

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(83) 621 final

Brussels, 21 October 1983

Second Amendment to the
Proposal for a
COUNCIL REGULATION (EEC, EURATOM, ECSC)

amending Regulation (EEC, EURATOM, ECSC) No 2891/77 implementing
the Decision of 21 April 1970 on the replacement of financial
contributions from Member States by the Communities' own resources

(presented by the Commission to the Council pursuant to the second
paragraph of Article 149 of the EEC Treaty and the second paragraph
of Article 119 of the EURATOM Treaty)

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EXPLANATORY MEMORANDUM

1. On 23 July 1982 the Commission sent to the Council a report on the implementation of Council Regulation (EEC, Euratom, ECSC) No 2891/77 of 19 December 1977 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, together with a proposal for amendments to that regulation.¹

The Council consulted the European Parliament and the Court of Auditors on the proposed amendments. The Court of Auditors adopted its opinion on 16 November 1982² and European Parliament adopted its opinion on 17 December 1982³. On 20 May the Commission sent the Council an amendment to its original proposal under Article 149 of the EEC Treaty and Article 119 of the Euratom Treaty.⁴

2. On 11 March 1983 the Commission took note of a report on the establishment of own resources (customs duties and agricultural levies) in the Member States, which drew attention to the need to define more precisely the concept of establishment and clarify the rules for the making available to the Commission of established entitlements.⁵ This report was placed before the Advisory Committee on Own Resources (ACOR) at its 44th meeting on 28 April 1983.

3. The conclusions of the report have led the Commission to make additional amendments to its original proposal to:

- A) define more precisely the concept of establishment in Article 2;
- B) add an article specifying in what circumstances and subject to what conditions the making available of established entitlements may be deferred;
- C) add an article specifying in what circumstances and subject to what conditions a Member State may be definitively released from its obligation to make entitlements available.

¹OJ No C 231, 4.9.1982, p. 15.
²OJ No C 133, 20.5.1983, p. 3.
³OJ No C 13, 17.1.1983, p. 222.
⁴OJ No C 146, 4.6.1983, p. 4.
⁵SEC(83)392, 4.3.1983.

These amendments do not affect the basic principle of the rules now in force, which require own resources to be made available to the Commission once they have been established. Exceptions to this principle are permitted only in a limited number of cases and the other provisions of the existing rules remain, particularly those contained in Article 11 of Regulation No 2891/77 providing for the payment of interest on amounts made available late.

A) Concept of establishment

4. The purpose of the proposed definition of establishment is to make quite clear at what point an entitlement is considered established for the purposes of own resources.

The text avoids the word "debt". This has a particular meaning in each Member State, since there are clearly defined conditions determining when a debt is "duly established". There is no intention of harmonizing these conditions and so the Member States will be free to retain their own definitions of a duly established debt and their procedures.

The text does, however, refer to the concept of entry in the accounts, which has been defined in Community rules on a number of occasions¹.

In cases not covered by these Community rules, particularly those concerned with disputes, the entitlement is established as soon as its amount has been determined by the administrative department responsible for the calculation of entitlements to be recovered, irrespective of any judicial decision. This may be an entitlement to be recovered later or an entitlement which is the subject of a dispute.

¹Particularly:

Regulation (EEC) No 1430/79 (repayment or remission of duties), OJ No L 175, 12.7.1979, p. 1.

Regulation (EEC) No 1697/79 (post-clearance recovery), OJ No L 197, 3.8.1979, p. 1

Directive 78/453/EEC (deferred payment of duties), OJ No L 146, 2.6.1983, p. 19.

Directive 79/623/EEC (customs debt), OJ No L 179, 17.7.1979, p. 31.

It will be noted that the new provisions in no way detract from the possibility of making new establishments (positive or negative).

B) Deferred established entitlements

5. Articles 9 and 10 on the making available of entitlements do not need altering. However, since the proposals below provide that a Member State may be permitted not to make available an established entitlement or may be refunded an entitlement already made available, these articles must be adapted accordingly. The Commission is therefore proposing technical amendments to them.

6. The basic principle continues to be that all established entitlements must be made available to the Commission on the first working day after the 19th day of the second month following establishment. However, the report on the establishment of own resources in the Member States, of which the Commission took note on 11 March 1983, clearly showed that, for de facto or de jure reasons, this automatic procedure could not work in a number of cases, for which appropriate rules were needed.

