covered by the Commission's powers. A similar situation in Germany was cleared retrospectively for 1993/94 by Regulation (EC) No 76/97[60].

As regards ASF in Spain in 1994 Regulation (EC) No 2561/94[61] was in line with the exceptional measure concerning Belgium in 1993, repeating the same explanation for cost sharing in its recital 5. The Regulation was repealed by Regulation (EC) No 753/95[62]. A parallel Regulation (EC) No 1393/94[63] and the corresponding repealing Regulation (EC) No 2302/94[64] concerning the CSF in the Netherlands, however, lack any recital for cost sharing. CSF, again breaking out in Germany at the end of 1994, was the cause for Regulation (EC) No 3146/94[65], leading to a long lasting exceptional measure which, after ten amending Regulations, was repealed by Regulation (EC) No 1030/96[66] as late as 1996. Structurally, it was shaped after the first exceptional measure carried out in Germany 1994. Remarkably, that exceptional measure was extended from the *Land* Lower Saxony to Bavaria and Mecklenburg-West Pomerania by Regulation (EC) No 546/95[67]. In doing so, Art. 1(4) and (5) of Regulation (EC) No 546/95 set up for the three German *Länder* separate EU und German quotas. This reflects the opinion held by the then German Federal Government, that, internally, the costs of co-financing have to be borne by the *Länder*.[68] The EU provisions concurred with that opinion via allowing to identify the shares of the *Länder*. Thus, it was within the financial and political responsibility of each *Land* to supplement the EU measure by own means. Due to the rule that new quotas were made available only if the previous had been exhausted co-financing once again had *de facto* become obligatory. 30

7. Evaluation of the CSF-exceptional measures by the ECA, 1995

The measures taken to fight CSF were described and critically evaluated in the Annual Report 1995 of the ECA[69]. At first, the ECA found that intensive pig-breeding had, on the one hand, led to an above-average income of the farmers and, on the other hand, to environmental problems and the spread of animal diseases. In 1990, the routinely vaccination against swine fever, based on a mitigation strategy passed in 1977, had come to an end, although the EU was not yet totally swine fever-free. The ECA pointed at the considerable irregularities and deficits regarding the execution of veterinary measures, co-financed by the EU, in Germany. Then, the ECA analysed the exceptional market support measures. The shortcomings of the latter were *inter alia* attributed to the unclear and imperfect wording of the Commission implementing rules. Regarding the problematic retroactive effect of Regulation (EC) No 151/96 in Belgium mentioned by the ECA, the Commission argued that this was a policy decision. 31

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60 OJ 1997 L 16, p. 74.
61 OJ 1994 L 272, p. 10.
62 OJ 1995 L 75, p. 5.
63 OJ 1994 L 152, p. 27.
64 OJ 1994 L 251, p. 4.
65 OJ 1994 L 332, p. 23.
66 OJ 1996 L 137, p. 3.
67 OJ 1995 L 55, p. 29.
68 Cfr. point 25 above.
69 OJ 1995 C 340, p. 1.

32 Apart from suggestions for improvements on some specific points, the ECA looked into the issue of financing. The ECA found that the heterogeneous financing provisions in Germany, Belgium and the Netherlands "did not ensure that the various Member States were treated similarly". Hereupon the Commission conceded that the result of the optional quotas, provided for in the beginning, was "that the last national instalment was not always fully used up, which meant that the Community financed more than the 70 % supposed to fall to it". In addition, the ECA called upon the Commission to "examine the extent to which intensive pig producers should contribute in greater degree towards the measures to combat CSF". By that the key question was raised if and to what extent the farmers, as the beneficiaries of the exceptional measures, should take a share in the costs. Describing co-financing "as a model for other areas" – in the German version referred to as "*heutzutage zum Besitzstand gehörend*"[70] – the Commission agreed with the ECA on a stronger involvement of farmers.

