, marking, documents, transport and handling instructions, instructions for vehicle crews.

Reference to the national legislation: Gefahrgut-Ausnahmereverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 24.

Content of the national legislation: Specification of applicable regulations and ancillary provisions for applying the derogation; up to 1 000 l: comparable with empty, non-cleaned packagings; above 1 000 l: Compliance with certain regulations for tanks; transportation empty and non-cleaned only.

Comments: List No 7, 38, 38a.

RO-SQ 3.5

Subject: Exemption of small quantities of certain goods for private use.

Reference to the Annex to the Directive: Table in Chapter 3.2. for certain UN numbers in Classes 1 to 9.

Content of the Annex to the Directive: Transport authorisation and provisions.

Reference to the national legislation: Gefahrgut-Ausnahmereverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 3.

Content of the national legislation: Classes 1 to 9; Exemption for very small quantities of various goods in packagings and quantities for private use; a maximum of 50 kg per transport unit; application of the general packing requirements for internal packaging.

Comments: Derogation limited to 31.12.2004.

List No 14*.

RO-SQ 3.6

Subject: Combined packaging authorisation.

Reference to the Annex to the Directive: 4.1.10.4. MP2.

Content of the Annex to the Directive: Prohibition of combined packaging.

Reference to the national legislation: Gefahrgut-Ausnahmereverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 21.

Content of the national legislation: Classes 1.4S, 2, 3 and 6.1; authorisation of combined packaging of objects in Class 1.4S (cartridges for small weapons), aerosols (Class 2) and cleaning and treatment materials in Classes 3 and 6.1. (UN numbers listed) as sets to be sold in combined packaging in packaging group II and in small quantities.

Comments: List No 30*, 30a, 30b, 30c, 30d, 30e, 30f, 30g.

FRANCE

RO-SQ 6.1

Subject: Transport of portable and mobile gamma radiography equipment (18).

Reference to the Annex to the Directive: Annexes A et B.

Content of the Annex to the Directive: -

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 28.

Content of the national legislation: The transport of gamma radiography equipment by users in special vehicles is exempted but subject to specific rules.

RO-SQ 6.2

Subject: Transport of waste arising from care activities involving infectious risks and treated as anatomical parts covered by UN 3291 with a mass less than or equal to 15 kg.

Reference to the Annex to the Directive: Annexes A et B.

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 12.

Content of the national legislation: Exemption from the requirements of the ADR for the transport of waste arising from care activities involving infectious risks and treated as anatomical parts covered by UN 3291 with a mass less than or equal to 15 kg.

RO-SQ 6.3

Subject: Transport of hazardous substances in public passenger transport vehicles (18).

Reference to the Annex to the Directive: 8.3.1.

Content of the Annex to the Directive: Transport of passengers and hazardous substances.

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 21.

Content of the national legislation: Transport of hazardous substances authorised in public transport vehicles as hand luggage: only the provisions relating to the packaging, marking and labelling of parcels set out in 4.1, 5.2. and 3.4. apply.

Comments: In hand luggage it is allowed to have only dangerous goods for personal or own professional use. Portable gas receptacles allowed for patients with respiratory problems in the necessary amount for one journey.

RO-SQ 6.4

Subject: Own-account transport of small quantities of hazardous materials (18).

Reference to the Annex to the Directive: 5.4.1.

Content of the Annex to the Directive: Obligation to have a transport document.

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 23-2.

Content of the national legislation: Own-account transport of small quantities of hazardous materials not exceeding the limits set in 1.1.3.6. is not subject to the obligation to have a transport document provided for in 5.4.1.

IRELAND

RO-SQ 7.2

Subject: Exemption from the requirement of 5.4.0. of the ADR for a transport document for the carriage of pesticides of ADR Class 3, listed under 2.2.3.3. as FT2 pesticides (f.p. < 23°C) and ADR Class 6.1, listed under 2.2.61.3. as T6 pesticides, liquid (flash point not less than 23°C), where the quantities of dangerous goods being carried do not exceed the quantities set out in 1.1.3.6. of the ADR.

Reference to the Annex to the Directive: 5.4.

Content of the Annex to the Directive: Requirement for transport document.

Reference to the national legislation: Regulation 82(9) of the Carriage of Dangerous Goods by Road Regulations 2004.

Content of the national legislation: Transport document is not required for the carriage of those pesticides of ADR Classes 3 and 6.1, where the quantity of dangerous goods being carried does not exceed the quantities set out in 1.1.3.6. of the ADR.

Comments: Unnecessary, onerous requirement for local transport and delivery of those pesticides.

RO-SQ 7.4

Subject: Exemption from requirement from some of the provisions of the ADR on the packaging, marking and labelling of the carriage of small quantities (below the limits in 1.1.3.6) of time expired pyrotechnic articles of classification codes 1.3G, 1.4G and 1.4S of Class 1 of the ADR, bearing the respective substance identification numbers UN0092, UN0093, UN0403 or UN0404, to the nearest military barracks for disposal.

Reference to the Annex to the Directive: 1.1.3.6, 4.1, 5.2. and 6.1.

Content of the Annex to the Directive: Disposal of out of date pyrotechnics.

Reference to the national legislation: Regulation 82(10) of the Carriage of Dangerous Goods by Road Regulations 2004.

Content of the national legislation: The provisions of the ADR on the packaging, marking and labelling of the carriage of expired pyrotechnic articles bearing the respective UN numbers UN 0092, UN 0093, UN 0403, UN 0404 to the nearest military barracks do not apply provided the general packaging provisions of the ADR are complied with and additional information is included in the transport document. It applies only to the local transport, to the nearest military barracks, of small quantities of these time expired pyrotechnics for safe disposal.

Comments: The carriage of small quantities of 'time expired' marine emergency flares, especially from pleasure boat owners and ships chandlers, to military barracks for their safe disposal has created difficulties; particularly in relation to packaging requirements. The derogation is for small quantities (below those specified in 1.1.3.6) on local transport.

RO-SQ 7.5

Subject: Exemption from the requirements of Chapters 6.7. and 6.8, in relation to the transport by road of nominally empty uncleaned storage tanks (for storage at fixed locations) for the purpose of cleaning, repair, testing or scrapping.

Reference to the Annex to the Directive: 6.7. and 6.8.

Content of the Annex to the Directive: Requirements for the design, construction, inspection and testing of tanks.

Reference to the national legislation: Proposed amendment to the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: [Proposed] Exemption from the requirements of Chapters 6.7. and 6.8. of the ADR for the carriage by road of nominally empty uncleaned storage tanks (for storage at fixed premises) for the purpose of cleaning, repair, testing or scrapping; provided (a) as much of the pipe work which was connected to the tank as it was reasonably practicable to remove from it has been removed; (b) a suitable pressure relief valve, which shall remain operational during the carriage, is fitted to the tank; and (c) subject to (b) above all openings in the tank and in any pipe work attached thereto have been sealed to prevent the escape of any dangerous goods; insofar as it is reasonably practicable to do so.

Comments: These tanks are used for storage of substances at fixed premises and not for the transport of goods. They would contain very small quantities of dangerous goods while they (the tanks) were being transported to different premises for cleaning, repairs, etc.

Previously under Article 6.10.

RO-SQ 7.6

Subject: Exemption from the requirements of Chapters 5.3, 5.4, Part 7 and Annex B of the ADR, in relation to the carriage of gas cylinders of dispensing agents (for beverages) where they are carried on the same vehicle as the beverages (for which they are to be used).

Reference to the Annex to the Directive: Chapters 5.3, 5.4, Part 7 and Annex B.

Content of the Annex to the Directive: The marking of the vehicles, the documentation to be carried and the provisions concerning transport equipment and transport operations.

Reference to the national legislation: Proposed amendment to the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: [Proposed] Exemption from the requirements of Chapters 5.3, 5.4, Part 7 and Annex B of the ADR for cylinders of gases, used as dispensing agents for beverages, where these cylinders of gases are carried on the same vehicle as the beverages (for which they are to be used).

Comments: The main activity consists of the distribution of packages of beverages, that are not substances of ADR, together with small quantities of small cylinders of associated dispensing gases.

Previously under Article 6.10.

RO-SQ 7.7

Subject: Exemption, for national transport within Ireland, from the construction and testing requirements for receptacles, and their use provisions, contained in Chapters 6.2. and 4.1. of the ADR for cylinders and pressure drums of gases of Class 2; that have undergone a multimodal transport journey, including maritime carriage, where (i) these cylinders and pressure drums are constructed, tested and used in accordance with the IMDG Code, (ii) these cylinders and pressure drums are not refilled in Ireland but returned nominally empty to the country of origin of the multimodal transport journey, and (iii) these cylinders and pressure drums are distributed locally in small quantities.

Reference to the Annex to the Directive: 1.1.4.2, 4.1. and 6.2.

Content of the Annex to the Directive: Provisions relating to multimodal transport journey, including maritime carriage, use of cylinders and pressure drums for gases of ADR Class 2, and construction and testing of these cylinders and pressure drums for gases of ADR Class 2.

