

COMMISSION OF THE EUROPEAN COMMUNITIES

This document cancels and replaces
document COM(80) 860 final.

Concerns only the English version.

COM(80) 860 final/2

Brussels, 6th February 1981

PROPOSAL FOR A COUNCIL DIRECTIVE

on the harmonization of provisions laid down by law,
regulation or administrative action concerning the exercise
of the right of appeal in respect of customs matters

(submitted to the Council by the Commission)

COM(80) 860 final/2

Explanatory MemorandumI. Need for Community action with regard to the exercise of a right of appeal in respect of customs matters

Irrespective the nature of the texts which constitute Community customs law, it is normally applied to persons who are subject to it by the competent authorities in the Member States whose duty it is to implement that law directly in each State.

Action by the competent authorities normally takes the form of decisions which are individual in character and which apply to the natural or legal persons concerned.

These persons may consider that decisions thus adopted affecting them do not comply with existing Community law, the implementation of which may indeed create problems of interpretation in view of the fact that such law is sometimes complex.

It may also happen that, for reasons which it does not specify, the competent authority fails to act on an application by a natural or legal person who wishes to benefit from a rule of Community law. That person is then in the same position as he would be if his application had been expressly rejected.

It is important that in the cases under consideration the persons concerned should be able to appeal against a competent authority's decision (or failure to take a decision). This right of appeal is an essential guarantee against the misapplication of Community law by the national authority or even, if need be, against any arbitrary decision which it might take in certain circumstances.

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Provision is made moreover, by the regulations in force in all the Member States for the exercise of a right of appeal in the cases in question. The conditions for exercising such right of appeal vary considerably, however, from one Member State to another. The iressential differences are :

- the time limits within which an appeal must be lodged ;
- the nature of the authorities empowered to give a ruling on an appeal ;
- the respective powers of the administrative authorities and judicial bodies called upon to give a ruling on an appeal ;
- the consequences of an appeal on the implementation of the disputed decision (whether lodging an appeal causes implementation to be suspended).

The effect of these disparities is that Community traders are not treated alike when they seek correct implementation of Community customs law. In particular, when an appeal is lodged with an administrative authority, all do not have access under the most favourable conditions to an interpretation of Community law by the Court of Justice pursuant to Article 177 of the Treaty. Above all, some of them are entitled, as a result of their appeal against a competent authority's decision, to defer payment of the duties which implementation of that decision would entail until final decision has been taken to which no appeal lies, whereas their counterparts who carry on their activities in other Member States are required to pay those duties in spite of the fact that an appeal has been lodged.

The fact that the large majority of appeals lodged against decisions taken by competent customs authorities result in decisions favourable to these authorities is an indication of the unfair advantage which the suspensory effect of the appeal can give to traders and the ensuring

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disparities in treatment. Moreover, suspended implementation of a decision affects the assessment of Community own resources, since the amount of duty taken into account after an appeal against the competent customs authority's decision has been rejected is not adjusted to offset any monetary erosion which may have occurred.

For all these reasons, harmonization of the conditions for exercising the right of appeal in respect of customs matters would appear to be necessary.

II. Limits to Community action

In order to ensure that the various traders in the Community are treated as equally as possible, it would certainly be desirable to draw up Community regulations governing all the conditions for exercising the right of appeal against decisions taken by Member States' customs authorities for the purpose of implementing Community customs law.

However, there are two main barriers to this objective :

- (i) Since there are no Community provisions for preventing infringements of Community law, national rules in force on this matter only can apply. There can be no question consequently, at the present stage of Customs Union of harmonizing the national provisions relating to appeals that might be lodged by those in breach against penalties imposed on them for failure to observe Community law. Such provisions are governed by the criminal law of the Member States and cannot be covered by this proposal for a Directive.

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(ii) Measures to be adopted at Community Level with regard to the right of appeal should not undermine the organization and operation of Member States' legal systems. Hence, the proposal cannot contain provisions governing the exercise of the right of appeal before the judicial bodies before which the appeal may be exercised.

