



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a
COUNCIL REGULATION (EC)
creating a mechanism whereby the Commission can intervene
in order to remove certain obstacles to trade

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. GENERAL

Background

A. Breaches of the principle of free movement of goods

1. The free movement of goods is one of the fundamental principles of the European Community; it is contained in Article 7a of the Treaty and is guaranteed in particular by Member States' compliance with Articles 30 to 36 of the Treaty.

Both citizens and businesses can see the resulting benefits every day. But they are also particularly sensitive to the malfunctions which may subsist or suddenly become apparent.

2. Various examples have shown that there can be grave breaches of the principle of free movement of goods. Such infringements may take a variety of forms, but the most spectacular are certainly the abrupt and unjustified prohibition on imports of products from other Member States, or the prevention of such products from moving or even their destruction. Infringements may seriously disrupt the proper functioning of the internal market and inflict indisputable damage on businesses, which must be rectified as soon as possible.

The Community must have an effective means of dealing with such serious infringements, if it is not to be criticized for failing to ensure real protection for the rights of individuals and allowing one of the fundamental principles of the Community to be endangered. But the present means of action do not necessarily enable certain recurrent breaches of Community law to be rectified with the requisite speed.

B. The means of action which exist at Community level

3. The present methods of dealing with breaches of Community law fall into two categories: (i) individuals may enforce their rights before the national courts, and (ii) the Commission and/or a Member State may bring an action before the Court of Justice under the infringements proceedings (failure to fulfil an obligation) (Articles 169 and 170).

Despite the fact that the Commission encourages action before the national courts, it has to acknowledge the large number of complaints which it receives itself and which request it to initiate infringement proceedings. Individuals are therefore continuing to use their legitimate right of reporting infringements of Community law which are detrimental to them.

The procedure establishing failure to fulfil an obligation consists of two phases, first the pre-litigation procedure (letter of formal warning and Reasoned Opinion), and second the litigation process (action and proceedings before the Court). The procedure may be lengthy, before the Court of Justice judgment establishing the failure to fulfil obligation is delivered.

C. The request of the Amsterdam European Council

4. At its meeting on 16 and 17 June, the Amsterdam European Council, in its conclusions on the action plan for the single market, requested the Commission "to examine ways and means of guaranteeing in an effective manner the free movement of goods" including the possibility of imposing sanctions on the Member States, and to "submit relevant proposals before its next meeting in December 1997". The present proposal is a response to these terms of reference, but the Commission has ensured that it can be adapted, if necessary and at the appropriate time, to the other freedoms of the internal market, and to other fields of Community law.

Proposal for a Regulation creating a Commission intervention mechanism

5. While the acceleration of the Commission's internal treatment of the Article 169 pre-litigation procedure is an appreciable improvement, and even if Article 186 of the Treaty is applied, the application for a declaration in infringement proceedings is still unsuitable for reacting efficiently to certain serious breaches of the principle of the free movement of goods which need to be rectified urgently. The litigation process remains lengthy, with a minimum of two years elapsing before the judgment establishing the infringement is delivered. In the intervening period, no legally binding instrument will be available particularly to help economic operators enforce their rights quickly and effectively as part of the means of redress provided by the Member States.

The Commission is therefore proposing the adoption of a Regulation creating a specific Commission intervention mechanism so that certain obstacles to the free movement of goods are rectified rapidly.

6. Under this mechanism, the Commission would request the Member State concerned, by means of a decision, to take the measures necessary to bring to an end a clear and unmistakable obstacle to the free movement of goods within the meaning of Articles 30 to 36 of the Treaty. The power given to the Commission would be confined to certain cases for which rapid action is necessary.

The creation of such a mechanism would bring clear advantages as compared with the present situation. A Decision taken by the Commission would produce immediate legal effects for individuals in the national legal systems.

Unlike the Reasoned Opinion in the Article 169 procedure, which is only one phase in the process in which the Court of Justice is required to establish an infringement, individuals could have the Decision rapidly enforced before the national courts and could, under the ways and means of national redress, obtain provisional measures, combined with penalty payments or fines, to prevent extension or aggravation of the obstacle, to end the alleged infringement and, if appropriate, achieve compensation for the loss suffered.