Reference to the national legislation: Proposed amendment to the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: [Proposed] The provisions of Chapters 4.1. and 6.2. do not apply to cylinders and pressure drums of gases of Class 2 provided (i) these cylinders and pressure drums are constructed and tested in accordance with the IMDG Code, (ii) these cylinders and pressure drums are used in accordance with the IMDG Code, (iii) these cylinders and pressure drums were transported to the consignor by means of a multimodal transport, including maritime carriage, (iv) the transport of these cylinders and pressure drums to the final user consists only of a single transport journey, completed within the same day, from the consignee of the multimodal transport [referred to in subparagraph (iii) above], (v) these cylinders and pressure drums are not refilled within the State and returned nominally empty to the country of origin of the multimodal transport [referred to in subparagraph (iii) above], and (vi) these cylinders and pressure drums are distributed locally within the State in small quantities.

Comments: The gases contained in these cylinders and pressure drums are of a specification, required by the final users, which results in the need to import them from outside the ADR area. Following use, these nominally empty cylinders and pressure drums are required to be returned to the country of origin, for refilling with the specially specified gases - they are not to be refilled within Ireland or indeed within any part of the ADR area. Though not in compliance with ADR, they are in compliance with and accepted for the IMDG Code. The multimodal transport, beginning from outside the ADR area, is intended to finish at the importers premises, from where it is intended to distribute these cylinders and pressure drums to the final user locally within Ireland in small quantities. This carriage, within Ireland, would come within the amended Art 6(9) of amended Directive 94/55/EC.

FINLAND

RO-SQ 13.1

Subject: Transport of dangerous goods in certain amounts in private cars and buses.

Reference to the Annex to the Directive: 4.1, 5.4.

Content of the Annex to the Directive: Packaging provisions, documentation.

Reference to the national legislation: Liikenne- ja viestintäministeriön asetus vaarallisten aineiden kuljetuksesta tiellä (277/2002; 313/2003).

Content of the national legislation: Transport of dangerous goods in certain amounts under that of 1.1.3.6. with a maximum net mass of not more than 200 kg in private cars and buses is allowed without using the transport document and without fulfilling all the packaging requirements.

RO-SQ 13.2

Subject: Description of empty tanks in the transport document.

Reference to the Annex to the Directive: 5.4.1.1.6.

Content of the Annex to the Directive: Special provisions for empty uncleaned packagings, vehicles, containers, tanks, battery-vehicles and MEGCs.

Reference to the national legislation: Liikenne- ja viestintäministeriön asetus vaarallisten aineiden kuljetuksesta tiellä (277/2002; 313/2003).

Content of the national legislation: In the case of empty, uncleaned tank vehicles in which two or more substances with UN numbers 1202, 1203 and 1223 have been carried, the description in the transport documents may be completed by words 'Last load' together with the name of the product having the lowest flashpoint; 'Empty tank vehicle, 3, last load: UN 1203 Motor spirit, II'.

RO-SQ 13.3

Subject: Labelling and marking of the transport unit for explosives.

Reference to the Annex to the Directive: 5.3.2.1.1.

Content of the Annex to the Directive: General orange-coloured plate marking provisions.

Reference to the national legislation: Liikenne- ja viestintäministeriön asetus vaarallisten aineiden kuljetuksesta tiellä (277/2002; 313/2003).

Content of the national legislation: Transport units transporting (normally in vans) small amounts of explosives (maximum 1 000 kg (net)) to quarries and working sites may be labelled at the front and at the rear, using the placard in model No 1.

RO-SQ 13.4

Subject: Adoption of RO-SQ 6.2.

Reference to the national legislation: To be specified in forthcoming Regulations.

RO-SQ 13.5

Subject: Adoption of RO-SQ 6.4.

Reference to the national legislation: To be specified in forthcoming Regulations.

THE UNITED KINGDOM

RO-SQ 15.1

Subject: Carriage of certain low-hazard radioactives such as clocks, watches, smoke detectors, compass dials (E1).

Reference to the Annex to the Directive: Most requirements of ADR.

Content of the Annex to the Directive: Requirements concerning the carriage of Class 7 material.

Reference to the national legislation: Radioactive Material (Road Transport) (Great Britain) Regulations 1996, Regulation 3(2)(f), (g) and (h).

Content of the national legislation: Total exemption from the provisions of the national regulations for certain commercial products containing limited quantities of radioactive material.

Comments: This derogation is a short-term measure, which will no longer be required when similar amendments to the IAEA regulations are incorporated into ADR

RO-SQ 15.2

Subject: Exemption from requirement to carry a transport document for certain quantities of dangerous goods as defined in 1.1.3.6. (E2).

Reference to the Annex to the Directive: 1.1.3.6.2. and 1.1.3.6.3.

Content of the Annex to the Directive: Exemptions from certain requirements for certain quantities per transport unit.

Reference to the national legislation: Carriage of Dangerous Goods by Road Regulations 1996, Regulation 3 and Regulation 13 and Schedule 2(8).

Content of the national legislation: Transport document is not required for limited quantities except where these form part of a larger load.

Comments: This exemption is suited to national transport, where a transport document is not always appropriate where local distribution is involved .

RO-SQ 15.3

Subject: Carriage of light gauge metal cylinders for use in hot-air balloons between the filling site and the launch/landing site (E3).

Reference to the Annex to the Directive: 6.2.

Content of the Annex to the Directive: Requirements for construction and testing of gas receptacles.

Reference to the national legislation: To be specified in forthcoming Regulations.

Content of the national legislation: See above.

Comments: Gas cylinders used for hot-air balloons are designed to be as light-weight as possible, which precludes their meeting the normal requirements for gas cylinders. The average balloon cylinder has a water capacity of 70 litres, and the largest does not exceed 90 litres. Not more than five cylinders are carried on the vehicle at any one time.

RO-SQ 15.4

Subject: Exemption from requirement of fire-fighting equipment for vehicles carrying low-level radioactive material (E4).

Reference to the Annex to the Directive: 8.1.4.

Content of the Annex to the Directive: Requirement for vehicles to carry fire-fighting appliances.

Reference to the national legislation: Radioactive Material (Road Transport) (Great Britain) 1996, Regulation 34(4) and (5).

Content of the national legislation: Regulation 34(4) removes requirement for carrying fire extinguishers when carrying only excepted packages (UN 2908, 2909, 2910 and 2911).

Reg. 34(5) restricts the requirement where only a small numbers of packages are carried.

Comments: Carriage of fire-fighting equipment is in practice irrelevant to transport of UN 2908, 2909, 2910, UN 2911, which may often be carried in small vehicles.

RO-SQ 15.5

Subject: Distribution of goods in inner packagings to retailers or users (excluding those of classes 1 and 7) from local distribution depots to retailers or users and from retailers to end users (N1).

Reference to the Annex to the Directive: 6.1.

Content of the Annex to the Directive: Requirements for the construction and testing of packagings.

Reference to the national legislation: Carriage of Dangerous Goods (Classification, Packaging & Labelling) and Use of Transportable Pressure Receptacles Regulations 1996, Regulations 6(1), 6(3) and 8(5) and Schedule 3.

Content of the national legislation: Packagings are not required to have been allocated an RID/ADR or UN mark or to be otherwise marked if they contain goods as set out in Schedule 3.

Comments: ADR requirements are inappropriate for the final stages of carriage from a distribution depot to a retailer or user or from a retailer to an end user. The purpose of this derogation is to allow the inner receptacles of goods for retail distribution to be carried on the final leg of a local distribution journey without an outer packaging.

RO-SQ 15.6

Subject: Movement of nominally empty fixed tanks not intended as transport equipment (N2).

Reference to the Annex to the Directive: Parts 5 and 7 to 9.

Content of the Annex to the Directive: Requirements concerning consignment procedures, carriage, operation and vehicles.

Reference to the national legislation: To be specified in forthcoming Regulations.

Content of the national legislation: See above.

Comments: Movement of such fixed tanks is not carriage of dangerous goods in the normal sense, and ADR provisions cannot in practice be applied. As the tanks are 'nominally empty', the amount of dangerous goods actually contained in them is by definition extremely small.

RO-SQ 15.7

Subject: To allow different 'maximum total quantity per transport unit' for Class 1 goods in categories 1 and 2 of table in 1.1.3.6.3. (N10).

Reference to the Annex to the Directive: 1.1.3.6.3. and 1.1.3.6.4

Content of the Annex to the Directive: Exemptions related to quantities carried per transport unit.

Reference to the national legislation: Carriage of Explosives by Road Regulations 1996, Regulation 13 and Schedule 5; Regulation 14 and Schedule 4.

Content of the national legislation: Lays down rules regarding exemptions for limited quantities and mixed loading of explosives.

Comments: To allow different quantity limits for Class 1 goods, viz '50' for Category 1 and '500' for category 2. For the purpose of calculating mixed loads, the multiplication factors to read '20' for Transport Category 2 and '2' for Transport Category 3.