For this reason the proposal deals only with the right of appeal against customs authorities' decisions on non-criminal matters and lays down conditions for exercising that right in its administrative stage only, merely requiring Member States to establish a judicial stage as well so that matters may be referred to the Court of Justice pursuant to Article 177 of the Treaty.

III. Content of the proposal for a Directive

Even though the proposed harmonization measures are limited in scope, as indicated at point II, they are extremely desirable in that they eliminate to a large extent the disadvantages referred to at point I, which are caused by differences in existing national regulations.

They can be summarized as follows :

a) Persons entitled to lodge an appeal in respect of customs matters

The proposal establishes the principle that any person whose rights may be prejudiced by a decision relating to the implementation of customs rules is entitled to apply for the annulment or revision of that decision (Article 2(1)).

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"Customs rules" means all provisions, arising either from the establishment of the customs union in the proper sense or from the establishment of the common agricultural policy, relating to the importation, exportation, transit and storage of goods forming the subject of trade between Member States and between the latter and non-member countries, including both Community provisions and national provisions adopted for the purpose of implementing them.

"Decision" means any act by which a customs authority gives a ruling in a particular case and which has legal effect on one or more known or ascertainable persons.

Persons who have applied to a customs authority for a decision as to their entitlement to benefit from a particular provision of the customs rules and who have not received a reply upon expiry of a specified time limit are also entitled to lodge an appeal (Article 2(2)).

b) Conditions for exercising an appeal

The proposal provides that the right of appeal may be exercised in two stages :

- initially before the customs authority itself (administrative stage) ;
- subsequently before an authority which is independent of the customs authorities and which is empowered to refer a matter to the Court of Justice of the European Communities pursuant to Article 177 of the Treaty (judicial stage).

These principles are in the line with those obtaining in most Member States and comply also with the provisions drawn up by the Customs Cooperation Council in Annex H 1 to the Convention on the Simplification and Harmonization of Customs Procedures.

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For the reasons set out at point II, the proposal confines itself laying down arrangements to the exercise of the right of appeal in its administrative stage. In view of the relative importance of this stage (most appeals do not go any further) it lays down precise rules which are designed to ensure that traders are treated alike, irrespective of the Member State in which they carry on their activity. These rules concern :

1. The time limit for lodging an appeal (Article 5)

In order to speed up the settlement of disputes, the time limit is the shortest considered feasible (two months). However, to ensure that the rights of the persons concerned are afforded the maximum protection, a longer time limit (six months) was laid down for persons who were not fully informed, or were misinformed, as to their right of appeal, or of the conditions for doing so, and for those who had applied to the customs authority for a decision but did not receive any reply.

2. Formalities to be complied with when lodging an appeal

Lodging of a written request, possibility of being represented, etc. (Art. 6, Art. 4(2)).

3. Legal consequences of lodging an appeal (Article 7)

An appeal does not suspend implementation of the disputed decision.

4. Examination of the appeal by the competent customs authority (Article 8)

The competent customs authority may in particular seek the opinion of independent experts.

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5. Conditions for giving a ruling on an appeal (Article 10)

The competent customs authority's decision must be given in writing, and the appellant must be notified of the decision and the grounds on which it is based. Where the decision goes against the appellant, it must contain the information he requires in order to exercise his right of appeal in the judicial stage.

6. The principle according to which the right of appeal is exercised free of charge (Article 11)

For the above reasons, the proposal for a Directive does not contain any provisions governing the exercise of the right of appeal in its judicial stage but confines itself to establishing the principle that, where an appeal lodged with a customs authority is rejected in whole or in part, the appellant may lodge a fresh appeal with a body which is independent of the customs authority and which is empowered to refer the matter to the Court of Justice of the European Communities pursuant to Article 177 of the Treaty (Article 12).

c) Final provisions

The main objective of the final provisions is to define clearly the scope of the proposed harmonization. It is laid down in particular :

- that the Directive is without prejudice to the right conferred by the laws of the Member States on any person who considers himself adversely affected by a decision regarding the application of the customs rules to refer that decision at any time to the competent judicial authority in accordance with the provisions of those laws (Article 13).