7. The Commission is therefore proposing that, in certain well-defined cases, the Member State may postpone making available to the Commission the amounts of established entitlements where Community provisions on entry in the accounts do not apply and recovery cannot be effected within the normal time limits as defined in the directive on deferred payments¹ or, in cases not covered by that directive, the usual time allowed by national rules.

8. In order that Member States are not able to withhold entitlements without the Commission knowing the reason, those which intend to make use of this provision must inform the Commission in advance of the types of cases to which they intend to apply it.

¹ Directive 78/453/EEC, OJ L 146, 2.6.1978, p. 19.

In any case, it will be up to the Commission, after consulting the Advisory Committee on Own Resources, to determine for each Member State the types of case to which these provisions may be applied.

9. Details of the cases to which the Member State has applied this provision will be supplied after the event. For this purpose, the Member States will be required to keep special central accounts of the entitlements not made available to the Commission. This means that such accounts will also need to be kept at local level and centralized at the same time as the entitlements made available.

When the Commission is informed each month of the amounts of entitlements made available, it will also be informed of those not made available. This will enable inspections to be carried out, as in normal cases. So that these inspections can be fully effective, the amounts of the entitlements will have to be broken down by the type of resource (customs duties, levies, etc.) and in accordance with the list of authorized cases produced by the Commission.

10. The Member States will make the amounts of these entitlements available to the Commission after they have actually been recovered or when they have renounced recovery.

Where the amounts are recovered, the entitlements will be made available on the first working day after the 19th day of the second month following recovery. In many disputed cases, the person liable for the duty will also be liable to pay interest and this should be paid to the Commission at the same time as the principal. It would not be right for a Member State to benefit from the fact that it did not make entitlements available as soon as they had been established, when it is really the Community that suffers the loss.

The Member State may also have to make established entitlements available to the Commission, even where it has decided not to pursue their recovery. This may happen if the Member State itself decides that the conditions for definitively not making available the entitlements have not been met. Generally, this would be the result of an administrative error which the Member State did not wish to reveal to the Commission.

C) Released established entitlements

11. The Commission is also proposing that it be possible for a Member State to be definitively released from its obligation to make established entitlements available to the Commission or for amounts already made available to be refunded. Member States may be released from this obligation only if all three of the following conditions are met:

(i) - either recovery has proved impossible despite the best efforts of the authorities (bankruptcy, disappearance of the person liable to pay, etc.).

- or non-recovery is covered by the regulation on post-clearance recovery (Regulation No 1697/79), the Member State having been authorized by the Commission to waive recovery or, in cases where the amount established is less than 2 000 ECU, having itself decided that the conditions of the regulation were satisfied and recovery could be waived.

(ii) Non-recovery is not the result of an error by the Member State's authorities.

(iii) The same taxable event has not given rise to the collection of national taxes. This may be the case if national taxes (excise duties, VAT, etc.) constitute a preferential debt in cases of bankruptcy while customs

duties and agricultural levies are unsecured debts or if there is a pro rata distribution between creditors of the same ranking.

12. If a Member State considers that the above conditions have been met, it will ask the Commission to be released from its obligation to make the amount concerned available. Such cases will be referred to the ACOR for its opinion and the Commission will then take a decision on whether or not to grant authorization.

It seems appropriate, however, to fix a point below which the Member State itself may take the decision on whether or not these conditions have been met. Determining this point poses a problem in that no figures exist giving a breakdown by amount of the cases which would be submitted to the Commission. The Commission wishes to strike a balance between the need to protect its own interests by judging for itself in which cases it can accept that Member States may be released definitively from the obligation to make established entitlements available and the need to be able to consider really important cases thoroughly without being overwhelmed by a large number concerning only small amounts. It is therefore proposing that the cut-off point - set at 100 ECU in the first instance - may be reviewed in the light of experience by a sufficiently flexible procedure.

13. Since the Commission must be able to monitor effectively the use made of this facility, it is intended that the Member States should send a report every six months. In addition, the accounts of the Member States would have to reflect the Commission's decisions and each month the Commission would be informed, through the monthly statement, of the amounts added or deducted as a result of its own decisions or those of the Member State. This will enable it to monitor these operations.