The Commission considers that the Decision it takes will therefore constitute a useful basis which individuals can invoke in their national legal systems so that effective, proportionate and deterrent sanctions can be imposed. The advantage of creating this mechanism will be that it encourages individuals to bring actions before the

national courts by giving them the means to obtain sanctions rapidly and at the appropriate time.

7. Where the Member State concerned does not comply with the Commission's decision, an intervention mechanism, in line with the second part of the Amsterdam Mandate, could be envisaged, which would take the form of penalty payments or fines to be established by the Commission at the end of the period laid down for compliance with the Commission Decision.

However, it was considered inappropriate to go any further as of now in this direction, since a penalty payment intervention mechanism of this type would constitute a first in Community law which needs to be examined in greater depth.

8. It was, therefore, judged preferable to use as an example the procedure set out in the Treaty regarding State aids (Article 93), the first part of which is a decision with effects similar to those in the decision provided for in the proposal for a regulation. The second part consists of an accelerated procedure for referral to the Court of Justice, facilitated by the removal of the pre-contentious stage.
9. In this perspective, the present proposal envisages that, where the Member State does not comply with the Commission's decision within the given period, the Commission will immediately refer the matter to the Court of Justice under Article 169 of the EC Treaty within the very short deadlines set out in the Regulation.
10. In deciding to propose the creation of a specific intervention mechanism, the Commission has taken into consideration, in addition to the terms of reference laid down by the Amsterdam European Council, the following points:
 - (a) the fact that the intervention mechanism should apply only to very specific situations; it is therefore limited to serious infringements of the free movement of goods, which can cause the Commission to intervene;
 - (b) the expectations of individuals and in particular of businesses: given the gravity of the obstacles to trade concerned, these individuals suffer very serious losses which require the European Community and the Member States to take the necessary measures;
 - (c) the fact that Community law does not provide appropriate means for putting an end to certain types of obstacles to the free movement of goods with the effectiveness and urgency required;
 - (d) the safeguarding of the institutional balance established by the Treaty.

Legal basis

11. Conferring on the Commission the power to take a Decision requesting a Member State to take rapid and appropriate measures to remove an obstacle to trade is necessary if one of the objectives of the Community is to be attained, namely the free movement of goods, as contained in Article 7a of the Treaty and therefore the proper functioning of the internal market. However, the procedures provided under Articles 169 and 186 of the Treaty are not suitable for removing this obstacle in due time.

Besides, conferral of this power is not, directly or indirectly, associated with harmonization, within the meaning of Article 100a of the Treaty. The purpose of the Regulation is action by the Commission which does not call into question the laws, regulations and administrative provisions of the Member States as such.

Accordingly, since the Treaty has not provided the powers of action so that the Commission is given such a right of intervention, the Commission considers that the only appropriate legal basis for this purpose would be Article 235.

The proposal takes the form of a Regulation.

II. JUSTIFICATION FOR THE PROPOSAL IN THE LIGHT OF THE PRINCIPLE OF PROPORTIONALITY

What are the objectives of the proposed measure in relation to the obligations incumbent on the Community?

12. The objectives of the measure are to ensure rapid restoration of the free movement of goods when it is impeded in such a way as to seriously disrupt the proper functioning of the internal market. This measure is in keeping with the strategic objective of guaranteeing the advantages of the internal market and its cohesion.

Does the proposed measure fall within the Community's sole field of competence or within a field of competence shared with the Member States?

13. The measure in question falls within the Community's sole field of competence: compliance with the principle of the free movement of goods.

Are the means of Community intervention proportionate to the objectives?

14. Yes, since the proposed instrument is confined to clear and unmistakable obstacles to the free movement of goods, within the meaning of Articles 30 to 36 of the Treaty, which seriously disrupt the functioning of the internal market, inflict serious losses on businesses and require immediate intervention. These are consequently special situations to which the appropriate response is specific means of action. The proportionality of the proposed mechanism is therefore based essentially on the speed and the binding force of the Commission's intervention in response to the situations described above.

