COMMISSION OF THE EUROPEAN COMMUNITIES

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COMPLETION OF THE INTERNAL MARKET : COMMUNITY LEGISLATION ON FOODSTUFFS

(Communication from the Commission to the Council and to the European Parliament)

COM- 603

INTRODUCTION

1. In its White Paper of 14 June 1985 on completing the internal market[1] the Commission recognized that a genuine common market could not be achieved by 1992 if the Community relied exclusively on the traditional methods of harmonization. It therefore recommended a new strategy combining the principles of the mutual recognition of national regulations and standards based on Articles 30 to 36 of the EEC Treaty, together with a more efficient mechanism for the harmonization of laws based, in particular, on Article 100 of the Treaty.

   The Commission took the view that this general policy would be particularly appropriate in certain fields, one of which is foodstuffs. It announced two communications in this sector[2] :
   - one before the end of 1985 on more efficient procedures for the implementation of Article 100 harmonization,
   - one in 1987 setting out the legal situation resulting in particular from Articles 30 to 36.

This paper is the first of these two communications.

OBJECTIVES

2. Two significant advances have recently been made in areas not directly related to the food sector.

   a) Directive 83/189/EEC obliges Member States to notify the Commission in advance of draft technical regulations and standards[3]. The Commission will shortly be proposing that this Directive be extended to foodstuffs[4].

1. COM (85) 310 final
2. Section 71, last indent, and Section 156, first sentence
3. O.J. N° L 109, 26 April 1983, p. 8
4. White Paper, Section 71, last indent, and timetable, Part 2, I.1

b) Council Resolution of 7 May 1985[5] on a new approach to technical harmonization and standards is designed to simplify and speed up the decision-making process for opening up the internal market. The principles underlying this new approach could usefully be extended to the food sector. It is only realistic to recognize, however, that it will not be possible merely to apply this resolution as it stands to foodstuffs, because of a number of specific features of the food sector:
   - the extreme sensitivity of public opinion in this field,
   - the very detailed nature of many national laws,
   - the almost complete lack of standards (in the sense of Directive 83/189/EEC) defining the composition of products.

RECOMMENDED METHODS

3. The orientation for food legislation described below has two aspects:

   a) A clear dividing line will be drawn between matters which still require legislative action and those which do not require the adoption of a binding legal act.

   b) A new distinction will be made between subjects calling for the Council's legislative powers and matters that can be delegated to the Commission.

BACKGROUND AND ANALYSIS

4. In the past, it was generally accepted that, as a rule, a technical barrier to trade in foodstuffs resulting from mandatory national provisions could be eliminated only by adopting a Community provision of the same nature ("a national legal act in principle calls for a Community legal act").

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5. O.J. N° C 136, 4 June 1985, p. 1

The programme for harmonization adopted in 1969 and updated in 1973 was based on that approach. It lists about 50 sectors falling within the general category of food legislation.[6]

5. So far, directives have been adopted in 14 of these sectors[7]. Proposals are before the Council in six more sectors and in some other sectors the Commission is carrying out preparatory work. It is therefore clear that only two fifths of the 1969/73 programme has been or is being implemented. There are also sectors that are not yet included in the programme. The current situation is as follows[8,9]:

6. The number of directives under consideration far exceeds 50 since there may be several directives in each sector.
7. Two other sectors were already covered by directives before the adoption of the 1969 programme.
8. The sectors not included in the 1969/73 programme are marked with an *.
9. International activities, in particular under the Codex Alimentarius, are not mentioned since they are not directly covered by the concept of "internal market".

- Sectors covered by directives

1. Labelling of foodstuffs in general
2. Colouring agents*
3. Preservatives*
4. Antioxidants
5. Emulsifiers, stabilizers, thickeners and gelling agents
6. Materials and articles in contact with food (framework directive + several specific directives)
7. Foods for particular nutritional uses (framework directive)
8. Cocoa and chocolate
9. Sugar
10. Honey
11. Fruit juices and similar products
12. Jams, jellies and marmalades
13. Preserved milk
14. Caseins and caseinates
15. Coffee and chicory extracts
16. Natural mineral waters

- Sectors before the Council[10]

1. Methods of sampling and analysis
2. Flavourings
3. Extraction solvents
4. Chemically modified starches
5. Frozen foods
6. Infant formulae and follow-up milks

- Sectors in preparation within the Commission[10]

1. New categories of additives*
2. Irradiation
3. Inspection measures

10. This list does not include proposals for the implementation of framework directives nor for the management of Community acts.