Previously a derogation under Article 6.10.

RO-SQ 15.8

Subject: Increase of maximum net mass of explosive articles permissible in EX/II vehicles (N13).

Reference to the Annex to the Directive: 7.5.5.2.

Content of the Annex to the Directive: Limitations on quantities carried for explosive substances and articles.

Reference to the national legislation: Carriage of Explosives by Road Regulations 1996, Regulation 13, Schedule 3.

Content of the national legislation: Limitations on quantities carried for explosive substances and articles.

Comments: United Kingdom Regulations allow a maximum net mass of 5 000 kg in Type II vehicles for Compatibility Groups 1.1C, 1.1D, 1.1E and 1.1J.

Many articles of Class 1.1C, 1.1D, 1.1E and 1.1J being moved in Europe are large or bulky and exceed about 2,5 m in length. They are primarily explosive articles for military use. The limitations on the construction for EX/III vehicles (which are required to be closed vehicles) make it very difficult to load and unload such articles. Some articles would require specialist loading and unloading equipment at both ends of the journey. In practice, this equipment rarely exists. There are few EX/III vehicles in use in the United Kingdom and it would be extremely onerous on industry to require further specialist EX/III vehicles to be constructed to carry this type of explosive.

In the United Kingdom military explosives are mostly carried by commercial carriers and are thus unable to take advantages of the exemption for military vehicles in the Framework Directive. To overcome this problem, the United Kingdom has always permitted the carriage of up to 5 000 kg of such articles on EX/II vehicles. The present limit is not always sufficient because an article may contain more than 1 000 kg of explosive.

Since 1950 there have been only two incidents (both in the 1950s) involving blasting explosives with a weight above 5 000 kg. The incidents were caused by a tyre fire and a hot exhaust system setting fire to the sheeting. The fires could have occurred with a smaller load. There were no fatalities or injuries.

There is empirical evidence to suggest that correctly packaged explosive articles would be unlikely to be initiated due to impact, e.g. from vehicle collisions. Evidence from military reports and from trials data on missile impact tests shows that it needs an impact velocity in excess of that created by the 12-metre drop test to bring about initiation of cartridges.

Present safety standards would not be affected.

RO-SQ 15.9

Subject: Exemption from supervision requirements for small quantities of certain Class 1 goods (N12).

Reference to the Annex to the Directive: 8.4. and 8.5. S1(6).

Content of the Annex to the Directive: Supervision requirements for vehicles carrying certain quantities of dangerous goods.

Reference to the national legislation: Carriage of Dangerous Goods by Road Regulations 1996, Regulation 24.

Content of the national legislation: Provides for safe parking and supervision facilities but does not require that certain Class 1 loads be supervised at all times as required in ADR Chapter 8.5. S1(6).

Comments: ADR supervision requirements are not always feasible in a national context.

RO-SQ 15.10

Subject: Easing of restrictions on transporting mixed loads of explosives, and explosives with other dangerous goods, in wagons, vehicles and containers (N4/5/6).

Reference to the Annex to the Directive: 7.5.2.1. and 7.5.2.2.

Content of the Annex to the Directive: Restrictions on certain types of mixed loading.

Reference to the national legislation: Carriage of Dangerous Goods by Road Regulations 1996, Regulation 18.

Content of the national legislation: National legislation is less restrictive regarding mixed loading of explosives, providing such carriage can be accomplished without risk.

Comments: The United Kingdom wishes to permit some variations on the mixing rules for explosives with other explosives and for explosives with other dangerous goods. Any variation will have a quantity limitation on one or more constituent parts of the load and would only be permitted provided that 'all reasonably practicable measures have been taken to prevent the explosives being brought into contact with, or otherwise endangering or being endangered by, any such goods.'

Examples of variations the United Kingdom may want to permit are:

1. Explosives allocated on classification to UN Numbers 0029, 0030, 0042, 0065, 0081, 0082, 0104, 0241, 0255, 0267, 0283, 0289, 0290, 0331, 0332, 0360, or 0361 may be carried in the same vehicle with the dangerous goods allocated on classification the UN Number 1942. The quantity of UN 1942 permitted to be carried shall be limited by deeming it to be an explosive of 1.1D;
2. Explosives allocated on classification to UN Number 0191, 0197, 0312, 0336, 0403, 0431, or 0453 may be carried in the same vehicle with dangerous goods (except flammable gases, infectious substances and toxic substances) in transport category 2 or dangerous goods in transport category 3, or any combination of them, provided the total mass or volume of dangerous goods in transport category 2 does not exceed 500 kg or l and the total net mass of such explosives does not exceed 500 kg;
3. Explosives of 1.4G may be carried with flammable liquids and flammable gases in transport category 2 or non-flammable, non-toxic gases in transport category 3, or in any combination of them in the same vehicle, provided the total mass or volume of dangerous goods when added together does not exceed 200 kg or litres and the total net mass of explosives does not exceed 20 kg.
4. Explosive articles allocated on classification to UN Numbers 0106, 0107 or 0257 may be carried with explosive articles in Compatibility Group D, E or F for which they are components. The total quantity of explosives of UN Numbers 0106, 0107 or 0257 shall not exceed 20 kg.

RO-SQ 15.11

Subject: Alternative to display of orange plates for small consignments of radioactive material in small vehicles.

Reference to the Annex to the Directive: 5.3.2.

Content of the Annex to the Directive: Requirement for orange plates to be displayed on small vehicles carrying radioactive material.

Reference to the national legislation: The Radioactive Material (Road Transport) Regulations 2002 Regulation 5 (4) (d).

Content of the national legislation: Permits any derogation approved under this process. The derogation requested is:

1. Vehicles must either:
 - (a) be placarded according to the applicable provisions of ADR paragraph 5.3.2; or
 - (b) in the case of a vehicles of less than 3 500 kg weight, carrying less than 10 packages containing non-fissile or fissile excepted radioactive material and where the sum of the transport indexes of these packages do not exceed 3, may alternatively carry a notice conforming to the requirements of paragraph 2.
2. For the purposes of paragraph 1, the notice to be displayed in a vehicle while it is carrying radioactive material shall conform to the following:
 - (a) It shall be not less than 12 cm square. All lettering on the notice shall be black, bold and legible. All lettering shall also be embossed or stamped. The capital letters in the word 'RADIOACTIVE' shall be not less than 12 mm high and all other capital letters shall be not less than 5 mm high.
 - (b) It shall be fireproof to the extent that the words on the notice shall remain legible after exposure to a fire involving the vehicle.

- (c) It shall be securely posted in the vehicle in a position where it is plainly visible to the driver, but does not obstruct his view of the road and shall be exhibited only when the vehicle is carrying radioactive material.
- (d) It shall be in an agreed form and shall state the name, address and telephone number for use in emergencies.

Comments: The derogation is required for limited movements of small quantities of radioactive material, primarily single patient doses of radioactive materials between local hospital facilities, where small vehicles are used and the ability to affix even small orange placards is limited. Experience has shown that for these vehicles the fixing of orange placards is problematic and they are difficult to retain under normal conditions of transport. The vehicles will be marked with placards identifying the contents in accordance with ADR 5.3.1.5.2. (and normally 5.3.1.7.4) clearly identifying the hazard. In addition, a fireproof notice carrying relevant emergency information will be attached in a clearly visible location. In practice, more safety information will be available than under the requirements of ADR 5.3.2.

ANNEX II

Derogations for Member States on local transport limited to their territory

BELGIUM

RO-LT 1.1

Subject: Transport in close proximity of industrial sites including transport on public road.

Reference to the Annex to Directive 94/55/EC (hereinafter referred to as the Directive): Annexes A and B.

Content of the Annex to the Directive: Annexes A and B.

Reference to the national legislation: Derogations 2-89, 4-97 and 2-2000.

Content of the national legislation: The derogations concern the documentation, labelling and marking of packages and the driver's certificate.

Comments: Dangerous goods are transferred between premises

- derogation 2-89: crossing the public highway (chemicals in packages);
- derogation 4-97: distance of 2 km (ingots of pig-iron at a temperature of 600 °C);
- derogation 2-2000: distance approximately 500 m (IBC, PG II, III Classes 3, 5.1, 6.1, 8 and 9).

RO-LT 1.2

Subject: Movement of storage tanks not intended as transport equipment.

Reference to the Annex to the Directive: 1.1.3.2.(f).

Reference to the national legislation: exemption 6-82, 2-85.

Content of the national legislation: Movements of nominally storage tanks for cleaning/repair purposes allowed.

Comments: Derogation registered by the European Commission as No 7 (under Article 6.10).

RO-LT 1.3

Subject: Training of drivers.

Local transport of UN 1202, 1203 and 1223 in packages and in tanks (in Belgium radius of 75 km from the location of the registered office).

