

# COMMISSION OF THE EUROPEAN COMMUNITIES

COM(83) 87 final

Brussels, 28 February 1983

Proposal for a  
COUNCIL REGULATION (EEC)  
on the strengthening of the common commercial policy with regard  
in particular to protection against unfair commercial  
practices

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(submitted to the Council by the Commission)

COM(83) 87 final

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A. EXPLANATORY MEMORANDUM

1. Background

The European Council of June 1982 laid down as Community objectives the need to act "with as much speed and efficiency as its trading partners" in the protection of trade and "to defend vigorously the legitimate interests of the Community in the appropriate bodies".

Following its communication to the Council<sup>1</sup> and the discussions in the Council on the strengthening of the instruments of the common commercial policy, the Commission undertook to present a formal proposal early in 1983.

After carrying out a critical study of the instruments of the Community's main trading partners, and in the light of the discussions referred to above, the Commission proposes that the Community should have at its disposal a new trade protection instrument to enable it to take effective action against unfair commercial practices on the part of non-member countries.

2. Scope

The Commission proposes that the aim should be to establish a procedure that is reasonable but effective, involving a broad approach and avoiding enumeration but consistent with the international legal framework.

Accordingly, it has opted for a middle path between two extreme approaches, avoiding the drawbacks of both:

- (i) The first or restricted policy option would involve concentrating on a limited list of clearly identified practices against which the Community would take action.

Such an instrument could prove to be of very little value, as it is impossible to draw up in advance an exhaustive list of cases which might arise.

- (ii) The other approach, as adopted by one of the Community's main trading partners, would allow counter-measures to be taken against any practice considered to be "unjustifiable, unreasonable or discriminatory".

This approach has been criticized by the Community, which has pointed out that the absence of a definition of these terms inevitably introduced an arbitrary element into the commercial policy of the Community's trading partners and could bring the relevant instruments into conflict with the provisions of the GATT.

For this reason, moreover, the Community's trading partners, which must - like it - act within the framework of their international obligations, have never gone so far as to use counter-measures outside the GATT framework, even though the relevant instruments make such action theoretically possible.

Lastly, a further drawback of such an ambiguous approach would be to encourage Community industry to make complaints which the Commission would be unable to answer effectively.

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<sup>1</sup>COM(82) 470 final (Council doc. 8979/82 COMER 95).

Consequently, this proposal for a Regulation, while not conferring on the Community any new rights vis-à-vis non-member countries, establishes commercial policy procedures aimed at:

- (a) responding to any unfair commercial practice and removing the injury resulting from such practice<sup>1</sup>;
- (b) ensuring the full exercise of the Community's rights<sup>2</sup>.

Given its awareness of the defects of the approach adopted by some of the Community's partners, the Commission felt that a clear definition was required of the "unfair" practices against which it seeks powers to act. It took as a starting point the concept that, in order to be described as "unfair", a practice must either be incompatible with the commitments of the non-member country concerned vis-à-vis the Community or, more generally, be condemned by international law or the rules regarding commercial policy commonly accepted by the Community's principal partners.

In addition, common sense dictates that the authorities should take action in respect of such practices only where they result in injury.

The Commission is of course aware that the proposed definition of "unfair practices" does not cover every situation which might give rise to complaints from Community producers. However, establishing too broad a field of application would only arouse in Community industry expectations that would be hard to satisfy.

It would therefore seem advisable at the present stage to leave open the possibility of taking action based directly on Article 113 of the Treaty, where cases arise which are not covered. In such cases, procedures similar to those implemented by the proposed instrument could be employed on an ad hoc basis.

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<sup>1</sup>Practices covered under (a) would be the following, for example:

- (i) restrictions on exports of raw materials contrary to the GATT,
- (ii) import restrictions or other charges that are incompatible with the GATT.

<sup>2</sup>For practical purposes, the procedures covered by (b) would be those involving recourse to the GATT dispute settlement procedures (Article XXIII or the corresponding provisions of the Tokyo Round codes, such as Title II of the Subsidies Code), requests for compensation pursuant to Article XIX, etc. for which no specific Community procedure exists at present.