6. This review shows a marked imbalance between the "horizontal" sectors (additives, labelling, other general matters) in which substantial progress has been made and the "vertical" sectors (specific foods) in which there has been relatively little progress.

The Member States appear therefore to be able to agree on the general principles of food legislation, but find difficulty in reconciling their differences of opinion on requirements for the composition of various individual foodstuffs.

BASIS OF THE NEW ORIENTATION

7. The legislative approach followed in the past was implicitly based on the assumption that all specific requirements in national legislation on foodstuffs necessarily met an essential public need.

This approach needs to be revised by drawing a distinction between, on the one hand,

- matters which by their nature must continue to be the subject of legislation,

and, on the other hand,

- those whose characteristics are such that they do not need to be regulated.

8. The principles developed by the Court of Justice subsequent to the "Cassis de Dijon" judgment now enable the Community to define a system of food legislation only containing provisions that are justified as being necessary to satisfy essential requirements in the general interest. The touchstone is the "principle of proportionality" which means that legal measures must not go further than is genuinely necessary to achieve the desired objective.

9. For foodstuffs, the criteria for legislation are "the protection of health and life of humans" referred to in Article 36 of the Treaty and "essential requirements" which could also justifiably override the application of the principle of free movement of goods enshrined in Article 30 of the Treaty.

In more concrete terms, future Community legislation on foodstuffs should be limited to provisions justified by the need to:

- protect public health,
- provide consumers with information and protection in matters other than health,
- ensure fair trading,
- provide for the necessary public controls.

MATTERS REQUIRING LEGISLATION

PUBLIC HEALTH

10. The need to protect public health is recognized by all Member States and this is reflected in all national legislation. Consequently, the Council has recognised that the objectives being pursued by the various Member States to protect the health of their people are equally valid in principle, even if different techniques are used to achieve them[11].

11. As a result, the national regulations and inspection systems, despite their differences, attempt to achieve these same objectives and should therefore normally be accorded recognition in all Member States. Pursuant to Art. 30-36, trade in a product lawfully manufactured and marketed in one Member State may only be hindered by the rules of other Member States if those rules are necessary to satisfay mandatory requirements and to serve a purpose which is in the general interest and for which they are an essential guarantee.

However, the application of this principle, although allowing the Commission, the Community and national courts to remove all unjustified barriers, comes up against drawbacks that must be overcome.

11. Conclusions on standardisation adopted on 16 July 1984, O.J. N° 136, 4.6.1985, p.2

Firstly, the lack of a clear position, involving frequent recourse to the courts to determine, case by case, whether a barrier is justified or excessive, creates uncertainty for national administrations and above all for businessmen. Therefore, the Commission has announced that in 1987 it will be publishing a Communication setting out the legal situation resulting from Articles 30-36 for the food sector, which will serve as a guide to public authorities on their obligations and to Community citizens as to their rights.

Secondly, the principle of mutual recognition is not applicable in those cases where barriers are justified in Community law and can thus be removed only through harmonization. Furthermore, there will be cases in which the introduction of common regulations and standards is essential for reasons of industrial policy; or for consumer protection; or to encourage and increase competitiveness on the basis of a single Community-wide market. Such requirements will therefore still justify the adoption of legislative measures by the Community.

FOOD ADDITIVES

12. It is necessary to draw up positive lists for those categories of additives that have not yet been dealt with, and Community conditions of use* must be laid down for all additives where toxicological data indicate that restrictions are necessary[12].

MATERIALS AND ARTICLES IN CONTACT WITH FOODSTUFFS

13. This area, already extensively covered by Community directives, in particular the framework Directive 76/893/EEC, must continue to be a matter for legislation. Considerations similar to those for food additives are applicable.

12. See Section 5 above.
(*) Conditions of use means determining the foods in which each additive is permitted and the allowable concentrations of the additive.