Reference to the Annex to the Directive: 8.2

Content of the Annex to the Directive:

Structure of the training:

- (1) training packages;
- (2) training tank;
- (3) special training CI 1;
- (4) special training CI 7.

Reference to the national legislation: To be specified in forthcoming regulation.

Content of the national legislation: Definitions — certificate — issue — duplicates — validity and extension — organisation of courses and examination — derogations — penalties — final provisions.

Comments: It is proposed to give an initial course followed by an examination limited to the transport of UN 1202, 1203 and 1223 in packages and in tanks in a radius of 75 km from the location of the registered office — the length of training must meet the requirements of the ADR - after five years the driver must follow a refresher course and pass an examination — the certificate will stipulate 'national transport of UN 1202, 1203 and 1223 pursuant to Article 6(9) of Directive 94/55'.

RO-LT 1.4

Subject: Transport of dangerous goods in tanks for elimination by incineration.

Reference to the Annex to the Directive: 3.2.

Reference to the national legislation: Derogation 01 — 2002.

Content of the national legislation: By derogation from the table in chapter 3.2. it is permitted to use a tank-container with tank-code L4BH instead of tank-code L4DH for the carriage of UN 3130, water reactive liquid, toxic, III, n.o.s. under certain conditions.

Comments: This Regulation may only be used for the carriage of hazardous waste for a short distance.

RO-LT 1.5

Subject: Carriage of waste to waste disposal plants.

Reference to the Annex of the Directive: 5.2, 5.4, 6.1. (old Regulation: A5, 2X14, 2X12)

Content of the Annex of the Directive: Classification, marking and requirements concerning the packaging.

Reference to the national legislation: Arrêté royal relatif au transport de marchandises dangereuses par route.

Content of the national legislation: Instead of classifying wastes according to ADR, wastes are assigned to different groups (flammable solvents, paints, acids, batteries, etc.) to avoid dangerous reactions within one group. The requirements for construction of packagings are less restrictive.

Comments: this regulation may be used for the carriage of small quantities of waste to disposal plants.

RO-LT 1.6

Subject: Adoption of RO-LT 14.5.

Reference to the national legislation: —

RO-LT 1.7

Subject: Adoption of RO-LT 14.6.

Reference to the national legislation: —

RO-LT 1.8

Subject: Adoption of RO-LT 15.2.

Reference to the national legislation: —

DENMARK**RO-LT 2.1**

Subject: UN 1202, 1203, 1223 and class 2 — no transport document.

Reference to the Annex to the Directive: 5.4.1.

Content of the Annex to the Directive: Transport document needed.

Reference to the national legislation: Bekendtgørelse nr. 729 af 15/08/2001 om vejtransport af farligt gods.

Content of the national legislation: When transporting mineral oil products in class 3, UN 1202, 1203 and 1223 and gases in class 2 in connection with distribution (goods to be delivered to two or more recipients and collection of returned goods in similar situations), transport document is not requisite provided the instructions in writing, besides the information requested in ADR, contain information about UN-No, name and class.

Comments: The reason for having a national derogation as above-mentioned is the development of electronic equipment making it possible for e.g. the oil companies using electronic equipment continuously to transmit information to the vehicles containing information about the customers. As this information is not available at the beginning of the transport and will be forwarded to the vehicle during the transport, it is not possible — before the transport begins — to draw up the transport documents. These kind of transports are restricted to limited areas.

Currently a derogation for Denmark for a similar provision under Article 6.10.

GERMANY

RO-LT 3.1

Subject: Waive of certain indications in the transport document (n2).

Reference to the Annex to the Directive: 5.4.1.1.1.

Content of the Annex to the Directive: Contents of the transport document.

Reference to the national legislation: Gefahrgut-Ausnahmeverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 18.

Content of the national legislation: For all classes except classes 1 (except 1.4S), 5.2. and 7:

No indication needed in the transport document

- (a) for the consignee in case of local distribution (except for full load and for transport with certain routings);
- (b) for the amount and types of packagings, if 1.1.3.6. is not applied and if the vehicle is in conformity with all provisions of Annex A and B;
- (c) for empty uncleaned tanks the transport document of the last load is sufficient.

Comments: Applying all provisions would not be practicable in concerned kind of traffic.

Derogation is registered by the European Commission as No 22. (under 6.10).

RO-LT 3.2

Subject: Transportation of Class 9 PCB-contaminated materials in bulk.

Reference to the Annex to the Directive: 7.3.1.

Content of the Annex to the Directive: Transportation in bulk.

Reference to the national legislation: Gefahrgut-Ausnahmeverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 11.

Content of the national legislation: Authorisation for transportation in bulk in vehicle swap bodies or containers sealed to be impermeable to fluids or dust.

Comments: Derogation 11 limited to 31 December 2004; as from 2005, same provisions in ADR and RID.

See also Multilateral Agreement M137.

List No 4*.

RO-LT 3.3

Subject: Transportation of packaged hazardous waste.

Reference to the Annex of the Directive: Parts 1 to 5.

Content of the Annex of the Directive: Classification, packaging and marking.

Reference to the national legislation: Gefahrgut-Ausnahmeverordnung - GGAV 2002 vom 6.11.2002 (BGBl. I S. 4350), geändert durch Artikel 2 der Verordnung vom 28.4.2003 (BGBl. I S. 595); Ausnahme 20.

Content of the national legislation: Classes 2 to 6.1, 8 und 9: Combined packaging and transportation of hazardous waste in packs and IBCs; waste must be packaged in internal packagings (as collected) and categorised in specific waste groups (avoidance of dangerous reactions within a waste group); use of special written instructions relating to the waste groups and as a waybill; collection of domestic and laboratory waste, etc.

Comments: List No 6*.

GREECE

RO-LT 4.1

Subject: Derogation on safety requirements for fixed tanks (tank-vehicles), registered before 31 December 2001, for the local transport or small quantities of some categories of dangerous goods.

Reference to the Annex of the Directive: 1.6.3.6, 6.8.2.4.2, 6.8.2.4.3, 6.8.2.4.4, 6.8.2.4.5, 6.8.2.1.17-6.8.2.1.22, 6.8.2.1.28, 6.8.2.2, 6.8.2.2.1, 6.8.2.2.2.

Content of the Annex of the Directive: Requirements for the construction, equipment, type approval, inspections and tests, and marking of fixed tanks (tank-vehicles), demountable tanks and tank containers and tank swap bodies, with shells made of metallic materials, and battery-vehicles and multiple element gas containers (MEGCs).

Reference to the national legislation: Τεχνικές Προδιαγραφές κατασκευής, εξοπλισμού και ελέγχων των δεξαμενών μεταφοράς συγκεκριμένων κατηγοριών επικινδύνων εμπορευμάτων για σταθερές δεξαμενές (οχήματα-δεξαμενές), αποσυναρμολογούμενες δεξαμενές που βρίσκονται σε κυκλοφορία. (Requirements for the construction, equipment, inspections and tests of fixed tanks (tank-vehicles), demountable tanks being in circulation, for some categories of dangerous goods.)

Content of the national legislation: Transitional provision: Fixed tanks (tank-vehicles), demountable tanks and tank containers first registered in our country between 1 January 1985 and 31 December 2001 may still be in use until 31 December 2010. This transitional provision concerns vehicles for the transport of the following dangerous materials (UN: 1202, 1268, 1223, 1863, 2614, 1212, 1203, 1170, 1090, 1193, 1245, 1294, 1208, 1230, 3262, 3257). This transport is supposed for small quantities or as local transport for vehicles registered at the above referenced period. This transitional period will be in force for tank vehicles adapted according to:

1. ADR paragraphs for inspection and tests, 6.8.2.4.2, 6.8.2.4.3, 6.8.2.4.4, 6.8.2.4.5, (ADR 1999: 211.151, 211.152, 211.153, 211.154).
2. Minimum shell thickness 3 mm for tanks with shells compartment capacity up to 3 500 lt and at least 4 mm thickness of mild steel for tanks with compartments with capacity up to 6 000 litres, regardless the type or thickness of the partitions.
3. If the used material is aluminium or other metal, tanks should fulfil the requirements for thickness and other technical specifications that derive from technical drawings approved from the local authority of the country where were previously registered. In case of absence of technical drawings, tanks should fulfil the requirements of paragraph 6.8.2.1.17. (211.127).
4. Tanks should fulfil marginal-paragraphs 211.128, 6.8.2.1.28. (211.129), paragraph 6.8.2.2. with sub-paragraphs 6.8.2.2.1. and 6.8.2.2.2. (211.130, 211.131).

More precisely, the tank-vehicles with mass less than 4 tonnes used for local transport of gas oil only (UN 1202), first registered before 31 December 2002, if their shell thickness is lower than 3 mm, they are permitted to be in use only if they are transformed according to the marginal 211.127. (5)b4 (6.8.2.1.20).

RO-LT 4.2

Subject: Derogation on Base Vehicle construction requirements, regarding vehicles intended for the local transport of dangerous goods first registered before 31 December 2001.