8. First BSE-crisis, 1996/97

33 The so-called first BSE-crisis started in 1996, entailing an almost complete isolation of the British beef market and, going along with it, extensive exceptional measures. The crisis was triggered by the statement of the British government of 20 March 1996, assuming that BSE and the *Creutzfeld-Jacob*-Disease (CJD) might be correlated. Based on Art. 23 of Regulation (EEC) No 805/68, the first exceptional measure enacted by the Commission was Regulation (EC) No 716/96[71]. Its starting point was on the one hand Commission Decision of 27 March 1996 on emergency measures to protect against BSE[72] which prohibited the "exportation of live bovine animals, or any part of them, from the UK to other Member States and their export to third countries as a result of the incidence of BSE in the UK". On the other hand, the UK prohibited "the introduction of bovine animals of more than 30 months at the time of slaughter into the human food and animal feed chains", as explained in sentences 1 and 2 of recital 1 of Regulation (EC) No 716/96. Further, sentence 1 of recital 5 read: "Whereas it is appropriate to establish a Community co-financed scheme authorizing the UK to purchase the animals covered by the abovementioned prohibition with a view to killing and subsequently destroying them." In doing so, the Commission interpreted its exceptional powers to the extent that they would not only cover exceptional measures based on EU-law but also exceptional measures induced by purely national action.

34 Because of the foreseeable extent of the exceptional measure it was clear from the very beginning that the quota model, previously used for co-financing, would be unfeasible. Hence, the Commission provided in Art. 2(2) of Regulation (EC) No 716/96 for a co-financing per individual bovine animal: "The Community shall co-finance the expenditure incurred by the United Kingdom for the purchases referred to under Article 1(1) at a rate of ECU 392 per purchased animal which has been destroyed in accordance with the provisions of Article 1." By that, as stated in recitals 2 and 3 of Regulation (EC) No 716/96, about 70 % of the costs were co-financed by the EU. From a legal point of view this was still regarded as an optional co-financing since

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[70] "nowadays being part of the *acquis*".
[71] OJ 1996 L 99, p. 14.
[72] OJ 1996 L 78, p. 47.

pursuant to Art. 1(1) of Regulation (EC) No 716/96 the UK was free to opt for or against the measure. In the aftermath, there were eleven amending Regulations, *inter alia* adjusting the amount of the purchase prices to the respective market situation. Even after almost fifteen years, the measure is, at least formally, still in force[73]. This leads to the question whether the Commission adheres to the restriction of its powers to the period strictly required for attaining the objectives, as stated in the 2nd subparagraph of Art. 44(2) sCMO and its predecessors.

Apart from the elimination of all bovine animals older than 30 months, two further 35 exceptional measures were taken concerning the UK. First, the UK brought forward an eradication plan stating that those birth cohorts of bovine animals, which had possibly come into contact with infected meat or bone-meal, should be bought and destroyed by the government. After the eradication plan was approved by the Commission by Decision 96/385/EG[74], the corresponding exceptional measure was enacted by means of Regulation (EC) No 1484/96[75]. On this basis the UK was allowed to pay "compensation" for the bovine animals under the eradication plan, of which 70 % was co-financed by the EU. By the aforementioned Regulation the UK was further empowered to grant "supplementary amounts" per bovine animal, financed purely nationally. Second, pursuant to Regulation (EC) No1757/96[76] the UK had to buy back all the beef taken out of intervention storage prior to 27 March 1996, provided that certain conditions were fulfilled. While the purchase costs were completely borne by the EU, the UK, pursuant to the 2nd sentence of Art. 1(8) of Regulation (EC) No 1757/96 "shall be fully responsible for the expenditure related to transport, take-over and storage of the repurchased quantities, as well as to the technical and financial costs involved". Therefore, the co-financing must be qualified as mandatory in contrast to the optional measures described before.

The effects of the first BSE-crisis, however, went far beyond the UK. For instance 36 before exports from the UK were banned, numerous calves had been exported into other Member States for fattening. Insofar the consumers in the entire EU became suspicious and avoided the consumption of beef. Thereupon, the Commission took exceptional measures in support of the market. The exceptional measures, enacted for Belgium, France and the Netherlands (Regulation (EC) No 717/96)[77], Portugal (Regulation (EC) No 1508/96)[78], France (Regulation (EC) No 164/97)[79], Germany (Regulation (EC) No 299/97)[80] and Ireland (Regulation (EC) No 1112/97)[81], corresponded to Regulation (EC) No 1484/96 concerning the UK; not until 2004, all these

[73] See the consolidated versions in EUR-Lex.