FOODSTUFFS FOR PARTICULAR NUTRITIONAL USES ("DIETETIC FOODS")

14. Foodstuffs devised for a particular nutritional use fall within the domain of public health and must therefore continue to be a matter for legislation. Directive 77/94/EEC has already established the general principles governing these foodstuffs.

PROCESSES FOR THE MANUFACTURE OR TREATMENT OF FOODS

15. It is only rarely necessary to legally regulate processes for the manufacture or treatment of foods in order to protect public health. In the current state of industrial and technological development, this requirement exists in respect of:

- deep freezing (a proposal for a directive on frozen foods is already before the Council - COM(84)498),

- irradiation treatment of food,

- certain biotechnological processes.

Other processes and treatments may have to be added to this list in the future.

THE NEED FOR CONSUMER INFORMATION AND PROTECTION IN MATTERS OTHER THAN HEALTH

16. There are two possible approaches to this question:

- one is to develop extremely detailed regulations on the composition and manufacturing characteristics of each foodstuff ("recipe law"),

- the other is based on the fundamental idea that, provided that the purchaser is given adequate information on the nature and composition of foodstuffs, it is not necessary to define these elements in law unless they are required for the protection of public health.

17. Clearly, the Community must commit itself to the second approach because:
    - it is neither possible nor desirable to confine in a legislative straitjacket the culinary riches of ten (twelve) European countries;
    - legislative rigidity concerning product composition prevents the development of new products and is therefore an obstacle to innovation and commercial flexibility;
    - the tastes and preferences of consumers should not be a matter for regulation.

LABELLING OF FOOD

18. The rejection of recipe law implies a well-developed and clear system of labelling, presentation and advertising that should take the form of a binding legal act so that producers may be protected against unfair competition and consumers against misleading practice .

19. Directive 79/112/EEC already goes a long way in this direction. However, it needs to be supplemented in some respects.

    Firstly, the options for national exceptions left to the discretion of Member States must be replaced by uniform rules or rules objectively tailored, in order to improve the state of Community legislation. This applies in particular to the use of revision clauses accompanying these derogations, for example ways of specifying additives in the list of ingredients and date marking of perishable or long-life foods.

    Secondly, additions and exceptions to the general rule, needed for specific foods but which are not applicable to all foods, should be drawn up at Community level where there is no detailed (vertical) directive on quality requirements dealing with those particular foods.

The Commission has already embarked on the usual consultations on these various amendments needed to Directive 79/112/EEC and a formal proposal should shortly be submitted to the Council.[13]

20. In its examination of the labelling of ordinary foodstuffs, the Community has not yet taken into account nutritional characteristics.[14] It seems desirable to encourage industry to give consumers qualitative and quantitative information on the main nutrients in a food and on its energy value. Details of the nature and quantity of the ingredients used are not sufficient to allow the average consumer to judge the nutritional quality of a food since products with apparently similar lists of ingredients can have very different nutritional properties.

21. The Commission recognizes that the usefulness of nutritional information is dependent on the level of dietary education of the general public. However, there is a growing public awareness of the relationship between diet and health which makes it necessary to facilitate the provision of easily understandable information and to avoid at the same time technical barriers to trade resulting from the use of diverse systems in the different Member States. Furthermore, there is a need to gain more experience on the kind of information which consumers will find useful and which the trade will be able to provide.

The Commission will therefore recommend the introduction of a voluntary system under which the choice of whether a food should bear nutrition labelling could be left to the trade. If, however, such labelling is being provided, it should appear in accordance with a uniform format throughout the Community.

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13. See attached timetable.

14. Nutritional labelling exists at Community level for foodstuffs for particular nutritional uses, but is not suitable for general application.

22. The Commission is currently consulting the Member States and interested parties, taking as a basis for its study the work done by the Codex Alimentarius. The need for legislative measures will be considered at a later stage.[15]

FAIR TRADING

23. Obviously, a food must not be harmful to the health of consumers. In addition, consumers must be correctly and adequately informed and not be misled ; producers must be protected against unfair competition. Once these conditions are met, fair trading is in principle ensured and this point does not need further examination.
Questions of a general nature concerning misleading advertising are not specific to foods. Therefore they are not included within the scope of this communication which is concerned only with food legislation.