Reference to the Annex to the Directive: ADR 2001: 9.2, 9.2.3.2, 9.2.3.3.

Content of the Annex to the Directive: Requirements concerning the construction of Base Vehicles.

Reference to the national legislation: Τεχνικές Προδιαγραφές ήδη κυκλοφορούντων οχημάτων που διενεργούν εθνικές μεταφορές ορισμένων κατηγοριών επικινδύνων εμπορευμάτων. (Technical requirements of vehicles already in use, intended for local transport of certain dangerous goods categories.)

Content of the national legislation: The Derogation applies to vehicles intended for the local transport of dangerous goods (categories UN 1202, 1268, 1223, 1863, 2614, 1212, 1203, 1170, 1090, 1193, 1245, 1294, 1208, 1230, 3262 and 3257), which were first registered before 31 December 2001.

The abovementioned vehicles shall comply with the requirements of Chapter 9 (paragraphs 9.2.1. to 9.2.6) of the Annex B of the Directive 94/55/EC with the following deviations.

Comply with requirements of paragraph 9.2.3.2. necessarily only in case the vehicle is equipped with an antilock braking system by vehicle manufacturer and shall be fitted with an endurance braking system as defined in 9.2.3.3.1. but not necessarily complying with paragraphs 9.2.3.3.2. and 9.2.3.3.3.

The electrical supply to the tachograph shall be provided via a safety barrier connected directly to the battery (marginal 220 514) and the electrical equipment of the mechanism for lifting a bogie axle shall be installed where it has first been installed by the vehicle manufacturer and must be protected in an appropriate sealed housing (marginal 220 517).

Specific, tank-vehicles with maximum mass less than 4 tonnes intended for local transport of diesel-heating oil (UN: 1202) shall comply with requirements of paragraphs 9.2.2.3, 9.2.2.6, 9.2.4.3. and 9.2.4.5. but not necessarily with the other ones.

Comments: The number of the abovementioned vehicles is small, when compared with the total number of already registered vehicles and in addition are intended for local transport only. The form of the derogation requested, the size of the vehicle fleet in question and the type of goods transported do not create a road safety problem.

SPAIN

RO-LT 5.1

Subject: Special equipment for distribution of anhydrous ammonia.

Reference to the Annex to the Directive: 6.8.2.2.2.

Content of the Annex to the Directive: In order to avoid any loss of contents in the event of damage to the external fittings (pipes, lateral shut-off devices), the internal stop valve and its seating must be protected against the danger of being wrenched off by external stresses or be so designed as to resist such stresses. The filling and discharge devices (including flanges or threaded plugs) and protective caps (if any) must be capable of being secured against any unintended opening.

Reference to the national legislation: Real Decreto 2115/1998. Anejo 1. Apartado 3.

Content of the national legislation: Tanks used for agricultural purposes for the distribution and application of anhydrous ammonia which were brought into service before 1 January 1992 may be equipped with external, instead of internal, safety fittings, provided they offer protection at least equivalent to the protection provided by the wall of the tank.

Comments: Before 1 January 1992 a type of tank equipped with external safety fittings was used exclusively in agriculture to apply anhydrous ammonia directly onto the land. Various tanks of this kind are still in use today. They are rarely driven, laden, on the road, but are used solely for fertiliser-spreading in large farms.

FRANCE

RO-LT 6.1

Subject: Utilisation of maritime document as transport document for short-distance trips following unloading of vessel.

Reference to the Annex to the Directive: 5.4.1.

Content of the Annex to the Directive: Information to appear in the document used as transport document for hazardous goods.

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 23-4.

Content of the national legislation: The maritime document is used as transport document within a radius of 15 km.

RO-LT 6.2

Subject: Transport of Class 1 articles together with hazardous materials in other classes (91).

Reference to the Annex to the Directive: 7.5.2.1.

Content of the Annex to the Directive: Prohibition against loading parcels with different hazard labels together.

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 26.

Content of the national legislation: Possibility of transporting simple or assembled detonators and goods not in Class 1 together, subject to certain conditions and for distances less than or equal to 200 km in France.

RO-LT 6.3

Subject: Transport of fixed LPG storage tanks (18).

Reference to the Annex to the Directive: Annexes A and B.

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 30.

Content of the national legislation: The transport of fixed LPG storage tanks is subject to specific rules. Applicable only to short distances.

RO-LT 6.4

Subject: Specific conditions relating to driver training and the approval of vehicles used for agricultural transport (short distances).

Reference to the Annex to the Directive: 6.8.3.2; 8.2.1. and 8.2.2.

Content of the Annex to the Directive: Tank equipment and driver training.

Reference to the national legislation: Arrêté du 1^{er} juin 2001 relatif au transport de marchandises dangereuses par route (Decree of 1 June 2001 on the transport of hazardous goods by road, 'ADR-Decree') - Article 29.2. - Annex D4.

Content of the national legislation: Specific provisions concerning the approval of vehicles. Special training for drivers.

IRELAND**RO-LT 7.1**

Subject: Exemption from the requirement of 5.4.1.1.1, to have (i) the names and addresses of the consignees, (ii) the number and description of the packages, and (iii) the total quantity of dangerous goods in the transport document, where kerosene, diesel fuel or liquefied petroleum gas bearing the respective substance identification numbers UN 1223, UN1202 and UN 1965 are being carried to the end user.

Reference to the Annex to the Directive: 5.4.

Content of the Annex to the Directive: Documentation.

Reference to the national legislation: Regulation 82(2) of the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: Where kerosene, diesel fuel or liquefied petroleum gas, bearing the respective substance identification numbers UN 1223, UN 1202 and UN 1965 as specified in Appendix B.5. of Annex B to the ADR, are being carried to the end user, it is not necessary to include the name and address of the consignee, the number and description of the packages, Intermediate Bulk Containers or receptacles, or the total quantity being carried, on the transport unit.

Comments: In the case of delivery of home heating oil to domestic customers, it is a common practice to 'top up' the customer's storage tank — hence the actual delivery is unknown and also the number of customers (in any one run) is also unknown at the time the loaded tanker begins its journey. In the case of delivery of cylinders of LPG to households, it is a common practice to replace empty cylinders with full ones — hence the number of customers and their individual consignments are unknown at the beginning of the transport operation.

RO-LT 7.2

Subject: Exemption to allow the transport document, required in 5.4.1.1.1, to be that for the last load in the case of the transport of empty uncleaned tanks.

Reference to the Annex to the Directive: 5.4.

Content of the Annex to the Directive: Documentation.

Reference to the national legislation: Regulation 82(3) of the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: In the case of the carriage of empty uncleaned tanks, the Transport Document for the last load is sufficient.

Comments: Particularly in the case of delivery of petrol and/or diesel fuel to petrol stations, the road tanker returns directly to the oil depot (to be loaded up again for the next deliveries) immediately after delivery of the last load.

RO-LT 7.3

Subject: Exemption to allow the loading and unloading of dangerous goods, to which the special provision CV1 in 7.5.11. or S1 in 8.5. is assigned, in a public place without special permission from the competent authorities.

Reference to the Annex to the Directive: 7.5. and 8.5.

Content of the Annex to the Directive: Additional provisions concerning the loading, unloading and handling.

Reference to the national legislation: Regulation 82(5) of the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: Loading and unloading of dangerous goods in a public place is permitted without special permission from the competent authority, in derogation from the requirements of 7.5.11. or 8.5.

Comments: For national transport within the State, this provision places a very onerous burden on the competent authorities.

RO-LT 7.4

Subject: Exemption to permit the transport of Emulsion Explosive Matrix, with substance identification number UN 3375, in tanks.

Reference to the Annex to the Directive: 4.3.

Content of the Annex to the Directive: Use of tanks, etc.

Reference to the national legislation: Regulation 82(6) of the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: The carriage of Emulsion Explosive Matrix, bearing the substance identification number UN 3375, is permitted in tanks.

Comments: The matrix, although classified as a solid, is not in a powdery or granular form.

RO-LT 7.5

Subject: Exemption from the 'mixed loading prohibition' of 7.5.2.1. for articles of Compatibility Group B and substances and articles of Compatibility D on same vehicle with dangerous goods, in tanks, of Classes 3, 5.1. and 8.

Reference to the Annex to the Directive: 7.5

Content of the Annex to the Directive: Provisions concerning loading, unloading and handling.

Reference to the national legislation: Regulation 82(7) of the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: Packages containing articles of Compatibility Group B of ADR Class 1 and packages containing substances and articles of Compatibility Group D of ADR Class 1 may be carried on the same vehicle with dangerous goods of ADR Classes 3, 5.1. or 8 provided — (a) the said packages of ADR Class 1 are carried in separate containers/compartments of a design approved, and under the conditions required, by the competent authority, and (b) the said substances of ADR Classes 3, 5.1. or 8 are carried in vessels meeting the requirements of the competent authority as regards their design, construction, testing, examination, operation and use.