[74] OJ 1996 L 151, p. 39.

[75] OJ 1996 L 188, p. 25.

[76] OJ 1996 L 230, p. 7.

[77] OJ 1996 L 99, p. 16. Before, the Netherlands applied a national buying-up measure which provided for a higher compensation than that set out by Regulation (EC) No 717/96. After the entry into force of Regulation (EC) No 717/96 the Dutch buying-up agency considered the estimated value, based on Dutch law, for animals which were up for purchase as incompatible with EU law to the extent that it exceeded the EU purchasing price. The ECJ in C-428/99 *van den Bor*, [2002], ECR p. I-127, paras 35 et seq, followed this argument because the animals in question had been bought after the entry into force of Regulation (EC) No 717/96. The national measure had – as the Court stated – only been covered by EU veterinary law until the entry into force of Regulation (EC) No 717/96.

[78] OJ 1996 L 189, p. 86.

[79] OJ 1997 L 29, p. 1.

[80] OJ 1997 L 50, p. 16.

[81] OJ 1997 L 162, p. 17.

Regulations were abrogated by Regulation (EC) No 1575/2004[82]. Since the bovine animals, which had caused the national measures of stock destruction, had been exported to other Member States prior to the export ban, the Regulations, however, lacked a causal relationship to disease-induced restrictions of the free movement of goods. Hence, there may be doubts, whether that bunch of Regulations was in its entirety still covered by the disease-related powers under the beef and veal CMO. In addition, the exceptional measures for Belgium, France and the Netherlands were, according to the 3rd sentence of recital 1 of Regulation (EC) No 717/96, not based on disease-related restrictions, but on the loss in consumer confidence: "Whereas the possibility that these calves may enter the human food or animal feed chains has led to a lack of consumer confidence in beef and a disturbance of the markets …" In principle, the measures were optional for the Member States, the co-financing by the EU was set at a rate of 70 %, and some Member States, like the UK, were free to grant a surcharge per intervened bovine animal.

37 Since the exceptional market support measures taken by the Commission had reached their outer limits, the Council, too, enacted exceptional measures, among others EU additional premiums on top of the existing direct payments for bovine animals and suckler cows under the beef and veal CMO, a special EU ceiling for further animal-related payments and the authority to grant supplementary national aid (Regulation (EC) No 1357/96)[83], another special EU ceiling (Regulation (EC) No 2443/96)[84] as well as the introduction of an early marketing premium (Regulation (EC) No 2222/96)[85]. As an additional consequence of the first BSE-crisis, a mandatory system for the identification and registration of bovine animals and the traceability of beef and veal products was introduced by Regulation (EC) No 820/97[86] and later replaced by Regulation (EC) No 1760/2000[87].

9. Evaluation of BSE-exceptional measures by the ECA 1998

38 The ECA Special Report 19/98[88] dealt with the financial effects of the measures taken by the EU in the context of the first BSE-crisis 1995/96. Apart from numerous problems of control and other enforcement deficiencies, the ECA particularly criticised the coexistence of a large number of measures and the entailing inconsistencies. Furthermore, several measures for the destruction of potentially infected bovine animal stocks would have, according to the ECA, to be qualified as disease-related rather than market-related. A correct qualification may have led to less EU expenditure because in the veterinary area the rate of co-financing is generally lower than in the market area. The ECA also stated that, in the absence of an export ban, it was wrong to base the financial support of the Member States' eradication plans on the disease-clause in the beef and veal CMO, and therefore it "lacks a valid legal basis".

39 The Commission countered by saying "that rapid and efficient action was taken to ensure a proper Community response to the unprecedented crisis following the UK Government's announcement on 20. 3. 1996. The Community beef market was

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[82] OJ 2004 L 288, p. 3.
[83] OJ 1996 L 175, p. 9.
[84] OJ 1996 L 333, p. 2.
[85] OJ 1996 L 296, p. 50.
[86] OJ 1997 L 117, p. 1.
[87] OJ 2000 L 204, p. 1.
[88] OJ 1998 C 383, p. 1.

pushed to the verge of collapse almost overnight as consumer confidence plummeted." Without further explanation, the Commission challenged the "'quasi-veterinary' nature" of the eradication plans, assumed by the ECA. The Commission therefore only referred to the Council's political decision of April 1996 which was in favour of the nature of the measure and of the extent of the Union's co-financing.[89] It is noteworthy that, in spite of the insufficiencies of Art. 23 of the beef and veal CMO, the Commission did not propose its amendment, thus taking care of the consumers' confidence. Later, in its legislative proposal of 2006, in which the Commission suggested an amendment to the eggs CMO and the poultrymeat CMO[90], it conceded that the provision, providing for disease-related exceptional measures, was insufficient to fight the eroding consumers' confidence.[91] But even then, the Commission did not propose such an amendment regarding the beef and veal CMO.