### 3. Referral to the Commission

The Commission considers that, following the practice of some of the Community's partners and what is in any case already current practice in Community's anti-dumping/anti-subsidy proceedings, Community industry<sup>1</sup> should be able to submit complaints direct to the Commission.

However, this right to submit complaints direct should be accorded only in respect of unfair commercial practices - i.e. cases covered under (a) - and provided that sufficient evidence can be provided of the existence of such practices and of material injury affecting the complainant.

The Member States should, of course, be able to refer to the Commission cases covered by both (a) and (b).

### 4. Examination proceedings

These are based directly on the provisions of Regulations 3017/79 (anti-dumping/anti-subsidy) and 288/82 (rules for imports) and consist of:

- (i) an examination of admissibility by the Commission, with consultation of the Member States (ad hoc advisory Committee);
- (ii) a decision by the Commission (within a set time limit) on the initiation of formal examination proceedings;
- (iii) an examination carried out within a set time limit and involving, if necessary, checks with firms and the authorities in the non-member countries concerned. The investigations would be on the lines of those carried out in anti-dumping proceedings, notably as regards examination of injury and the confidentiality of information.

Investigations would be carried out automatically in response to complaints of unfair commercial practices (i.e. complaints under (a)).

Such examination proceedings, by reason of their transparency, would have two advantages:

- (i) they would meet the requirements of equity,
- (ii) but would also undoubtedly bring political and economic pressure to bear on the non-member countries concerned, as has been demonstrated in the case of the instruments used by some of the Community's partners.

### 5. Form of action to be taken

Given the broad, non-enumerative approach adopted with regard to the scope of the instrument, it is impossible to draw up a catalogue of measures to be taken in individual cases.

Generally speaking, the measures to be implemented fall into two distinct categories:

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<sup>1</sup>"Community industry" is here taken to mean industry and agriculture but not commerce.

1. Those taken following international dispute settlement procedures carried out under GATT or in some other international legal context (EFTA, Lomé Convention, and so on).

It follows that in these cases (which are likely to be the more numerous), once the international procedures have been concluded, the measure to be taken will correspond to implementation of the findings resulting from the procedures.

2. In other cases - notably as regards countries or products not covered by a legal framework - measures will be taken unilaterally.

For practical purposes, the measures to be taken, irrespective of the category into which the case falls, would consist of:

- (i) the suspension or withdrawal of concessions resulting from commercial policy negotiations;
- (ii) the raising of existing duties or the introduction of any other charge on imports;
- (iii) the establishment of quantitative restrictions;
- (iv) or the introduction of any other measure modifying import or export conditions or otherwise affecting trade with the non-member countries concerned.

#### 6. Decision-making machinery

From the purely legal standpoint, the Community already has - under Article 113 - all the scope for action that it might need in the matter of commercial policy.

In view of the delays and shortcomings inseparable from the decision-making machinery provided for in Article 113, however, it is clear that if the Community wishes to act in conducting its commercial policy "with as much speed and efficiency as its trading partners", as the European Council of June 1982 stressed, it needs to be able to overcome these drawbacks by means of a more effective decision-making process. This is, moreover, the necessary consequence of the establishment of formal arrangements for the submission of complaints by Community industry direct and the conduct of the examination proceedings within strict time limits.

The proposed decision making process would comprise the following:

- (i) Commission decision, following prior consultation of the Member States;
- (ii) right of appeal to the Council for those Member States which recorded their opposition in the consultations;
- (iii) in addition, in the event of appeals and in order to avoid the shortcomings of the present decision-making machinery a "guillotine" procedure would be established: the Commission's decision would be deemed to have been adopted and would be implemented if the Council, acting by a qualified majority, had not decided otherwise within a set time limit.

7. Time limits

The establishment of effective decision-making machinery is pointless unless the examination proceedings themselves are completed within set time limits.

The time limits adopted in the proposal for a Regulation are based mainly on those currently in use by the Community's main trading partners, as follows:

- (i) 45 days for the examination of admissibility;
- (ii) five months for the submission of the examination report, except in particularly complex cases (seven months);
- (iii) final decision taken within five months of the submission of the examination report, except where international dispute settlement procedures are invoked, in which case the resulting decisions should be put into effect within three months of the conclusion of the procedures.