Comments: To permit, under conditions approved by the competent authority, the loading of articles and substances of Class 1 Compatibility Groups B and D on the same vehicle with dangerous goods, in tanks, of Classes 3, 5.1. and 8 — i.e. Pump Trucks.

RO-LT 7.6

Subject: Exemption from requirement in 4.3.4.2.2, which requires flexible filling and discharge pipes which are not permanently connected to the shell of a tank-vehicle to be empty during transport.

Reference to the Annex to the Directive: 4.3.

Content of the Annex to the Directive: Use of tank-vehicles.

Reference to the national legislation: Regulation 82(8) of the Carriage of Dangerous Goods by Road Regulations, 2004.

Content of the national legislation: Flexible hose reels (including fixed pipelines associated with them) attached to tank-vehicles engaged in the retail distribution of petroleum products with substance identification numbers UN 1202, UN 1223, UN 1011 and UN 1978 are not required to be empty during carriage by road provided adequate measures are taken to prevent any loss of contents.

Comments: Flexible hoses fitted to home delivery tank-vehicles must remain full at all times even during transport. The discharge system is known as a 'wet-line' system that requires the tank-vehicle's meter and hose to be primed so as to ensure the customer receives the correct quantity of product.

RO-LT 7.7

Subject: Exemption from some requirements of Chapters 5.4.0, 5.4.1.1.1. and 7.5.11. of the ADR for the transport in bulk of Ammonium Nitrate Fertiliser UN 2067 from ports to consignees.

Reference to the Annex to the Directive: 5.4.0, 5.4.1.1.1. and 7.5.11.

Content of the Annex to the Directive: The requirement for a separate transport document, with the correct total quantity for the particular load included, for each transport journey; and the requirement for the vehicle to be cleaned before and after the journey.

Reference to the national legislation: Proposed amendment to 'Carriage of Dangerous Goods by Road Regulations, 2004'.

Content of the national legislation: Proposed derogation to allow modifications to ADR requirements on the transport document and vehicle cleaning; to take account of the practicalities of bulk transport from port to consignee.

Comments: The ADR provisions require (a) a separate transport document, containing the total mass of dangerous goods carried for the particular load, and (b) the Special Provision 'CV24' on cleaning for each and every load being transported between the port and the consignee during the unloading of a bulk ship. As the transport is local and as it concerns the unloading of a bulk ship, involving multiple transport loads [on the same or consecutive days] of the same substance between the bulk ship and the consignee; a single transport document, with an approximate total mass of each load, should suffice and it should not be necessary to require the Special Provision 'CV24'.

THE NETHERLANDS**RO-LT 10.1**

Subject: Scheme for the transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 1.1.3.6; 3.3; 4.1.4; 4.1.6; 4.1.8; 4.1.10; 5.2.2; 5.4.0; 5.4.1; 5.4.3; 7.5.4; 7.5.7; 8.1.2.1, subsections a) and b); 8.1.5, subsection c); 8.3.6.

Content of the Annex to the Directive:

1.1.3.6: Exemptions in connection with the transported quantities per transport unit.

3.3: Special provisions applicable to specified substances or objects.

4.1.4: List with packing instructions; **4.1.6:** Special packaging requirements for class 2 goods; **4.1.8:** Special packaging requirements for infectious substances; **4.1.10:** Special requirements for collective packaging.

5.2.2: Labelling of transport packages; **5.4.0:** Any goods transported under the ADR scheme must be accompanied by the documentation prescribed in this chapter, where applicable, unless an exemption has been granted under points 1.1.3.1. to 1.1.3.5; **5.4.1:** Transit document for dangerous goods along with related information; **5.4.3:** written instructions.

7.5.4: Precautions with regard to food, other articles of consumption and animal feedingstuffs; **7.5.7:** Handling and stowage.

8.1.2.1: In addition to the documentation required by law, the following documents must be carried on board the transport unit: **a.** the transit documents referred to in 5.4.1. and covering all the dangerous goods transported and, where applicable, the container loading certificate as stipulated in point 5.4.2; **b.** the written instructions as set out in point 5.4.3, relating to all the dangerous goods transported; **8.1.5:** Each transport unit carrying dangerous goods must be fitted with: **c.** the equipment needed to permit the carrying-out of the supplementary and special measures as indicated in the written instructions referred to in point 5.4.3. **8.3.6:** Leaving the engine running during loading and unloading.

Reference to the national legislation: Artikel 3 van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 3

The following sections of the ADR shall not apply:

- a. 1.1.3.6;
- b. 3.3;
- c. 4.1.4; 4.1.6; 4.1.8; 4.1.10;
- d. 5.2.2; 5.4.0; 5.4.1; 5.4.3;
- e. 7.5.4; 7.5.7;
- f. 8.1.2.1. subsections a) and b); 8.1.5. subsection c); 8.3.6.

Comments: The scheme has been designed in such a way as to enable private citizens to present 'small chemical waste' at a single location. This applies to residual substances such as dye waste, for instance. The danger level is minimised by the choice of means of transport, involving, *inter alia*, the use of special transport elements and 'no smoking' notices clearly visible to members of the public.

In view of the limited quantities offered and the specialised nature of the packaging, this article excludes a number of sections of the ADR. Supplementary rules are laid down elsewhere in the scheme.

RO-LT 10.2

Subject: Scheme for transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 1.1.3.6.

Content of the Annex to the Directive: Exemptions in connection with the transported quantities per transport unit.

Reference to the national legislation: Artikel 10, onderdeel a, en 16, onderdeel b, van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation:

- 10a. The attendant's certificate of professional competence and the note referred to in Article 16(1)(b) are both on board the vehicle;
- 16b. The vehicle attendant holds the qualification 'transport of hazardous waste' issued by the CCV (Drivers' Certification Board).

Comments: Because of the wide range of domestic hazardous waste involved, the transport operator must have a certificate of professional competence, notwithstanding the small quantities of waste presented. An additional requirement is that the transport operator has been issued with a qualification for the transport of hazardous waste.

One of the reasons for this is to ensure that the transport operator does not, for instance, pack acids and bases together and that he knows how to respond properly to incidents.

RO-LT 10.3

Subject: Scheme for the transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 1.1.3.6.

Content of the Annex to the Directive: Exemptions in connection with the transported quantities per transport unit.

Reference to the national legislation: Artikel 10b van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 10 b

The following are present on board the vehicle: b. written instructions and information compiled in accordance with the annex to the act setting up the scheme.

Comments: As the scheme excludes exemption from section 1.1.3.6. of the ADR scheme, written instructions must also accompany small quantities. This is deemed necessary because of the wide range of hazardous waste presented and the fact that those presenting the waste (private citizens) are unfamiliar with the danger level involved.

RO-LT 10.4

Subject: Scheme for the transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 6.1

Content of the Annex to the Directive: Provisions on the construction and testing of packaging.

Reference to the national legislation: Artikel 6 van de Regeling vervoer huishoudelijk gevaarlijke afval 2002.

Content of the national legislation: Article 6

1. The domestic hazardous waste is to be presented only in a hermetically sealed packaging that is appropriate for the substance in question, and:
 - (a) for objects coming under category 6.2: a packaging guaranteed not to cause injury upon presentation;
 - (b) for domestic hazardous waste of industrial origin: a box having a capacity of not more than 60 litres, in which the waste substances are separated according to danger category (kga-box).
2. The packaging is free, on the outside, from domestic hazardous waste.
3. The name of the substance is indicated on the packaging.
4. For each collection, only one box within the meaning of point 1, subsection b, will be accepted.

Comments: This article results from Article 3 in which particular sections of the ADR are declared non-applicable. Under this scheme, there is no need for approved packaging as provided for in section 6.1. of the ADR. This is because of the limited quantities of dangerous substances involved. Instead, a number of rules are laid down in the article including a requirement to the effect that the hazardous substances be delivered in sealed containers so as to prevent seepage from the packaging.

RO-LT 10.5

Subject: Scheme for the transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 6.1

Content of the Annex to the Directive: Provisions on the construction and testing of packaging.

Reference to the national legislation: Artikel 7, tweede lid, van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 7.2

The vehicle has a load compartment that is separated from the driver's compartment by a solid thick wall or, alternatively, a load compartment that is not an integral part of the vehicle.

Comments: Under this scheme, it is not necessary to have an approved packaging as stipulated in section 6.1. of the ADR. This is because of the limited quantities of dangerous substances involved. Accordingly, this Article contains an additional requirement designed to prevent toxic fumes from leaking into the driver's compartment.

RO-LT 10.6

Subject: Scheme for the transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 6.1

Content of the Annex to the Directive: Provisions on the construction and testing of packaging.

Reference to the national legislation: Artikel 8, eerste lid, van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 8.1

The load compartment of a closed vehicle has an air extractor, which is kept permanently on, at the top and is fitted with apertures underneath.