As a consequence of the first BSE-crisis, veterinary and foodstuff matters were sourced out of the Directorate-General for Agriculture of the Commission and transferred to a new Directorate-General. Thus, also from an organisational point of view veterinary-related measures became separated from the market-related measures. This, on the one hand, led to a stronger focus on the public health sector, on the other hand, however, complicated the interaction between the two areas. The ECA's Special Report 19/98 was followed by Special Report 14/2001[92]. In the latter there are overviews of the utilisation of the bovine animals withdrawn by BSE measures, of the cases of BSE in the Member States until spring 2001 and of the BSE-related measures of the EU from 1986 until 2000. The ECA directed its attention especially to the unsatisfactory execution of EU veterinary law in the Member States. The ECA suggested withholding the financing of BSE-exceptional measures by the EU if the Member States "significantly" fail to apply EU veterinary law. **40**

10. CSF in the Netherlands, Germany and Spain 1997/98

From 1997 until 1998 CSF broke out again in the Netherlands, Germany and Spain. The respective exceptional purchase measures were designed according to the previous exceptional measures for CSF, however, without adopting the quota-model for co-financing. Regarding the Netherlands, Regulation (EC) No 413/97[93], for instance, fixed a flat rate co-financing of 70 % of the aid granted per animal; by that the Commission picked up on the co-financing rate already used in the context of the first BSE-crisis. At the same time, the Regulation determined the maximum number of eligible animals whilst leaving the measure optional for the Member States. The exceptional measure of 3 March 1997 was enacted retroactively. To this, recital 7 of Regulation (EC) No 413/97 read: "Whereas the restrictions on the free movement of live pigs have been operative for several weeks now in the zones in question, provoking a substantial increase in the weight of the animals and consequently leading to an intolerable situation where the welfare of the animals is concerned; **41**

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[89] In addition the European Council of 21./22. 6. 1996 had requested in its conclusions the implementation of the measures intended by the Commission; for a chronological sequence of the decisions in the European Council and Council see Commission (ed.), General Report of the Activities of the EU 1996, pp. 208 et seq.

[90] See *Busse*, Art. 45 point 2.

[91] COM (2006) 153 final, 29 March 2006, p. 2.

[92] OJ 2001 C 324, p. 1.

[93] OJ 1997 L 62, p. 26.

whereas retroactive application of this Regulation from 18. 2. 1997 is therefore justified." Apparently, this official explanation is not quite complete since the retroactive effect could have become necessary only if the Netherlands had started the buying-up already prior to the entry into force of the exceptional measure.

42 The exceptional measures enacted by Regulation (EC) No 414/97[94] for Germany and by Regulation (EC) No 913/97[95] for Spain corresponded with the exceptional measure for the Netherlands. Like in 1993, the quotas for Germany were allocated per *Land* individually, so enabling an internal split of the costs. The exceptional measures, frequently prolonged by amending Regulations, were repealed for Germany by Regulation (EC) No 2113/97[96], for the Netherlands by Regulation (EC) No 1430/98[97] and for Spain by Regulation (EC) No 258/1999[98]. In Germany, an equally structured exceptional measure was enacted by Regulation (EC) No 370/98[99], finally abrogated by Regulation (EC) No 2130/98[100].