14. If the Commission considers that all the conditions laid down have been satisfied and accepts the Member State's request, the consequences will vary depending on whether or not the Member State has already made the entitlements concerned available to the Commission. If it has, the amount will be deducted from that made available on the first working day after the 19th day of the second month following the Commission's decision. If it has not, the Member

State will be authorized definitively not to make it available.

The decision by the Member State on amounts below the cut-off point will have a similar effect, except that, in cases where entitlements have already been made available to the Commission, they will be deducted on the first working day after the 19th day of the second month following that in which the Commission was notified.

On the other hand, if the Commission decides that all the conditions set out in paragraph 11 have not been met, it will retain amounts already made available, and if they have not already been made available, this will be done on the first working day after the 19th day of the second month following the Commission's decision.

15. These provisions replace the concept of force majeure in Article 17 of the present Regulation No 2891/77 and will cause the provisions of Article 9 of Regulation No 1697/79 to lapse.

amendment to the proposal for a Council Regulation (EEC, Euratom, ECSC) amending Regulation (EEC, Euratom, ECSC) No 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources

. After the third recital, add the following new recital:

Whereas the concept of establishment should be clearly defined to ensure that it is applied in an adequately uniform manner; whereas Community customs legislation introduced the concept of "entry in the accounts", defined as the official act by which the amount of the import duties or export duties to be collected by the competent authorities is duly determined; whereas the establishment of entitlements should be provided^{ed for} even in cases where it is not possible to make an entry in the accounts as so defined.

. After the fifth recital, add the following new recital:

Whereas after entitlements have been established, the corresponding own resources should be made available; whereas, however, where recovery is delayed or proves impossible, provision should be made for the making available of entitlements to be deferred or definitively waived; whereas this possibility should be strictly limited in order to protect the Community's financial interests; whereas appropriate procedures should be laid down.

II

(Preparatory Acts)

COMMISSION

Second amendment to the proposal for a Council Regulation amending Regulation (EEC, Euratom, ECSC) No 2891/77 implementing the Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources ⁽¹⁾

COM(83) 621 final

(Submitted by the Commission to the Council pursuant to Article 149 (2) of the EEC Treaty and Article 119 (2) of the Euratom Treaty on 24 October 1983)

After the third recital, add the following new recital:

'Whereas the concept of establishment should be clearly defined to ensure that it is applied in an adequately uniform manner; whereas Community customs legislation introduced the concept of "entry in the accounts", defined as the official act by which the amount of the import duties or export duties to be collected by the competent authorities is duly determined; whereas the establishment of entitlements should be provided for even in cases where it is not possible to make an entry in the accounts as so defined;'

After the fifth recital, add the following new recital:

'Whereas after entitlements have been established, the corresponding own resources should be made available; whereas, however, where recovery is delayed or proves impossible, provision should be made for the making available of entitlements to be deferred or definitively waived; whereas this possibility should be strictly limited in order to protect the Community's financial interests; whereas appropriate procedures should be laid down;'

1. The first (unnumbered) paragraph of Article 2 is numbered paragraph 1 and is amended as follows:

(a) For the purpose of applying this Regulation, in cases where Community rules impose an obligation to enter an entitlement in the accounts, the entitlement shall be deemed to be established as soon as it has been entered in the accounts.

(b) In cases not covered by these rules, however, an entitlement shall be deemed to be established as soon as its amount has been determined by the appropriate department or agency of the Member State.'

2. The second (unnumbered) paragraph of Article 2 is numbered paragraph 2.

3. At the beginning of Article 9 (1), the following is inserted:

'Subject to the provisions of Articles 10a and 10b, the ...'

4. At the beginning of Article 10 (1), the following is inserted:

'Subject to the provisions of Articles 10a and 10b, the entry ...'

5. The following Article 10a is inserted after Article 10:

— paragraph 1: Article 17 (1) becomes Article 10a (1).

— paragraph 2:

(a) The Member State may, however, subject to the conditions set out below, defer making available an entitlement established in accordance with Article 2 (1) (b) where the entitlement cannot be recovered within the normal time allowed.

(b) The Member States shall send the Commission a description of the situations in which they plan to make use of this provision. After consulting the Committee referred to in Article 20, the Commission shall draw up a list of model cases in which this provision may be applied.