Comments: Under this scheme, it is not necessary to have an approved packaging as stipulated in section 6.1. of the ADR. This is because of the limited quantities of dangerous substances involved. Accordingly, this article contains an additional requirement designed to prevent the accumulation of toxic fumes in the load compartment.

RO-LT 10.7

Subject: Scheme for the transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 6.1.

Content of the Annex to the Directive: Provisions on the construction and testing of packaging.

Reference to the national legislation: Artikel 9, eerste, tweede en derde lid, van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 9

1. The vehicle is fitted with units which, during transport:
 - (a) are protected against accidental displacement; and
 - (b) are sealed with a lid and protected against accidental opening.
2. Point 1, subsection b, is not applicable during transit for collection purposes or when the vehicle is stationary on its collection rounds.
3. A sufficiently large clearance zone should be set aside in the vehicle so as to enable the domestic hazardous waste to be sorted and deposited in the different units.

Comments: Under this scheme, it is not necessary to have an approved packaging as stipulated in section 6.1. of the ADR. This is because of the limited quantities of dangerous substances involved. This article seeks to provide a single guarantee through the use of units for storing the packagings, thereby ensuring an appropriate method of storage for each category of dangerous goods.

RO-LT 10.8

Subject: Scheme for transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 6.1

Content of the Annex to the Directive: Provisions on the construction and testing of packaging.

Reference to the national legislation: Artikel 14 van de Regeling vervoer huishoudelijk gevaarlijke afval 2002.

Content of the national legislation: Article 14

1. Domestic hazardous waste is exclusively transported in elements.
2. There is a separate element for substances and objects in each class.
3. With regard to class 8 substances and objects, there are separate elements for acids, bases and batteries.
4. Spray cans may be placed in closable cardboard boxes provided that these boxes are transported in accordance with Article 9(1).
5. If class 2 fire extinguishers have been collected, they may be placed in the same element as spray cans not packed in cardboard boxes.
6. By derogation from Article 9(1), no lid is required for the transport of batteries, provided that they are placed in the element in such a way that all of the batteries' openings are closed off and face upward.

Comments: This article results from Article 3 in which particular sections of the ADR are declared non-applicable. Under this scheme, there is no need for approved packaging as provided for in section 6.1. of the ADR. This article lays down requirements for the elements in which domestic hazardous waste is temporarily stored.

RO-LT 10.9

Subject: Scheme for transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 6.1.

Content of the Annex to the Directive: Provisions on the construction and testing of packaging.

Reference to the national legislation: Artikel 15 van de Regeling vervoer huishoudelijk gevaarlijke afval 2002.

Content of the national legislation: Article 15

1. The elements, or boxes destined for transport of spray cans, should be clearly marked as follows:
 - (a) for class 2 sprays collected in cardboard boxes: the word 'SPUITBUSSEN' [spray cans];
 - (b) for class 2 fire extinguishers and spray cans: label No 2.2;
 - (c) for class 3 fire extinguishers and spray cans: label No 3;
 - (d) for class 4.1. paint waste: label No 4.1;
 - (e) for class 6.1. noxious substances: label No 6.1;
 - (f) for class 6.2. objects: label No 6.2;
 - (g) for class 8 caustic substances and objects: label No 8; and furthermore:
 - (h) for alkaline substances: the word 'BASEN' [bases];
 - (i) for acidic substances: the word 'ZUREN' [acids];
 - (j) for batteries: the word 'ACCU'S' [batteries].
2. The same labels and texts are visibly displayed on the closable spaces within the vehicle where the elements may be placed.

Comments: This article results from Article 3 in which particular sections of the ADR are declared non-applicable. Under this scheme, there is no need for approved packaging as provided for in section 6.1. of the ADR. This article lays down requirements for the identification of elements in which domestic hazardous waste is temporarily stored.

RO-LT 10.10

Subject: Scheme for transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 7.5.4.

Content of the Annex to the Directive: Precautions with regard to food, other articles of consumption and animal feeding-stuffs.

Reference to the national legislation: Artikel 13 van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 13

1. The transport of food for humans and animal feedingstuffs at the same time as domestic hazardous waste is prohibited.
2. The vehicle must be stationary during collection.
3. An amber flashing light must be operated on the vehicle while it is moving or stationary for collection.
4. During collection at a fixed location, indicated for this purpose, the engine must be switched off and, by derogation from point 3, the flashing light may be switched off.

Comments: The prohibition in section 7.5.4. of the ADR is extended here because, given the wide range of substances presented, there is virtually always a class 6.1. substance present.

RO-LT 10.11

Subject: Scheme for the transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 7.5.9.

Content of the Annex to the Directive: Ban on smoking.

Reference to the national legislation: Artikel 9, vierde lid, van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 9

4. 'No smoking' notices must be clearly displayed on the sides and at the rear of the vehicle.

Comments: Because the scheme covers the presentation of dangerous substances by private citizens, Article 9.4. stipulates that a 'no smoking' notice must be clearly displayed.

RO-LT 10.12

Subject: Scheme for transport of domestic hazardous waste 2002.

Reference to the Annex to the Directive: 8.1.5.

Content of the Annex to the Directive: Equipment of various types.

Every transport unit carrying hazardous goods must be fitted with:

- (a) at least one stop block for each vehicle with a size appropriate for the vehicle's weight and the diameter of the wheels;
- (b) the equipment necessary to carry out the general measures indicated in the safety instructions referred to in 5.4.3, in particular:
 - two separate upright warning signals (e.g. reflective cones, emergency warning triangles, or flashing amber lights that are independent of the vehicle's electrical installation);
 - a good quality safety jacket or safety clothing (e.g. as described in European standard EN 471) for every crew member;
 - a hand-held torch (see also 8.3.4) for every crew member;
 - protective breathing equipment in accordance with additional requirement S7 (see chapter 8.5) if this additional provision is applicable in accordance with the indication in column 19 of table A of chapter 3.2;
- (c) the equipment necessary to carry out the additional and special measures as indicated in the written instructions referred to in 5.4.3.

Reference to the national legislation: Artikel 11 van de Regeling vervoer huishoudelijk gevaarlijk afval 2002.

Content of the national legislation: Article 11

A safety kit is carried on board within reach for each member of crew, comprising the following:

- (a) fully sealing safety goggles;
- (b) protective breathing mask;
- (c) acid-resistant, acid-proof overalls or apron;
- (d) synthetic-rubber gloves;
- (e) acid-proof, acid-resistant boots or safety shoes; and
- (f) an eye rinse bottle with distilled water.

Comments: Because of the wide range of hazardous substances presented, extra requirements are imposed on mandatory safety equipment over and above those of section 8.1.5. of the ADR.

FINLAND

RO-LT 13.1

Subject: Modification of information in the transport document for explosive substances.

Reference to the Annex to the Directive: 5.4.1.2.1(a).

Content of the Annex to the Directive: Special provisions for Class 1.

Reference to the national legislation: Liikenne- ja viestintäministeriön asetus vaarallisten aineiden kuljetuksesta tiellä (277/2002; 313/2003).

Content of the national legislation: In the transport document, it is allowed to use the number of detonators ((1 000 detonators correspond to 1 kg explosives) instead of actual net mass of explosive substances.

Comments: The information is considered sufficient for national transport. This derogation is used mainly for the blasting industry in small amounts in local transport.

Derogation is registered by the European Commission as number 31.

RO-LT 13.2

Subject: Adoption of RO-LT 14.2.

Reference to the national legislation: To be specified in forthcoming Regulations.

RO-LT 13.3

Subject: Adoption of RO-LT 14.7.

Reference to the national legislation: To be specified in forthcoming Regulations.

SWEDEN

RO-LT 14.1

Subject: Carriage of hazardous waste to hazardous waste disposal plants.

Reference to the Annex to the Directive: 2, 5.2. and 6.1.

Content of the Annex to the Directive: Classification, marking and labelling, and requirements for the construction and testing of packaging.

Reference to national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: The legislation consists of simplified classification criteria, less restrictive requirements for the construction and testing of packaging, and modified labelling and marking requirements.

Instead of classifying hazardous waste according to ADR it is assigned to different waste groups. Each waste group contains substances that can, in accordance with ADR, be packed together (mixed packing).

Each package must be marked with the relevant waste group code instead of the UN number.

Comments: These regulations may only be used for the carriage of hazardous waste from public recycling sites to hazardous waste disposal plants.

RO-LT 14.2

Subject: The name and address of the consignor in the transport document.

Reference to the Annex to the Directive: 5.4.1.1.

Content of the Annex to the Directive: General information required in the transport document.

Reference to the national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: National legislation states that the name and address of the consignor is not required if empty, uncleaned packaging is returned as a part of a distribution system.

Comments: Empty uncleaned packaging being returned will in most cases still contain small quantities of dangerous goods.

This derogation is mainly used by industries when returning empty uncleaned gas receptacles in exchange for full ones.

RO-LT 14.3

Subject: Transport of dangerous goods in the close proximity of industrial site(s), including transport on public roads between various parts of the site(s).