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- that the Directive does not apply to appeals lodged with a view to the annulment or revision of a decision taken by customs authorities on the basis of rules governing criminal matters (Article 16).

It is also specified that the Directive is not mandatory in the case of appeals lodged against customs authorities' decisions based on all exclusive power, accorded to those authorities under Community customs rules, of assessing the factual circumstances on which they found their decisions, (see Article 14), and that it does not affect the provisions of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties¹.

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Adoption of this Directive will constitute a step forward in the establishment of the Customs Union. It will abolish certain differences in the way Community traders are treated and will eliminate certain disparities in the national provisions on which the assessment of Community own resources is based.

The opinions of the European Parliament and the Economic and Social Committee must be obtained on this proposal for a Directive, since it is based on Article 100 of the Treaty establishing the European Economic Community.

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¹ OJ N° L 175 of 12 July 1979, p. 1

Proposal for a Council Directive
on the harmonization of provisions laid down by
law, regulation or administrative action concerning
the exercise of the right of appeal in respect of
customs matters

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,
and in particular Articles 43 and 100 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Whereas the Community is based upon a customs union ;

Whereas the establishment of that customs union is governed in the main
by Title I, Chapter 1 of Part Two of the Treaty; whereas this Chapter con-
tains a series of specific provisions dealing in particular with the elimi-
nation of customs duties between Member States, the establishment and progres-
sive introduction of the Common Customs Tariff and the autonomous alteration
or suspension of that Tariff ;

Whereas, while Article 27 of the Treaty provides that Member States shall,
before the end of the first stage in so far as may be necessary, take steps
to approximate their provisions laid down by law, regulation or administra-
tive action relating to customs matters, the said article does not however
empower institutions of the Communities to lay down mandatory provisions
in that field; whereas, however, a thorough examination undertaken jointly

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¹ OJ N° C

² OJ N° C

³ OJ N° C

with Member States has shown the need to lay down in certain areas, by binding Community acts, the measures necessary to establish customs rules which would ensure uniform application of import duties or export duties imposed on goods being traded between the Community and non-member countries ;

Whereas Community law on customs matters covers more generally all of the provisions relating to importation, exportation, transit and storage of goods which are the subject of trade between the Member States as well as between the latter and third countries; whereas this provisions may arise either from the establishment of the customs union in the proper sense or from the establishment of the common agricultural policy ;

Whereas Community customs rules are normally applied by means of individual decisions taken by the competent authorities of the Member States ;

Whereas, in so far as those individual decisions may not comply with Community customs rules, they shall be of such a nature as to affect adversely the rights of the persons concerned; whereas there is therefore good reason, for enabling those persons to exercise, in specific circumstances, the right to appeal against such decisions ;

Whereas the exercise of the right of appeal is important for the correct and uniform implementation of Community customs rules throughout the Community and for the elimination of differences in the treatment of traders who reside there ;

Whereas there are considerable discrepancies in the provisions in force in the Member States concerning the right of natural or legal persons to appeal against customs authorities' decisions which affect their rights; whereas this is particularly so with regard to the time-limits within which

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which the right must be exercised, the kind of authorities empowered to decide on appeals, the respective jurisdiction of administrative authorities and judicial institutions called upon to decide on appeals and, above all, with regard to the consequences of the exercise of the right of appeal on the implementation of the disputed decision ; whereas it is necessary therefore, in order to ensure that those persons benefit as equally as possible from a correct application of Community customs rules, to lay down at Community level the conditions for exercising the right of appeal ;

Whereas, in accordance with the principles generally observed in most Member States and recommended by the Customs Co-operation Council, it seems appropriate to provide that an appeal be lodged initially with the customs authority itself and subsequently with an authority independent of the customs authority; whereas, in order to ensure uniform application throughout the Community of Community customs rules under the most favourable conditions, it is important that the independent authority be empowered to refer matters to the Court of Justice of the European Communities pursuant to Article 177 of the Treaty ;