III. EXAMINATION OF THE PROVISIONS OF THE PROPOSAL

Article 1

15. This Article restrictively defines the scope of the proposed Regulation.

The Regulation applies only to obstacles to the free movement of goods, within the meaning of Articles 30 to 36 of the Treaty, and does so under the application of primary and secondary legislation.

The obstacles must originate in an act or failure to act of a Member State. Failure to act exists when the Member State concerned refrains from implementing any general or particular measure, necessary and proportionate to stop actions taken by private individuals. It is clear that the evaluation of cases of inaction does not affect the exercise of fundamental rights, recognized in national legal systems, such as the right to strike, rights which are not as such affected by Community law. In its evaluation, and, case by case, the Commission will assess whether the Member State has implemented the measures available to it under its legal system for safeguarding the free movement of goods without affecting the exercise of fundamental rights concerned.

Three cumulative conditions must also exist:

- the existence of a grave disruption of the free movement of goods;
- this disruption must cause serious loss to the individuals affected;
- and lastly, immediate intervention is required in order to prevent any continuation, extension or aggravation of the disruption or loss.

16. The most typical cases of the type of obstacle covered by the Regulation might be the following:

- the untimely and unjustified prohibition on the importation of products from other Member States;
- measures abruptly introducing or reintroducing import formalities, e.g. permits or technical certificates;
- the destruction of large quantities of products from other Member States for example, on the roads, in shopping centres or in warehouses;
- the prevention of products from moving so that they are unable to gain access to the national territory or to move on that territory: for example, blocking of means of transport at borders, on motorways, in ports or in airports.

Article 2

17. Article 2 describes the principle of the Commission intervention mechanism. This mechanism is based on:

- (a) the Commission establishing the existence of obstacles to trade which satisfy the conditions in Article 1 of the draft Regulation;
- (b) the Commission taking a Decision with binding legal effects;
- (c) the Member States being obliged to take necessary and proportionate measures within a time-limit fixed by the Commission.

Article 2 contains an obligation for the Commission to take a Decision once it has established the existence of an obstacle to trade which satisfies the conditions in Article 1 of the draft Regulation.

18. The Commission Decision produces immediate legally binding effects in the national legal system. The individuals affected by the obstacle concerned will be able to invoke the Decision rapidly before the national authorities responsible, in particular the courts.

They will thus be able to obtain, within the ways and means of the national redress, provisional measures coupled, if appropriate, with penalty payments or fines, to prevent any extension or aggravation of the consequences of the obstacle concerned, to remove the obstacle, or to achieve compensation for the loss suffered.

19. Since this is a Decision under Article 189 of the Treaty, proceedings for annulment will be possible under Article 173.

Similarly the powers of the Court of Justice defined by Article 169 are fully respected; under Article 2 of the draft Regulation, the Commission's intervention is conceived as a mechanism to be implemented outside the infringement proceedings (establishing failure to fulfil an obligation) provided for in Article 169.

Article 3

20. Article 3 describes the procedure that the Commission must follow to take the Decision.

The rights of defence of the Member State concerned will be respected in so far as the Commission has to give it an opportunity to make known its point of view before it takes the Decision. To this end, any means may be used, including bilateral meetings with the Commission.

In view of the criteria of urgency and efficacy which typify the intervention mechanism laid down by the draft Regulation, binding time-limits for action or reaction are laid down for both the Member State concerned and the Commission.

Article 4

21. Article 4 lays down the extremely short and strict time-limits after which, if the Member State does not comply with the Commission Decision within the period laid down, the Commission can refer the matter rapidly to the Court of Justice. Such referral will have to take place in accordance with the conditions laid down in Article 169 of the Treaty.

Articles 5 and 6

22. Article 5 defines the obligation for the Commission to publish the Decision that it takes under Article 2 and to transmit the text to any interested parties which so request.