11. Second BSE-crisis 2000/01

43 The so-called second BSE-crisis started in Germany at the end of 2000. The consumers' confidence in beef collapsed not only in Germany. The exceptional measures resulting from that led to a significant change of the previous practice. At that time, the disease-related restrictions and related exceptional market measures, ordered during the first BSE-crisis in the UK, still existed.[101] Hence, there were no substantially new export restrictions. Accordingly, in order to combat the recurring market crisis the recourse to Art. 39 of Regulation (EC) No 1254/1999 was disputable and had already been criticised by the ECA in the context of the measures of 1996 based on the consumers' confidence crisis[102]. As a consequence, the Commission decided to have recourse to the general clause concerning market disturbances in Art. 38(2) of Regulation (EC) No 1254/1999 and provided via Regulation (EC) No 2777/2000[103] for all Member States, besides the UK, for the purchase of bovine animals. Pursuant to Art. 11 of Regulation (EC) No 2777/2000 the temporal scope of the Regulation was limited to 30 June 2001.[104]

44 In contrast to the previous measures, the so-called first purchase measure in 2000 was quite complex and peculiar. First, the number of animals to be purchased was unlimited, i.e. there were no quotas for each Member State. The measure was merely limited in time until 30 June 2001. Second, the animals had to be fit for

[94] OJ 1997 L 62, p. 29.
[95] OJ 1997 L 131, p. 14.
[96] OJ 1997 L 295, p. 1.
[97] OJ 1998 L 190, p. 22. By Decision 2002/524/EC (OJ 2002 L 170, p. 77) the Commission rejected the Dutch request for the refunding of more than 20 Mio. EUR due to administrative deficiencies in the context of the implementation of the exceptional measure. The case brought by the Dutch government against this decision was dismissed by the ECJ (Case C-318/02, Judgement of 24. 2. 2005 (not published in ECR)).
[98] OJ 1999 L 30, p. 20.
[99] OJ 1998 L 47, p. 10.
[100] OJ 1998 L 269, p. 7.
[101] See point 34.
[102] See points 38 and 40.
[103] OJ 2000 L 321, p. 47.
[104] The Commission authorised by Decision 2001/3/EC, OJ 2001 L 1 p. 23, Denmark and the Netherlands, due to their sufficient BSE testing capacities, to stop the first purchase measure already at 3 January 2001.

human consumption and "fully … destructed". Hence, the production of products unfit for human consumption was prohibited. Third, the measure was optional for the Member States. Since the co-financing rate for the EU was again 70 % of the purchase prices, unevenly fixed per Member State, the Member States had to provide financial resources of an amount difficult to calculate. Moreover pursuant to the 4th subpara. of Art. 4(2) of Regulation (EC) No 2777/2000, they had to bear the entire additional costs, above all the expenditure for the destruction. Fourth, the EU co-financed the post mortem BSE tests for beef from bovine animals older than 30 months up to material costs of 15 EUR. At the same time, it was ordered that only meat tested in such a way was cleared for human consumption in the EU. The latter two measures, however, rather belonged to the veterinary area. Regarding these BSE-tests which primarily come under veterinary law, sentence 2 of recital 3 states that it had to be guaranteed "that no double payment are made from the Community budget".

The strict requirement of complete destruction of all purchased bovine animals **45** unfit for human consumption led to a discussion on the ethical legitimacy of such a measure.[105] As a result, the Commission, in Regulation (EC) No 690/2001[106] concerning the so-called second purchase measure of 2001, provided, first, for the purchase of beef instead of the further purchase of live bovine animals. Second, as an alternative, it permitted the storage of beef. At the same time, the Commission replaced the fixed price system by a tendering procedure, specific for each Member State, which, in the following, had to be carried out according to specific Commission implementing law.[107] Once again, the EU co-financing rate for the purchase costs was 70 %. According to Art. 10 of Regulation (EC) Nr. 690/2001 profits from sales remained with the Member States. Due to low profits however, Member States were not able to effectively cover the costs. In addition the Commission accepted that parts of the meat were released from intervention free of charge. For instance, Germany provided beef to aid Northern Korea, and France supported her people in need.[108]

In the following years the exceptional measure was modified by numerous **46** amending Regulations, however without changing it fundamentally.[109] In principle, the animals earmarked for destruction had to be destroyed in a rendering plant. The land burial of animals, which was the practice in some peripheral areas of the EU in 2001 and 2002, was retroactively approved by the amending Regulation (EC)

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[105] In Germany a number of farmers went to Court (Verwaltungsgericht Frankfurt am Main) claiming the German intervention agency to be ordered to refrain from purchasing of animals. They argued that the measure was in contradiction with the principle of human dignity. The Verwaltungsgericht dismissed the case by Judgment of 1. 3. 2001, case number 1 G 429/01 (V), Neue Juristische Wochenschrift 2001, p. 1295.