Whereas, although precise provisions can be laid down with regard to the appeal procedure in its initial stage, as Community law stands at present, the organization of the appeal procedure in its second stage should be left to the discretion of the Member States;

Whereas this Directive does not prevent the parties concerned from taking any other action open to them under Community customs rules against certain decisions of Member States' competent authorities;

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Whereas, in cases where the customs authority has the exclusive power of assessing the factual circumstances on which it founds its decision, it can be left to the Member States to choose between the procedure laid down in this Directive and a different appeal procedure ;

HAS ADOPTED THIS DIRECTIVE :

Article 1

1. This Directive sets out the rules which must be included in the provisions laid down by law, regulation or administrative action in the Member States concerning the right of persons affected by a decision applying law on customs matters as defined in paragraph 2(a), to enter an appeal for the annulment or amendment of that decision, and the appeal procedure to be followed.

2. For the purposes of this Directive :
 - (a) law on customs matters means all customs and agricultural provisions on the importation, exportation, transit and storage of goods forming the subject-matter of trade between the Member States and between the latter and non-member countries, including both Community provisions and national provisions adopted for the purpose of implementing them.
 - (b) decision means any act by which a customs authority gives a ruling in a particular case and which has direct effect on one or more known or ascertainable persons.
 - (c) customs authority means any authority competent to apply customs rules within the meaning of subparagraph (a), even where the authority is not part of the customs administration.
 - (d) person means a natural or a legal person.
 - (e) appellant means the person who lodges the appeal.

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Article 2

1. Any person whose rights may be encroached upon by a decision regarding the application of law on customs matters is entitled to apply for the decision to be annulled or amended.
2. Any person who has requested a decision from the competent authority and has not obtained a ruling on that request is also entitled to apply for a decision regarding the application of law on customs matters.

This appeal may be lodged upon expiry of a time-limit laid down in each Member State, which may not be longer than three months, without prejudice to the right of the customs authority competent to take the requested decision to exceed this time-limit, where there is good reason for doing so, provided that it notifies the appellant of the extension in advance and states the grounds on which it is based, as well as the new time-limit which it needs to decide on the request.

3. The right of appeal referred to in paragraphs 1 and 2 may be exercised :
 - (i) initially, before the customs authority designated for this purpose ;
 - (ii) subsequently, before the authority referred to in Article 12(1).

TITLE I

Initial stage of the exercise of the right to
appeal

Article 3

Articles 4 to 11 set out the rules to be followed for the exercise of the right of appeal in its initial stage.

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Article 4

The person entitled to lodge an appeal shall retain this right even where he has previously accepted all or part of the decision of the customs authority.

That person may appoint another person to represent him in all matters relating to the lodging of the appeal and the implementation of the procedure relating thereto.

Article 5

1. An appeal shall be lodged within two months of notification of the decision of the customs authority.
2. The time limit laid down in paragraph 1 shall be extended to six months where the person entitled to lodge an appeal :
 - (a) is not the person to whom one decision was notified; in this case the time-limit runs from the date of notification of the Decision to the person for whom it is intended ;
 - (b) was not informed or was misinformed, as to his right to appeal, by the customs authority which took the decision.
3. In the cases referred to in Article 2(2) the appeal must be lodged within six months of the date of expiry of the period referred to in the second subparagraph of this paragraph.
4. The time limits specified in the preceding paragraphs may be extended only if the appellant shows that he has been prevented from lodging an appeal within the specified time-limits as a result of an unavoidable accident or force majeure.

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Article 6

1. An appeal shall be lodged by means of a written request addressed to the customs authority which took the decision or which was requested to take the decision, or to any other customs authority designated by the Member State concerned.

As soon as the abovementioned authority receives the request, it shall forward it to the customs authority which is competent to give a ruling if it has not itself been designated as such.

2. The written request referred to in paragraph 1 must contain all points of fact or law adduced by the appellant in support of his appeal.

However, provided that he mentions it in its appeal, the appellant may supply further evidence within a time limit prescribed by the customs authority which is competent to give a ruling on the appeal. If further evidence is not submitted within this time limit, the said authority shall give a ruling on the basis of the evidence available to it.