COMPOSITIONAL RULES (RECIPES)

24. The expression "compositional rules" as used in this paper refers to a set of regulations, whether or not issued by the public authorities, specifying the composition of certain foodstuffs or their manufacturing characteristics, excluding regulations designed to protect the life and health of human beings.

25. In the many judgments it has given on the free movement of goods, the Court of Justice has never accepted that a Member State authority can prohibit the sale of a product which does not conform to its own compositional rules, but which has been lawfully manufactured and marketed in another Member State in accordance with that State's own rules.

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15. See attached timetable

26. This ruling means that the Community no longer needs to introduce compositional rules in its legislation.

27. One criticism often advanced against this approach concerns the legal uncertainty that may result since it is not always clear whether, and if so to what extent, a Member State may successfully make an exception in respect of a product coming from another Member State.

In this context, it must be borne in mind that the meaning given to the term "compositional rule" excludes any public health connotation. Consequently, the only essential requirement that might possibly justify the refusal to accept a food manufactured in another Member State in conformity with its compositional rules is the need to protect consumers against misleading practices and producers against unfair competition. Present Community labelling provisions, together with those about to be drawn up[16], will provide adequate information and avoid confusion.

Once this stage is reached in accordance with the guidelines set out in this paper, legal uncertainty will obviously be eliminated. In the meantime, practical measures which the Commission will be proposing should reduce the number of doubtful cases to a minimum.

28. Another criticism levelled is the danger that the lack of Community compositional rules would automatically lead to a reduction in quality, since the most liberal national rule will become general practice.

The Commission does not share this view, nor does the available evidence support it.

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16. See Sections 18-22 above.

It is true, however, that the approach based on Article 30 and the mutual recognition of national regulations and rules must be accompanied by adequate administrative cooperation and by collaboration with all the interests concerned. For this reason, the Commission will be initiating talks with the heads of national departments responsible for food legislation and inspection and discussions within the Advisory Committee on Foodstuffs which consists of representatives of agriculture, industry, labour, commerce and consumers. The purpose of these consultations will be to determine whether and, if so, how the Community should encourage industry to adopt an active quality policy for foodstuffs. If this is found desirable, the need for a Community system for the mutual recognition of labels or other quality marks and for the relevant checks and certification will then have to be examined.

Clearly, the Commission will be open to any other suggestions made in the course of these consultations.

It should also be recalled that compositional rules established within the Common Agricultural Policy in order to fulfil the aims laid down in Article 39 of the Treaty and which do not strictly belong to food laws will continue to operate.

OFFICIAL INSPECTION

29. Official inspection which is designed to assure compliance with rules of health protection must by its very nature be a matter for legislation.

    The free movement of goods does not prevent authorities from exercising appropriate and efficient control over trade in foodstuffs. On the contrary, such control is necessary and must include products crossing Community frontiers in the same way as products remaining within a single Member State.

    In particular, the competent authorities of the Member States should not confine themselves to inspecting only those products intended for consumption on their national territory, but should also extend this inspection to products going to other Member States.

In addition, public inspection must not be confined to retail sales. A system of this kind is inefficient and outmoded since it does not allow the inspection authorities to obtain an idea of the quality of mass production, nor can it be extended to products for dispatch to other Member States, and this is contrary to the idea of a single market.

The Commission intends to submit a new proposal for a directive on the general principles that should govern public inspection in the area of health protection. Preparatory studies are in progress. Mandatory measures should be accompanied by a series of other voluntary measures intended to encourage cooperation between national inspection departments. The Commission will later be putting forward a memorandum on this subject.

30. The Commission intends to include in the consultation mentioned in paragraph 28 the question of control of compliance with rules other than those relating to health protection. One objective would be to determine whether there is a need for compulsory legal measures or whether, on the contrary, other more flexible means should be envisaged.

MANAGEMENT OF THE "ACQUIS COMMUNAUTAIRE"

31. The need to manage the "acquis communautaire" is self-evident. Where this takes the form of Community legislation, it is necessary that amendments to be adopted must also take the form of legislation. It is the procedures for adopting amendments that are the real problem, and this will be covered in general terms in the following chapters.