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Finally, the Commission would draw the Council's attention to the balance struck in this proposal between the establishment of new opportunities for Community action, together with the right to submit complaints, and the implementation of effective decision-making machinery. The Commission wishes to emphasize explicitly that its proposal constitutes an integral whole.

6'  
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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,  
and in particular Article 113 thereof,

Having regard to the instruments establishing the common organization of  
agricultural markets and the Regulations adopted under Article 235 of the  
Treaty, applicable to goods processed from agricultural products, and in  
particular the provisions of those instruments which allow for derogation  
from the general principle that any quantitative restriction or measure  
having equivalent effect may be replaced solely by the measures provided  
for in those instruments,

Having regard to the proposal from the Commission,

Whereas the common commercial policy must be based on uniform principles,  
notably with regard to commercial protection; whereas Council Regulation (EEC)  
No 3017/79<sup>1</sup> on protection against dumped or subsidized imports from third  
countries, as amended by Regulation (EEC) No 1580/82<sup>2</sup>, and the rules for  
imports laid down by Council Regulations (EEC) No 288/82<sup>3</sup>, No 1765/82<sup>4</sup> and  
No 1766/82<sup>5</sup> constitute important components of that policy;

Whereas in the light of experience and of the conclusions of the European  
Council of June 1982, which considered that it was of the highest importance  
to defend vigorously the legitimate interests of the Community, it has  
become apparent that the common commercial policy needs to be strengthened,  
notably in the fields not covered by existing rules;

Whereas to this end it is advisable to provide the Community with procedures  
enabling it

- to respond to any unfair commercial practice and to remove the injury  
resulting therefrom,
- to ensure full exercise of the Community's rights;

Whereas in particular the Community should be enabled to remove the injury

<sup>1</sup>OJ No L 339, 31.12.1979, p. 1.

<sup>2</sup>OJ No L 178, 22.6.1982, p. 9.

<sup>3</sup>OJ No L 35, 9.2.1982, p. 1.

<sup>4</sup>OJ No L 195, 5.7.1982, p. 1.

<sup>5</sup>OJ No L 195, 5.7.1982, p. 21.

resulting from third countries' practices whose unfair nature is evident from their incompatibility either with international law or with the rules regarding commercial policy commonly accepted by the Community's principal partners;

Whereas the measures taken under the procedures in question should, however, be without prejudice to other measures which might be adopted directly pursuant to Article 113 of the Treaty;

Whereas the Community must act in compliance with its international obligations; whereas where such obligations result from agreements, it is important, in order to maintain the balance of rights and obligations which it is the purpose of those agreements to establish, to take account of the interpretation of the agreements by the Community's principal partners;

Whereas it is necessary to confirm, by establishing a formal complaints procedure, the right of Community industry to submit to the Commission any complaint regarding unfair commercial practices by third countries;

Whereas for the purposes of implementation of this Regulation there should be cooperation between the Member States and the Commission and, to this end, arrangements should be made for consultations within an advisory committee;

Whereas it is appropriate to lay down clearly the rules of procedure to be followed during the examination, in particular the rights and obligations of the Community authorities and the parties involved, and the conditions under which interested parties may have access to information and may ask to be informed of the essential facts and considerations on the basis of which it is intended to recommend and adopt measures, and of the possible nature of such measures;

Whereas in conducting the defence of its commercial interests, the Community needs to have at its disposal a decision-making process which permits rapid and effective action,

HAS ADOPTED THIS REGULATION:

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Article 1

AIMS

This Regulation establishes procedures in the matter of commercial policy which, subject to compliance with existing international obligations, are aimed at:

- (a) responding to any unfair commercial practice attributable to a third country and removing the injury resulting therefrom;
- (b) ensuring full exercise of the Community's rights.

