

Opinion on the proposal for a European Parliament and Council Decision establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community⁽¹⁾

(94/C 195/03)

On 18 January 1994 the Council decided to consult the Economic and Social Committee, under Article 100a of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 15 April 1994. The Rapporteur was Mr Connellan.

As its 315th Plenary Session (meeting of 27 April 1994), the Economic and Social Committee adopted the following Opinion unanimously.

1. Introduction

1.1. In its Resolution on making the Single Market work⁽²⁾, the Council undertook to work in partnership with all the Community Institutions and Member States to ensure that the Single Market worked effectively and to act speedily if new barriers were found which could jeopardize its operation. It also invited the Commission to propose any practical arrangements to help ensure the smooth running of the Single Market.

1.2. This proposal, which follows on from the Commission Communication on the management of the mutual recognition of national rules after 1992, is aimed specifically at establishing a simple procedure for the exchange of information between Member States and the Commission that will enable the Community to manage transparently and pragmatically the mutual recognition of national laws which have not been harmonized at Community level.

1.3. The Committee has taken account of its Opinions of 27 May 1993⁽³⁾ on the Commission Communication on the operation of the Community's Internal Market after 1992 — Follow-up to the Sutherland Report and also of its Opinion of 22 September 1993⁽⁴⁾ on the Working Document of the Commission on a Strategic Programme on the Internal Market.

1.4. The Committee attaches great importance to ensuring the transparent functioning of the Internal Market, and welcomes this further step in ensuring the greatest consistency possible in the application of the rules.

2. General remarks

2.1. This is the first opportunity that the Community has had to scrutinize the drafting of the new Internal Market legislation along the lines recommended in the Sutherland Report, which recommended that all proposed legislation should be examined against the five criteria of need, effectiveness, proportionality, consistency and communication.

2.2. The Member States are allowed to make an exception to the principle of free movement of goods if it is justified under Article 36 of the Treaty or the case law of the Court of Justice relating to Article 30. Article 36 allows Member States to restrict imports from other Member States on the grounds of public morality, public policy or security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Reasons of public interest for the purposes of a mandatory requirement accepted by the Court under its case-law relating to Article 30 of the Treaty include consumer protection, improvement of working conditions, fair terms of trade, effective tax control and environment protection. Such prohibitions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Further, they must be necessary, viz they must be pertinent (there must be a causal link between the measure adopted and the desired aim) and no alternative must exist which would place fewer restrictions on free movement of goods. Lastly, such measures must be commensurate with the desired aim or practical effects of the prohibition.

2.3. Need

At present Member States may invoke the criteria listed in point 2.2 to introduce new laws or retain existing ones, even if this may restrict the free movement of

⁽¹⁾ OJ No C 18, 21. 1. 1994, p. 13.

⁽²⁾ OJ No C 334, 18. 12. 1992.

⁽³⁾ OJ No C 201, 26. 7. 1993.

⁽⁴⁾ OJ No C 304, 10. 11. 1993.

goods. However, they have no obligation to notify other Member States formally of these actions. There is clearly a need for the other Member States to be aware of the grounds, e.g. those referred to above, on which free circulation is restricted.

2.4. *Effectiveness*

The proposal recommends that Member States wishing to derogate from free movement of goods must notify all other Member States and the Commission of the measures taken. The Committee considers that this procedure will highlight barriers to the Internal Market, and meet the desired criterion of effectiveness.

2.5. *Proportionality*

The proposal recommends that the information should be provided on a one-page form. The Committee considers that this does not represent an undue burden on Member States and, therefore, meets the criterion of proportionality.

2.6. *Consistency*

The availability to the Commission and to Member States of information on a form will (i) make it easier to compare national legislation deviating from the free movement of goods and products and (ii) make for more consistent control of the application of the texts, which would not have been the case without these new provisions. (sic)

2.7. *Communication*

While not expressly provided for in the proposed Decision, it is understood that general information regarding the number of notifications and their nature will be published annually in the Commission's Report on the operation of the Internal Market.

To ensure that the Internal Market operates smoothly the Committee considers a more frequent system of communication to be desirable.

2.8. *Summary*

The Committee considers that the proposal's implementation will be particularly beneficial for SMEs who may not otherwise be aware of the reasons and justification for restricting access for their products to another Member State. The Committee notes that traded services are not within the scope of the proposed Decision, and recommends that a similar equivalent proposal be prepared for such services.

3. *Specific remarks*

3.1. *Need*

3.1.1. Since the completion of the Internal Market on 31 December 1992, border controls have been eliminated and there has been an increased need for coordination of policy in all areas involving mutual recognition.

3.1.2. This applies to particular cases not already covered by draft technical regulations already notified under Directive 83/189/EEC⁽¹⁾ or by Decision 89/45/EEC where a general ban has been imposed on a particular product on the grounds of hazard to the health and safety of consumers. There are many products such as industrial components which are not covered by either of these instruments.

3.1.3. The proposed notification procedure will increase the confidence of consumers, workers and entrepreneurs in the Community legislative process.

3.2. *Effectiveness*

3.2.1. Article 1 outlines the requirement that a Member State shall inform the Commission and other Member States of its decision to restrict, ban or withdraw products from the market.

3.2.2. The Committee is concerned to ensure that no ambiguity should exist in the interpretation of the words 'goods' and 'products'. Both terms are used in this article. 'Products' may be interpreted to include certain services. On the other hand, a recent ruling of the Court of Justice has drawn a distinction between goods and the conditions under which they are sold, e.g. hallmarks or reselling at a loss. The Court ruled that certain sale conditions are outside the scope of Article 30. For these reasons it is essential that the coverage of 'goods' and 'products' in the article be clearly defined, without however closing the door on subsequent developments in the case law of the Court of Justice.