Reference to the Annex to the Directive: Annexes A and B.

Content of the Annex to the Directive: Requirements for the transport of dangerous goods on public roads.

Reference to the national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: Transport in the close proximity of industrial site(s), including transport on public roads between various parts of the site(s). The derogations concern the labelling and marking of packages, transport documents, drivers certificate and certificate of approval according to part 9.

Comments: There are several situations in which dangerous goods are transferred between premises situated on opposite sides of a public road. This form of transport does not constitute carriage of dangerous goods on a private road and should therefore be associated with the relevant requirements.

Compare also with the Directive 96/49/EC, Article 6(14).

RO-LT 14.4

Subject: Transport of dangerous goods that have been seized by the authorities.

Reference to the Annex to the Directive: Annex A and B.

Content of the Annex to the Directive: Requirements for the transport of dangerous goods by road.

Reference to national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of national legislation: Deviations from the regulations may be permitted if they are motivated by reasons of labour protection, unloading risks, submission of evidence, etc.

Deviations from the regulations are only permitted if satisfactory safety levels are met during normal conditions of carriage.

Comments: These derogations may only be applied by authorities seizing dangerous goods.

This derogation is intended for local transport. It could be transport of goods that have been seized by the police e.g. explosives or stolen property. The problem with these types of goods is that you can never be sure of classifications. In addition the goods are often not packed, marked or labelled in accordance with ADR. There are several hundred such transportations carried out by the police every year.

In the case of smuggled liquor, this must be transported from the place where it is seized to an evidence storage facility and then on to a facility for destruction, the latter two may be quite far apart from each other. The deviations permitted are: (a) each package does not need to be labelled, and (b) approved packages do not need to be used. However each pallet containing such packages must be correctly labelled. All other requirements must be fulfilled. There are approximately 20 such transportations each year.

RO-LT 14.5

Subject: Transport of dangerous goods in and in close proximity to ports.

Reference to the Annex to the Directive: 8.1.2, 8.1.5, 9.1.2.

Content of the Annex to the Directive: Documents to be carried on the transport unit; every transport unit carrying dangerous goods must be equipped with the specified equipment; vehicles approval.

Reference to the national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: Documents (except for the driver's certificate) need not to be carried on the transport unit.

A transport unit need not be equipped with the equipment specified in 8.1.5.

Tractors need not have a certificate of approval.

Comments: Compare Directive 96/49/EC, Article 6(14).

RO-LT 14.6

Subject: Inspectors' ADR training certificate.

Reference to the Annex to the Directive: 8.2.1

Content of the Annex to the Directive: Drivers of vehicles must receive training courses.

Reference to the national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: Inspectors that perform the yearly technical inspection of the vehicle do not need to attend the training courses mentioned in 8.2. or hold the ADR training certificate.

Comments: In some cases vehicles being tested in the technical inspection may be carrying dangerous goods as load, e.g. uncleaned, empty tanks.

The requirements in 1.3. and 8.2.3. are still applicable.

RO-LT 14.7

Subject: Local distribution of UN 1202, 1203 and 1223 in tankers.

Reference to the Annex to the Directive: 5.4.1.1.6, 5.4.1.4.1

Content of the Annex to the Directive: For empty uncleaned tanks and tank-containers the description shall be according to 5.4.1.1.6.

The name and address of multiple consignees may be entered in other documents.

Reference to the national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: For empty, uncleaned tanks or tank-containers the description in the transport document according to 5.4.1.1.6. is not needed if the amount of the substance in the loading plan is marked with 0.

The name and address of the consignees is not required in any document on board the vehicle.

RO-LT 14.8

Subject: Transport of empty uncleaned storage tanks not intended as transport equipment.

Reference to the Annex to the Directive: 5.4.1.1.1, 6.8, 8.2.2.8.1.

Content of the Annex to the Directive: Transport document, requirements for the construction, testing etc. for tanks, and drivers certificate.

Reference to the national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: Substances of UN 1202, 1203, 1223 and 1965 can be transported in storage tanks not intended as transport equipment. The tanks must be emptied.

The transport unit must be marked like a tanker vehicle with the relevant substance. The driver must have a certificate in accordance with 8.2.2.7.1.

Comments: This derogation is applied when storage tanks must be moved for instance for repair or maintenance purposes.

The reason for this derogation is to avoid the risk and environmental impact associated with the cleaning of empty tanks prior to transport.

This derogation applies to small quantities. Often this type of transport is local, but in rare cases such transport can be over 300 km in low-populated Northern Sweden.

Transport conditions: Equipment mounted on the storage tank must not be placed so that it is susceptible to damage during transport. Documents showing that the storage tank is approved for the relevant substance must accompany the vehicle. The bindings and fastenings used to secure the storage tank to the vehicle must be able to hold a tank weighing twice that of the storage tank being transported. Flammables cannot be carried as load on the same vehicle as the tank.

RO-LT 14.9

Subject: Local transport in relation to agriculture sites or construction sites.

Reference to the Annex to the Directive: 5.4, 6.8. and 9.1.2.

Content of the Annex to the Directive: Transport document; Construction of tanks; Certificate of approval.

Reference to the national legislation: Särskilda bestämmelser om vissa inrikes transporter av farligt gods på väg och i terräng.

Content of the national legislation: Local transport in relation to agriculture sites or construction sites need not fulfil some regulations:

- the dangerous goods declaration is not required,
- older tanks/containers not constructed according to chapter 6.8. but according to older national legislation and fitted on crew wagons may still be used,
- older tankers, not fulfilling the requirements in 6.7. or 6.8, intended for the transport of substances of UN 1268, 1999, 3256 and 3257, with or without road surface coating equipment, may still be used for local transport and in close proximity to road work places,
- certificate of approval for crew wagons and tankers with or without road surface coating equipment are not required.

Comments: A crew wagon is a kind of caravan for a work crew with a crew room and fitted with a non approved tank/container for diesel fuel intended for the operation of forestry tractors.

RO-LT 14.10

Subject: Tank transport of explosives.

Reference to the Annex to the Directive: 4.1.4.

Content of the Annex to the Directive: Explosives may only be packed in packagings in accordance with 4.1.4.

Reference to the national legislation: Appendix S - Specific regulations for the domestic transport of dangerous goods by road issued in accordance with the Transport of Dangerous Goods Act and the Swedish regulation SÄIFS 1993: 4.

Content of the national legislation: The national competent authority will approve vehicles intended for tank transport of explosives. Tank transport is permissible only for those explosives listed in the regulation or by special authorisation from the competent authority.

A vehicle loaded with explosives in tanks must be marked and labelled in accordance with 5.3.2.1.1, 5.3.1.1.2. and 5.3.1.4. Only one vehicle in the transport unit may contain dangerous goods.

Comments: This is only applicable for domestic transport and the transport is mostly of a local nature.

The regulations in question were in force before Sweden joined the European Union.

Only two companies perform transport with explosives in tank-vehicles. In the near future transition into emulsions is expected.

Old derogation No 84.

RO-LT 14.11

Subject: Driver's licence

Reference to the Annex to the Directive: 8.2.

Content of the Annex to the Directive: Requirements concerning the training of the vehicle crew.

Reference to the national legislation: Appendix S - Specific regulations for the domestic transport of dangerous goods by road issued in accordance with the Transport of Dangerous Goods Act.

Content of the national legislation: Driver training is not permitted with any vehicle referred to in 8.2.1.1.

Comments: Local transport.

THE UNITED KINGDOM**RO-LT 15.1**

Subject: Crossing of public roads by vehicles carrying dangerous goods (N8).

Reference to the Annex to the Directive: Annexes A and B.

Content of the Annex to the Directive: Requirements for the carriage of dangerous goods on public roads.

Reference to the national legislation: Carriage of Dangerous Goods by Road Regulations 1996, Regulation 3 Schedule 2 (3)(b); Carriage of Explosives by Road Regulations 1996, Regulation 3(3)(b).

Content of the national legislation: Disapplication of the dangerous goods regulations to carriage within private premises separated by a road.

Comments: Such a situation can easily occur where goods are transferred between private premises situated on both sides of a road. They do not constitute carriage of dangerous goods on a public road in the normal sense of the term, and none of the provisions of the dangerous goods regulations should apply in such a case.

RO-LT 15.2

Subject: Exemption from prohibition of driver or driver's assistant opening packages of dangerous goods in a local distribution chain from a local distribution depot to a retailer or end user and from the retailer to the end user (except for Class 7) (N11).

Reference to the Annex to the Directive: 8.3.3.

Content of the Annex to the Directive: Prohibition of driver or driver's assistant opening packages of dangerous goods.

Reference to the national legislation: Carriage of Dangerous Goods by Road Regulations 1996, Regulation 12 (3).

Content of the national legislation: Prohibition of opening packages is qualified by the proviso 'Unless authorised to do so by the operator of the vehicle'.

Comments: If taken literally, the prohibition in the Annex as worded can create serious problems for retail distribution.