Article 2

DEFINITIONS

1. For the purposes of this Regulation, the Community's rights shall be those pertaining to the fields covered by the commercial policy.
2. For the purposes of this Regulation, unfair commercial practices shall be any practices attributable to third countries which are incompatible with international law or the rules commonly accepted by the Community's principal partners regarding commercial policy.
3. For the purposes of this Regulation, injury shall be any material injury caused or threatened to Community industry.

4. The term "Community industry" shall be taken to mean the Community producers as a whole of products identical or similar to the product which is the subject of unfair practices or of products competing directly with that product, or those producers whose combined output constitutes a major proportion of total Community production of the products in question.

Article 3

COMPLAINT ON BEHALF OF COMMUNITY PRODUCERS

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of unfair commercial practices may lodge a written complaint.
2. The complaint must contain sufficient evidence of the existence of unfair commercial practices and the injury resulting therefrom. Proof of injury must be given on the basis of the elements set out in Article 8.
3. The complaint shall be submitted to the Commission, which shall inform the Member States without delay.
4. The complaint may be withdrawn, in which case the procedure may be terminated unless such termination would not be in the interest of the Community.
5. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

Article 4

REFERRAL BY A MEMBER STATE

1. Any Member State may ask the Commission to initiate the procedures referred to in Article 1.

2. It shall supply the Commission with the necessary evidence to support its request. Where unfair commercial practices are alleged, proof thereof and of the injury resulting therefrom must be given on the basis of the elements set out in Article 8.

3. The Commission shall notify the Member States of the requests without delay.

#### Article 5

#### CONSULTATION PROCEDURE

1. For the purposes of consultations pursuant to this Regulation, an Advisory Committee, hereinafter referred to as "the Committee", is hereby set up and shall consist of representatives of each Member State, with a representative of the Commission as chairman.

2. Consultations may be initiated at the request of a Member State or on the initiative of the Commission. The chairman shall provide the Member States, as promptly as possible, with all relevant information in his possession.

3. The Committee shall meet when convened by its chairman.

4. Where necessary, consultations may be in writing. In such case the Commission shall notify in writing the Member States who, within a period of eight working days from such notification, shall be entitled to express their opinions in writing.

5. Consultations shall in particular cover:

- (a) in the case of allegations of unfair commercial practices,
  - the nature of the alleged practices,
  - the existence and extent of the injury caused by the alleged practices,
  - the causal link between such practices and the injury resulting therefrom,
  - the measures which, in the circumstances, are appropriate to prevent or remedy the injury in question, and the ways and means for putting them into effect;

- (b) the measures which should be taken to ensure full exercise of the Community's rights.

Article 6

COMMUNITY EXAMINATION PROCEDURE

1. Where, after consultation, it is apparent to the Commission that there is sufficient evidence to justify initiating an examination procedure, the Commission shall act as follows:
  - (a) it shall announce the initiation of an examination procedure in the Official Journal of the European Communities; such announcement shall indicate the product and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may make known their views in writing and may apply to the heard orally by the Commission in accordance with paragraph 5;
  - (b) it shall so notify officially the representatives of the principal exporting country or countries concerned, with whom, where appropriate, consultations may be held;
  - (c) it shall conduct the examination at Community level, acting in cooperation with the Member States.
2.
  - (a) If necessary, and notably in cases of complaints of unfair commercial practices, the Commission shall carry out an investigation into the records of importers, exporters, traders, agents, producers and trade associations and organizations, provided that the firms or organizations concerned give their consent;
  - (b) where necessary, the Commission shall carry out investigations on the territory of third countries, provided that the governments of the countries concerned have been officially notified and raise no objection;
  - (c) the Commission shall be assisted in its investigation by officials of the Member State on whose territory the checks are carried out, provided that the Member State in question so requests.

3. The Member States shall supply the Commission, upon request, with all information necessary for the examination, in accordance with the detailed arrangements laid down by the Commission.

4.(a) The complainants and the exporters and importers primarily concerned, as well as the representatives of the principal exporting country or countries may inspect all information made available to the Commission except for internal documents for the use of the Commission and its departments, provided that such information is relevant to the defence of their interests and not confidential within the meaning of Article 7 and that it is used by the Commission in its examination procedure. The persons concerned shall address a reasoned request in writing to the Commission, indicating the information required.