Article 7

The lodging of an appeal shall not cause implementation of the disputed decision to be suspended.

The customs authority may, however, suspend enforcement of this decision in whole or in part if it has good reason to believe that the disputed decision is inconsistent with the customs rules. Suspension of enforcement may, where appropriate, be subject to the lodging of a security.

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Article 8

The customs authority which is competent to give a ruling on the appeal shall conduct such investigations as may be necessary to enable it to give its decision and may, if it deems it appropriate, submit the case to experts who are independent of the customs authority with a view to obtaining their opinion.

The appellant shall be required to assist the said authority in its investigation of the facts and shall in particular supply, within the time limits specified by the authority, any information or documents at his disposal which the latter considers necessary to enable it to assess the situation correctly.

Article 9

The appellant may withdraw his appeal until such time as a decision has been taken on it. Notice of withdrawal must be given in writing.

Article 10

1. The customs authority competent to give a ruling on the appeal shall give its decision in writing.

The decision may impose greater constraints on the appellant than those contained in the decision which was the subject-matter of the appeal.

2. The appellant shall be notified of the decision and of the grounds on which it is based. Where the decision goes against the appellant, the authority referred to in paragraph 1 shall inform him of the opportunity available to him of initiating the second stage of his right of appeal.

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Article 11

There shall be no charge for lodging an appeal. Whatever the result of the appeal, there shall be no reimbursement of any expenses incurred either by the appellant or by the customs authorities when an appeal is examined.

TITLE II

Second stage of the exercise of the right of appeal

Article 12

1. Where an appeal which has been lodged with a customs authority is rejected in whole or in part, the appellant must be able to introduce a fresh appeal before an authority which is independent of the customs authority and which is empowered by virtue of its structure to refer the matter to the Court of Justice of the European Communities pursuant to Article 177 of the Treaty.

The independent authority referred to in the preceding subparagraph may be a judicial authority or a specialized body, depending on the provisions in force in the Member States.

2. For the purposes of paragraph 1, an appeal lodged with the customs authority shall be deemed to have been rejected where no decision has been taken on it upon expiry of a time limit to be laid down in each Member States which shall not exceed six months, without prejudice to the right of that authority to exceed the time limit, where there is good reason for doing so, provided that it notifies the appellant beforehand and sets out the grounds on which the extension is based, as well as the new time-limit which it needs to to decide on his appeal.

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TITLE III

Final provisions

Article 13

This Directive shall not prejudice :

- (i) the right conferred by the laws of the Member States on any person who considers himself adversely affected by a decision regarding the application of the customs rules to refer that decision at any time to the competent judicial authority, in accordance with the provisions of those laws ;
- (ii) the right of Member States, where the second stage of the right of appeal must be exercised before a specialized body, to provide that, in certain cases, an appeal must be lodged directly with the said authority ;
- (iii) the right conferred by Italian law on persons whose appeal has been rejected by the customs authority to refer the matter to the Head of State pursuant to that law.

Article 14

Where the law on customs matters grants to the customs authorities the exclusive power to assess the factual circumstances on which they found their decisions, the detailed rules for exercising the right of appeal against such decisions may be different from those laid down in this Directive.

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Article 15

An application for repayment or remission of import or export duties submitted to a customs office pursuant to Council Regulation (EEC) No 1430/79 of 2 July 1979 (1) shall not constitute the lodging of an appeal for the purposes of this Directive.

Article 16

This Directive shall not apply to appeals lodged with a view to the annulment or revision of a decision taken by customs authorities on the basis of rules governing criminal matters.

Article 17

Member States shall bring into force the provisions necessary to comply with this Directive not later than 1 January 1983.

Article 18

Each Member State shall inform the Commission of the provisions it adopts for the implementation of this Directive.

The Commission shall forward this information to the other Member States.

Article 19

This Directive is addressed to the Member States.

(1) OJ No L 175 of 12 July 1979, p. 1