DIVISION OF LEGISLATIVE POWERS BETWEEN THE COUNCIL AND THE COMMISSION

32. The review of directives adopted in the area of food legislation[17] shows that the Member States are able to agree on the general principles of food law. However, it also shows that insurmountable differences of opinion may exist on points of detail, preventing

17. See section 5 above.

any decisions from being taken. This impasse is unacceptable in view of the fact that all the Member States apply the same basic principles and have reached equivalent levels of protection.

33. Some examples illustrate this situation:

a) All the directives on food additives have derogation clauses for substances on which unanimous agreement could not be reached.

The Community lists currently contain some 150 additives. For ten years it has been virtually impossible to obtain unanimous agreement to add to these lists. Preservatives provide a striking example. In 1981, the Commission proposed to authorize or to extend the authorization of three substances (including natamycin) regarded as perfectly acceptable by the Scientific Committee for Food. So far, after almost four years of discussion, the Council has been unable to reach agreement on that proposal. At the very best, it could agree on a possibility of national derogations, an absolutely unacceptable solution from the viewpoint of a single market.

b) The labelling Directive 79/112/EEC introduced a number of compulsory indications, the usefulness of which in providing better information for consumers is not disputed. However, when it comes to applying these principles to certain specific cases (dating of ice cream, indication of the weight of certain small packages, etc.) apparently insuperable differences of view remain.

c) Directive 73/241/EEC on cocoa and chocolate did not definitively regulate the use of vegetable fats and of certain additives in chocolate. The Commission proposal designed to solve these problems is now becoming bogged down in the Council and there appears to be no possibility of any agreement other than to maintain the status quo.

34. In view of this situation, it is necessary to review the procedure for the adoption of legislation in the food sector.

The problems outlined above are extremely serious as they demonstrate that the Community is frequently unable to equip itself with uniform legislation, nor to manage its existing legislation properly. The directives tend to freeze a scientific or technical situation existing at a given time without allowing for future adaptations.

THE SIMPLIFIED PROCEDURE

35. The rule of unanimity prevailing in the Council hampers the adoption and development of Community legislation. This constant blocking of progress is no longer acceptable. It might be preferable to have recourse to the courts through the procedure available under Articles 30 et seq. in conjunction with Articles 169 and 177 of the EEC Treaty, rather than to adopt Community provisions that would merely inhibit any future developments. It is obvious, however, that systematic recourse to the courts is not a satisfactory solution either.[18]

Consequently, it is essential to find a reasonable dividing line between matters calling for a unanimous Council decision and those that can be decided by the tried and tested simplified procedure of the "Standing Committee on Foodstuffs", which ensures close cooperation between the Commission and the Member States and involves qualified majority voting.

36. This simplified procedure should be used on the understanding that:

a) it must always be up to the Council to adopt the basic rules of Community food law and to lay down the conditions under which the implementing arrangements for these basic rules will be determined,

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18. See Section 11 above.

b) the best way of ensuring operational efficiency and flexibility will be to give the Commission the task of drawing up implementing procedures for the basic rules established by the Council, under the conditions laid down by the Council.

37. As regards food additives, it must be left to the Council, pursuant to Article 100 of the EEC Treaty, to decide on the general principles governing the drawing-up of approved lists. In particular, it should be laid down as a general condition that any substance must have been evaluated by the Scientific Committee for Food before being placed on a Community list. The use of additives must in addition meet a technological requirement. This must be examined in the light of criteria that the Council will have to lay down on the basis of recommendations made by the Commission for the Codex Alimentarius (FAO/WHO) and the Scientific Committee for Food. Once these various requirements have been met, the task of drawing up the approved list and relevant conditions of use may be given to the Commission.

38. The same considerations apply to materials and articles coming into contact with foodstuffs, with the proviso that Directive 76/893/EEC requires only a few adjustments.

39. The basic rules for foods for particular nutritional uses are already laid down in Directive 77/94/EEC. The Commission is now examining the need for further clarification of these rules.

The specific directives would have to be adopted by the Commission on the basis of recommendations made by the Scientific Committee for Food.