Article 6 lays down the date on which the Regulation enters into force.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 235 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

1. Whereas in its conclusions the Amsterdam European Council of 16 and 17 June 1997 invited the Commission to examine ways and means of guaranteeing in an effective manner the free movement of goods, including the possibility of imposing sanctions and requested the Commission to submit relevant proposals;
2. Whereas as provided for in Article 7a of the Treaty, the Internal Market comprises an area without internal frontiers in which, in particular, the free movement of goods is ensured in accordance with the provisions of Articles 30 to 36 of the Treaty;
3. Whereas breaches of this principle, such as occur when products originating in other Member States are prevented from moving or destroyed, or their importation abruptly suspended without justification, may cause grave disruption to the proper operation of the Internal Market and inflict very serious losses on the individuals affected, while the procedures provided under Articles 169 and 186 of the Treaty are not capable of ensuring that such breaches are remedied in due time;
4. Whereas such breaches may result not only from the action but also from inaction on the part of a Member State; whereas this is the case, in particular, where the action is taken by private individuals and the Member State fails to implement any necessary and proportionate measure available to it for safeguarding the free movement of goods without affecting the exercise of fundamental rights recognized under national law;
5. Whereas, in the absence of immediate intervention, there is a risk that the disruption or loss in question will continue, increase or intensify; whereas there may be a breakdown in trade and the contractual relations which underlie it;
6. Whereas, in addition, this type of situation may call into question the achievements and the credibility of the Internal Market;

¹ OJ C

² OJ C

7. Whereas Community law offers no adequate means for putting an end to such obstacles with the necessary efficiency and urgency and whereas injured parties have no appropriate instrument to rely on in defending their rights;
8. Whereas the Commission should be able to intervene with the Member State concerned by way of decision in order that it speedily and effectively corrects the aforementioned breaches of the principle of free movement of goods, and individuals can defend their rights within the national legal system;
9. Whereas, if the Member State concerned fails to comply with its decision, the Commission should be in a position speedily to refer the case to the Court of Justice pursuant to Article 169 of the Treaty, whereas, to this end, strict time-limits must be provided for the pre-litigation phase of the procedure;
10. Whereas the Treaty provides for no powers, other than those in Article 235 of the Treaty, for the adoption of this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

1. This Regulation shall apply to clear, unmistakable and unjustified obstacles to the free movement of goods, within the meaning of Articles 30 to 36 of the Treaty, originating in an action or inaction on the part of a Member State, which:
 - lead to serious disruption of the free movement of goods; and
 - cause serious loss to the individuals affected; and
 - require immediate action in order to prevent any continuation, increase or intensification of the disruption or loss in question.
2. Inaction within the meaning of this Regulation exists when a Member State, in the presence of actions taken by private individuals, fails to implement any necessary and proportionate measure available to it for safeguarding the free movement of goods without adversely affecting the exercise of fundamental rights recognized under national law.

Article 2

Where the Commission establishes the existence in a Member State of obstacles within the meaning of Article 1, it shall address a decision to the Member State directing it to take the necessary and proportionate measures to remove the said obstacles, within a period which it shall fix.

Article 3

1. The Commission shall open the procedure provided for in this Article not later than five days following the day on which it becomes fully apprised of all the facts concerning the obstacles.

2. Before adopting the decision provided for in Article 2, the Commission shall give the Member State concerned an opportunity to make known its point of view within a period which it shall fix with reference to the urgency of the case, and which shall in any event comprise between three and five working days from the day on which the Commission raises the issue with that Member State.
3. The Commission shall adopt the decision referred to in Article 2 as soon as possible and not later than ten days following the expiry of the period provided for in paragraph 2.

Article 4

1. Where a Member State to which a decision is addressed fails to comply with it within the prescribed period, the Commission shall immediately put it on notice to submit its observations within three days.
2. Where the obstacle continues after the expiry of the period of three days mentioned in paragraph 1, the Commission shall immediately issue a Reasoned Opinion calling upon the Member State to comply with it within three days.
3. Where, by the end of the period referred to in paragraph 2, the Member State has not complied with the Reasoned Opinion, the Commission may institute proceedings before the Court of Justice.

Article 5

The Commission shall publish in the *Official Journal of the European Communities* decisions which it adopts pursuant to Article 2 and shall immediately transmit the text to any interested party which so requests.

Article 6

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

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

Done at Brussels,

For the Council
The President

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