[106] OJ 2001 L 95, p. 8.

[107] See Regulation (EC) No 713/2001 (OJ 2001 L 100, p. 3) and the numerous Regulations that were enacted subsequently. According to Regulation (EC) No 482/2002 (OJ 2002 L 75 p. 34) the 21st partial invitation to tender was published

[108] See concerning France Decision 2001/569/EC of 12. 7. 2001, OJ 2001 L 202, p. 35.

[109] This exceptional measure was embedded in a whole series of market support measures; see Decision 2003/600/EC of 2 April 2003, OJ 2003 L 209, p. 12, points 16 et seq., concerning the antitrust case *Viandes bovines françaises*, where the Commission fined several French agricultural associations for prohibited agreements restricting competition. The associations had agreed both on a minimum price for cows intended for slaughter and on restricting beef imports into France as they considered public price support as insufficient. Even the French Minister for Agriculture had endorsed those agreements.

No 1757/2005[110] provided that environmental damage was excluded. Particularly, the mandatory co-financing of both purchase measures was challenged by certain Member States. For instance, Germany sued the Commission before the ECJ successfully for annulment of the co-financing clause in Regulation (EC) No 690/2001. In the end, the EU had to bear the entire cost of the second purchase measure[111]. As a consequence, an EU co-financing rate of 50 % was explicitly provided for in all further CMO-provisions on disease-related exceptional market measures[112]. The general clauses on exceptional measures, however, remained untouched. Hence, also Art. 38(1) of Regulation (EC) No 1254/1999[113] was not amended; this was all the more surprising as the clause, exclusively used for exceptional measures in the second BSE-crisis, had triggered the above mentioned German case before the ECJ. Accordingly, all future exceptional measures, which were related to a loss of consumer confidence, had to be financed solely by the EU, until in 2006 co-financing was introduced for eggs and poultrymeat[114].

12. CSF in the Netherlands and Spain 2001/02

47 Between 2001 and 2007 the EU was spared from further major outbreaks of animal diseases. When in 2001 CSF broke out in the Netherlands the Commission in Regulation (EC) No 1046/2001[115] reverted to the optional purchase measure for live pigs, repeatedly practiced in the past, providing their subsequent processing into products not fit for human consumption. New was, however, on the one hand that, pursuant to Art. 6 of Regulation (EC) No 1046/2001, the EU co-financing rate was only 50 % and the EU ceiling was limited to EUR 80 Mio. On the other hand, according to the 1st sentence of Art. 5(1) of Regulation (EC) No 1046/2001 the aid for piglets was connected "to the ban on insemination introduced by the Dutch authorities"; at the same time aid was granted for the affected sows. As to that ban recital 6 of Regulation (EC) No 1046/2001 stated, that it is "reasonable and justified to interrupt the production of piglets by banning the insemination of sows, thus avoiding the need to slaughter piglets in a few months' time, and reducing the pig density and thus the risk of future spread of the disease". Already one and a half months later the exceptional measure could be repealed by Regulation (EC) No 1459/2001. With Regulation (EC) No 416/2002[116] and the related repeal Regulation (EC) No 1817/2002[117] a similar measure was enacted for Spain, however without a ban on artificial insemination. The EU measures related to FMD were analysed at length in the ECA Special Report 8/2004[118]. The focus, however, was not on exceptional market measures but on disease-related measures, especially the refund arrangements under the European Veterinary Fund, which was also criticised for shortcomings. Further the ECA complained about the differing compensa-

[110] OJ 2005 L 285, p. 6.
[111] See in more detail *Busse*, Art. 46 points 3 et seq.
[112] See in more detail *Busse*, Art. 46 points 5 et seq.
[113] OJ 1999 L 168, p. 21.
[114] See *Busse*, Art. 45 point 2.
[115] OJ 2001 L 145, p. 31.
[116] OJ 2002 L 63, p. 19.
[117] OJ 2002 L 276, p. 18.
[118] OJ 2004 C 54, p. 1.