40. In the case of processes for the manufacture or treatment of food, the best allocation of tasks between the Council and the Commission will have to be decided in each specific case.

41. The labelling Directive has to be amended in order to eliminate derogations. This is a matter for the Council.

It will, however, be up to the Commission to lay down the procedures for applying the general Directive to different product sectors.

42. The adoption of basic regulations for official inspection must continue to be a matter for the Council. The Commission should be responsible in particular for adopting methods of analysis and sampling. This point has already been established in existing directives. A proposal establishing the Commission's role for all foodstuffs is now before the Council (COM(84)39 final).

43. The management of the "acquis communautaire" is traditionally regarded as an implementing measure and must therefore be entrusted to the Commission.

FEATURES OF THE SIMPLIFIED PROCEDURE

44. The simplified procedure consists of giving the Commission powers to implement regulations established by the Council.

45. In all cases of this nature, there must be a procedure establishing close cooperation between the Member States and the Commission. The "Standing Committee on Foodstuffs" (regulatory committee) procedure introduced in 1969 has proved successful for this purpose and should be maintained.

It goes without saying that the present practice of consulting before any matter is referred to the Standing Committee will be continued.

46. Where there are public health problems, it will be obligatory to consult the Scientific Committee for Food.

47. The Commission also regularly consults the Advisory Committee on Foodstuffs on any draft food legislation. This Committee consists of representatives of agriculture, industry, labour, commerce and consumers.

CONCLUSIONS AND PROCEDURE

48. A new orientation to Community food legislation is necessary in order to simplify and speed up procedures in a way which will make possible the completion of the internal market by 1992.

This orientation must:

- define matters requiring the adoption of a legislative act,
- allocate tasks between the Council and the Commission.

49. The Commission will submit proposals for directives in application of this communication according to the attached timetable which follows the stages already proposed in the White Paper.

This communication constitutes a comprehensive explanatory memorandum common to all these proposals.

50. The Commission invites the Council and the European Parliament to consider the orientation described in this communication and to give it their support with a view to adopting the proposals mentioned in the previous paragraph. The Economic and Social Committee should also be asked to express its opinion.

ANNEX I

TIMETABLE OF THE MAIN ACTIVITIES [1]

	Doc. No	Date of Commission's proposal	Expected date for adoption by Council
PERIOD 1985-86			
General directive on food additives (in part modification of existing directives)		1985	1986
General directive on materials and articles in contact with food (amendment)		1985	1986
General directive on food for particular nutritional uses (amendment)		1985	1986
General directive on food labelling (amendment)		1985	1986
General directive on food inspection		1986	1987
General directive on sampling and methods of analysis	COM(84)39	1984	1985
General directive on quick frozen food	COM(84)489	1984	1985
Management of existing vertical directives (procedure)		1985	1986

[1] Extract from the timetable attached to the White Paper.

	Doc. No	Date of Commission's proposal	Expected date for adoption by Council
PERIOD 1987-92			
General directive on irradiation of foodstuffs		1987	1988
General directive on new foodstuffs obtained by a biotechnological process		1987	1988
Additional labelling requirements (nutrition labelling)		1989	1990
Adaptation of directives to technical progress		1987-89	1988-90

ANNEX II

OTHER ACTIVITIES IN PROGRESS[1]

	Doc. No	Date of Commission's proposal	Expected date for adoption by Council
Preservatives (amendment)	COM(81)712	1981	1985
Emulsifiers (amendment)	COM(84)4	1984	1985
Infant formulae and follow-up milks (food for particular nutritional uses)	COM(84)703	1984	1986
Cocoa and chocolate - codification	COM(83)787	1984	1986
Coffee and chicory extracts (amendment)	COM(84)138	1984	1985
Obligation to indicate ingredients and alcoholic strength	COM(82)626	1982	1985
Claims in the labelling of foodstuffs	COM(81)159	1981	1985
Simulants (plastic materials in contact with foodstuffs)	COM(84)152	1984	1985
Modified starches	COM(84)733	1984	1986
Fruit juices, etc. (amendment)		1985	1986
Jams, etc. (amendment)		1985	1986

[1] For information.