Furthermore, it is essential that the scope of the proposed Decision should be clearly defined. Obstacles to the free movement of goods which may not be deemed by the Court to fall within the scope of Article 30 should be considered.

3.2.3. It is possible that not all restrictions on free movement of goods will be notified by Member States. All individuals and groups have the right to bring market restrictions to the attention of the Commission. It is essential that the Commission be provided with comprehensive information of conditions in practice.

⁽¹⁾ OJ No L 109, 26. 4. 1983.

The Committee considers that individual traders, consumers or associations should be encouraged to submit information to the Commission where Member States are perceived as infringing the principle of the free movement of goods either through legislative or administrative practices.

The Euro Info Centres and the ESC have a role to play in this respect.

3.2.4. In addition the Committee proposes to incorporate the examination of national measures derogating from the principle of the free movement of goods within the Community in the process of hearings on the operation of the Internal Market described in the ESC Opinion of 22 September 1993 ⁽¹⁾.

3.3. *Proportionality*

3.3.1. Article 4 states that the information required shall comprise:

- a copy of the decision taken by the national authority, and
- an information sheet containing particulars presented on a form

to be communicated within 30 days of the decision by the Member State concerned.

3.3.2. The Committee welcomes the pragmatic approach which requires only essential information. Experience in relation to the notifications of draft technical regulations under Directive 83/189 EEC shows that between 300 and 400 notifications per annum are submitted. Since the proposed Decision requires notification of exceptions to a harmonized framework under Article 36 of the Treaty it could be expected that the number of notifications will be somewhat lower in this instance.

3.3.3. While the principle of proportionality must be respected it should not become a refuge which encourages infringement of the wider principle of the free movement of goods.

Therefore where Member States fail to implement the simple procedures proposed in this Decision it should be made clear that they will be subject to Court Referral.

3.4. *Consistency*

3.4.1. The main objective of the notification procedure is to ensure that the principle of mutual recognition is being applied, with rare exceptions, across the Community. Where exceptions occur, it will be a matter for the Member States to accept the situation, to resolve the disputes on a bilateral basis, or for the Community Institutions to intervene. It is recommended that a

conciliation procedure be established at Community level.

3.4.2. The aim should be to find practical solutions and to resolve disputes as quickly as possible. It is essential that clear, simple, fast, and efficient procedures are implemented by the Commission to deal with the examination of actions requiring conciliation between Member States. A decision should be reached not later than 6 months after notification of the derogation by a Member State.

3.4.3. The powers of the Commission in this area emanate from its role as guardian of the Treaty as specified in Article 155. Based on the case-law of the European Court of Justice it may therefore alert Member States where necessary of the risk of referral to the Court under Article 169.

3.5. *Communication*

3.5.1. Article 6 states that Member States and the Commission are not required to disclose information which is by its nature covered by professional secrecy except where safety or health issues are concerned.

3.5.2. Article 8 requires the Commission to publish a report within two years of the Decision. It is understood that this report will comprise a general assessment of the operation of the Decision.

3.5.3. The Committee notes the provision in Article 8 that within two years of the date of notification of the Decision the Commission will report to the Council and the Parliament on its implementation and shall propose any amendment it deems appropriate. The Committee insists that the Economic and Social Committee be included in this reporting process.

3.5.4. In addition the Commission will include a report on national measures notified under the Decision in its Annual Report on the Internal Market. An analysis of obstacles to the free movement of goods should be included in this report. The Committee also recommends that a cumulative list of all measures notified, and still in operation, should be included in subsequent annual reports. In this context, it is essential that when a notified derogation is no longer in force it should be removed from the list.

3.5.5. The Committee recommends that there should be a more regular, say quarterly, publication by the Commission or Member States of all measures notified under the Decision. It is essential that such important commercial information is available to traders and consumers at the earliest opportunity.

⁽¹⁾ OJ No C 304, 10. 11. 1993.

4. Conclusion

The Committee strongly welcomes the proposal, and considers that it fills an important gap in ensuring that the Single Market is operated in a consistent and

transparent manner. It considers, subject to the modifications proposed above, that the notification procedures meet the essential requirements of need, effectiveness, proportionality, consistency and communication.

Done at Brussels, 27 April 1994.

The Chairman
of the Economic and Social Committee
Susanne TIEMANN

Opinion on the proposal for a European Parliament and Council Directive on textile names⁽¹⁾

(94/C 195/04)

On 17 February 1994 the Council decided to consult the Economic and Social Committee, under Article 100A of the Treaty establishing the European Community, on the abovementioned proposal.

The Section for Industry, Commerce, Crafts and Services, which was responsible for preparing the Committee's work on the subject, adopted its Opinion on 15 April 1994. The Rapporteur was Mr Smith.

At its 315th Plenary Session (meeting of 27 April 1994) the Economic and Social Committee adopted the following Opinion unanimously.

1. The proposal serves the purpose of consolidating in one single text all legislative instruments adopted since 1971 concerning textile names.
2. The Committee considers it most useful to have all texts assembled in one Directive. It has been assured that this consolidated compilation contains no material changes and serves the only purpose of rendering Community law clear and transparent. The Committee fully endorses this objective and, having received the abovementioned assurance, welcomes the proposal.

Done at Brussels, 27 April 1994.

The Chairman
of the Economic and Social Committee
Susanne TIEMANN

⁽¹⁾ OJ No C 96, 6. 4. 1994, p. 1.