(b) The complainants and the exporters and importers primarily concerned and the representatives of the principal exporting country or countries, may ask to be informed of the essential facts and considerations on the basis of which it is intended to recommend a commercial policy measure, and also of the possible nature of the measure.

(c) (i) Requests for information pursuant to (b) shall:

(aa) be addressed to the Commission in writing,

(bb) specify the particular issues on which information is sought,

(cc) be received not later than one month after the announcement of initiation of the procedure;

(ii) the information given by the Commission either orally or in writing shall not prejudice any decision which may be taken by the Commission or the Council. Confidential information shall be treated in accordance with Article 7;

(iii) information shall normally be given no later than 15 days prior to the Commission's decision pursuant to Article 13. Representations made after the information is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 6 days, due consideration being given to the urgency of the matter.

5. The Commission may hear the parties concerned. It shall hear them if they have, within the period prescribed in the notice published in the Official Journal of the European Communities, made a written request for a hearing showing that they are a party primarily concerned by the result of the proceeding and that there are particular reasons why they should be heard orally.

6. Furthermore, the Commission shall, on request, give the parties primarily concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward. In providing this opportunity the Commission shall take account of the wishes of the parties and of the need to preserve confidentiality. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

7. When the information requested by the Commission is not supplied within a reasonable time or where the investigation is significantly impeded, findings may be made on the basis of the facts available.

8. The Commission shall take a decision as soon as possible on the opening of a Community examination procedure following any complaint or request made in accordance with Articles 3 and 4; the decision shall normally be taken within 45 days of referral.

9. When it has concluded its examination, the Commission shall report to the Committee. The report should normally be presented within five months of the announcement of initiation of the procedure, unless the complexity of the examination is such that the Commission extends the period to seven months.

10. The provisions of this Article shall not prevent protective measures being taken at any time pursuant to Article 12. Immediately after the introduction of such measures, the Commission shall carry out any additional examinations it considers necessary.

#### Article 7

#### CONFIDENTIALITY

1. Information received in pursuance of this Regulation shall be used only for the purpose for which it was requested.

2. (a) Neither the Council, nor the Commission, nor Member States, nor the officials of any of these, shall reveal any information of a confidential nature received in pursuance of this Regulation, or any information provided on a confidential basis by a party to an examination procedure, without specific permission from the party submitting such information.

(b) Each request for confidential treatment shall indicate why the information is confidential and shall be accompanied by a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary.

3. Information will normally be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

4. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded.

5. This Article shall not preclude the disclosure of general information by the Community authorities and in particular of the reasons on which decisions taken in pursuance of this Regulation are based. Such disclosure must take into account the legitimate interest of the parties concerned that their business secrets should not be divulged.

#### Article 8

##### EXAMINATION OF INJURY

1. An examination of injury shall involve the following factors, no one or several of which can necessarily give decisive guidance:

- (a) the volume of Community imports or exports concerned, notably where there has been a significant increase or decrease, either in absolute terms or relative to production or consumption;
- (b) the prices of the Community producers' competitors, in particular in order to determine whether there has been, either in the Community or on third country markets, significant undercutting of the prices of Community producers;

(c) the consequent impact on Community producers of products similar to the product which is the subject of unfair practices or of products competing directly with that product, as indicated by trends in certain economic factors such as:

- production,
- utilization of capacity,
- stocks,
- sales,
- market share,
- prices (that is, depression of prices or prevention of price increases which would normally have occurred),
- profits,
- return on capital,
- investment,
- employment.

2. Where a threat of injury is alleged, the Commission shall also examine whether a particular situation is likely to develop into actual injury.

In this regard, account may also be taken of factors such as:

- (a) the rate of increase of exports to the market where the competition with Community products is taking place;
- (b) export capacity in the country of origin or export, which is already in existence or will be operational in the foreseeable future, and the likelihood that the exports resulting from that capacity will be to the market referred to in point (a).

3. Injury caused by other factors which, either individually or in combination, are also adversely affecting Community industry, must not be attributed to the practices under consideration.