(c) The amounts of the entitlements to which the Member State applies this provision shall be recorded in a special section of the own resources accounts referred to in Article 6, broken down by the type of resource involved and the type of case as contained in the list provided for in (b) above.

⁽¹⁾ OJ No C 231, 4. 9. 1982, p. 15.

(d) The entitlements referred to in this paragraph shall be made available to the Commission not later than the first working day after the 19th day of the second month following that in which:

- they were recovered; any interest paid on the entitlements by the person liable shall also be made available,
- the Member State decided to terminate the recovery procedure without making use of the provisions of Article 10b;’.

6. The following Article 10b is added after Article 10a:

— paragraph 1:

‘(a) A Member State may be authorized not to make available to the Commission the amounts corresponding to established entitlements in cases where recovery of the entitlement proves impossible or the Member State is released under Community law from the obligation to recover the entitlement and:

- the non-recovery referred to in the previous Article is not the result of an error by the Member State;
- the same taxable event has not given rise to the collection of national revenue.

(b) At the request of a Member State the Commission shall decide, after consulting the Committee referred to in Article 20, whether the conditions set out in (a) have been met and whether the request of the Member State should be granted.

(c) However, if the amount of the entitlement referred to in (a) above is less than an amount which is initially fixed at 100 ECU and which may be revised by the Commission after consulting the Committee referred to in Article 20, a Member State which considers that the conditions set out in (a) above have been

met may itself decide not to make these amounts available to the Commission. During the first and third quarters of the year, it shall send the Commission a list of cases in which decisions not to make own resources available have been taken during the previous half-year and the reasons for these decisions.’

— paragraph 2:

‘(a) The effect of the Commission’s decision to grant the request of a Member State or the decision of a Member State taken under 1 (c) shall be:

- to authorize the Member State which has paid over amounts under Article 10a (1) to deduct these amounts from the own resources to be made available to the Commission on the first working day after the 19th day of the second month following that in which the Commission’s decision was taken or the communication referred to in 1 (c) was made,
- to authorize the Member State which has availed itself of the facility referred to in Article 10a (2) not to pay to the Commission the amount of the entitlements in question.

(b) If the Commission does not accede to the request of a Member State which has availed itself of the facility referred to in Article 10a (2), the Member State shall make available to the Commission the amount of the entitlements in question not later than the first working day after the 19th day of the second month following that in which the decision was taken.

(c) The entitlements referred to in this Article shall be listed case by case in a special section of the own resources accounts referred to in Article 8.’

7. Paragraphs 1 and 2 of Article 17 are deleted and paragraph 3 becomes Article 17.

FINANCIAL STATEMENT

The aim of these proposals is to define the rules governing the making available of own resources, in order to achieve a more workable system for the collection of own resources and to improve the operating conditions and administration by the Commission of the transfers for which the establishment of the entitlements causes difficulties at a national level.

In the absence of exhaustive analyses of those cases, it is impossible to evaluate the financial results of these proposals, which are probably not very great.

referred to in Article 20, a Member State which considers that the conditions set out in (a) above have been met may itself decide not to make these amounts available to the Commission. During the first and third quarters of the year, it shall send the Commission a list of cases in which decisions not to make own resources available have been taken during the previous half-year and the reasons for these decisions.

- Paragraph 2:

- (a) The effect of the Commission's decision to grant the request of a Member State or the decision of a Member State taken under 1(c) shall be:
- to authorize the Member State which has paid over amounts under Article 10a(1) to deduct these amounts from the own resources to be made available to the Commission on the first working day after the 19th day of the second month following that in which the Commission's decision was taken or the communication referred to in 1(c) was made;
 - to authorize the Member State which has availed itself of the facility referred to in Article 10a(2) not to pay to the Commission the amount of the entitlements in question.
- (b) If the Commission does not accede to the request of a Member State which has availed itself of the facility referred to in Article 10a(2), the Member State shall make available to the Commission the amount of the entitlements in question not later than the first working day after the 19th day of the second month following that in which the decision was taken.
- (c) The entitlements referred to in this article shall be listed case by case in a special section of the own resources accounts referred to in Article 8.
7. Paragraphs 1 and 2 of Article 17 are deleted and paragraph 3 becomes Article 17.