#### Article 9

#### TERMINATION OF THE PROCEDURE

Where it is found as a result of the examination procedure that the interests of the Community do not require any action to be taken, the procedure shall be terminated in accordance with Article 13.

Article 10

UNDERTAKINGS

1. Where, during the course of an examination procedure, undertakings are offered which the Commission, after consulting the Member States, considers satisfactory, the procedure may be terminated without a measure being introduced, by means of a decision taken pursuant to Article 13.

2. The undertakings referred to in paragraph 1 are those by which the authorities of the third country or countries concerned undertake to take all necessary measures:

- (a) to remove the unfair commercial practices or the injury resulting therefrom or
- (b) to guarantee to the Community the full exercise of its rights.

3. The Commission shall supervise compliance with the undertaking or undertakings, where appropriate on the basis of information supplied at intervals, which it may request from the third countries concerned and check as necessary.

Failure to supply information requested by the Commission will be regarded as a violation of the undertaking.

4. Where an undertaking has been violated or evaded, or where the Commission has reason to believe that it has, or if the undertaking has been withdrawn or its renewal refused, the Commission shall inform the Member States forthwith and shall immediately take the measures which appear necessary.

Article 11

ADOPTION OF COMMERCIAL POLICY MEASURES

1. Where it is found as a result of the examination procedure that action is necessary in the interests of the Community in order:

- (a) to respond to any unfair commercial practice and remove the injury resulting therefrom, or
- (b) to ensure full exercise of the Community's rights,

the appropriate measures shall be determined in accordance with the procedure set out in Article 13.

2. Any commercial policy measures may be taken which are compatible with existing international obligations, notably:

- (a) recourse to international dispute settlement procedures,
- (b) suspension or withdrawal of any concession resulting from commercial policy negotiations,
- (c) the raising of existing customs duties or the introduction of any other charge on imports,
- (d) the introduction of quantitative restrictions or any other measure modifying import or export conditions or otherwise affecting trade with the third country concerned.

Article 12

PROTECTIVE MEASURES

In critical circumstances where any delay would result in injury which would be difficult to remedy, and where the Commission has sufficient evidence to justify immediate action to safeguard Community interests, it may, at the request of any Member State or on its own initiative, take protective measures on the lines of those specified in Article 11.

Article 13

DECISION-MAKING MACHINERY

1. The decisions referred to in Articles 9, 10, 11 and 12 shall be taken by the Commission after consulting the Member States, which shall be notified by telex. Failing an appeal to the Council, decisions shall be applicable on expiry of a period of five days following such notification.

2. Any Member State which opposed the proposed measure when consulted may refer the Commission's decision to the Council within the period specified in paragraph 1; in that event, application of the Commission's decision shall be suspended until the Council has taken a decision, unless the Commission, in the situations referred to in Article 12, decides otherwise.

If, within a period of 30 days following the date of the Commission's notification to the Member States, the Council, acting by a qualified majority, has not decided otherwise, the Commission's decision shall become finally applicable.

3. Decisions shall state the reasons on which they are based and shall be published in the Official Journal of the European Communities. Publication shall in particular be deemed to constitute notification to the countries and parties primarily concerned.

4. The decisions referred to in Articles 9, 10, 11 and 12 shall be taken within the shortest possible period, which should not normally exceed five months following presentation of the examination report. Where recourse is had to international dispute settlement procedures, the relevant decisions should be taken within three months of the conclusion of such procedures.

#### Article 14

This Regulation shall operate by way of complement:

- (a) to the other rules adopted in the commercial policy field;
- (b) to the rules establishing the common organization of agricultural markets and their implementing provisions;
- (c) to the specific rules adopted under Article 235 of the Treaty, applicable to goods processed from agricultural products.

It shall operate by way of derogation from any provisions of the rules specified in points (b) and (c) which preclude the application of measures taken on the basis of this Regulation.

It shall be without prejudice to other measures which may be taken pursuant to Article 113 of the Treaty.

Article 15

This Regulation shall enter into force on

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

Done at Brussels

For the Council

The President