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COUNCIL REGULATION (EC) No 3286/94

of 22 December 1994

laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization

(OJ L 349, 31.12.1994, p. 71)

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COUNCIL REGULATION (EC) No 3286/94

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laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization

THE COUNCIL OF THE EUROPEAN UNION,

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

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

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament [1],

Whereas the common commercial policy must be based on uniform principles, in particular with regard to commercial defence;

Whereas Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices [2] provided the Community with procedures enabling it:

— to respond to any illicit commercial practice with a view to removing the injury resulting therefrom, and

— to ensure full exercise of the Community's rights with regard to the commercial practices of third countries;

Whereas experience in the application of Regulation (EEC) No 2641/84 has shown that the need to deal with obstacles to trade adopted or maintained by third countries remains, and whereas the approach followed in Regulation (EEC) No 2641/84 has not proved to be entirely effective;

Whereas it appears necessary, therefore, to establish new and improved Community procedures to ensure the effective exercise of the rights of the Community under international trade rules;

Whereas international trade rules are primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but they can also be those laid down in any other agreement to which the Community is a party and which sets out rules applicable to trade between the Community and third countries, and whereas it is appropriate to give a clear idea of the types of agreements to which the term ‘international trade rules’ refers;

Whereas the abovementioned Community procedures should be based on a legal mechanism under Community law which would be fully transparent, and would ensure that the decision to invoke the Community's rights under international trade rules is taken on the basis of accurate factual information and legal analysis;

Whereas this mechanism aims to provide procedural means to request that the Community institutions react to obstacles to trade adopted or maintained by third countries which cause injury or otherwise adverse trade effects, provided that a right of action exists, in respect of such obstacles, under applicable international trade rules;

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[1] Opinion delivered on 14 December 1994 (not yet published in the Official Journal) (SIC! OJ No C 18, 23. 1. 1995).

[2] OJ No L 252, 20. 9. 1984, p. 1. Regulation as last amended by Regulation (EC) No 522/94 (OJ No L 66, 10. 3. 1994, p. 10).

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Whereas the right of Member States to resort to this mechanism should be without prejudice to their possibility to raise the same or similar matters through other existing Community procedures, and in particular before the committee established by Article 113 of the Treaty;

Whereas regard should be paid to the institutional role of the committee established by Article 113 of the Treaty in formulating advice for the institutions of the Community on all issues of commercial policy; whereas, therefore, this committee should be kept informed of the development of individual cases, in order to enable it to consider their broader policy implications;

Whereas, moreover, to the extent that an agreement with a third country appears to be the most appropriate means to resolve a dispute arising from an obstacle to trade, negotiations to this end shall be conducted according to the procedures established in Article 113 of the Treaty, in particular in consultation with the committee established thereby;

Whereas it is appropriate to confirm that the Community must act in compliance with its international obligations and, where such obligations result from agreements, maintain the balance of rights and obligations which it is the purpose of those agreements to establish;

Whereas it is also appropriate to confirm that any measures taken under the procedures in question should also be in conformity with the Community's international obligations, as well as being without prejudice to other measures in cases not covered by this Regulation which might be adopted directly pursuant to Article 113 of the Treaty;

Whereas the rules of procedures to be followed during the examination procedure provided for in this Regulation should also be confirmed, in particular as regards the rights and obligations of the Community authorities and the parties involved, and the conditions under which interested parties may have access to information and may ask to be informed of the essential facts and considerations resulting from the examination procedure;

Whereas in acting pursuant to this Regulation the Community has to bear in mind the need for rapid and effective action, through the application of the decision-making procedures provided for in the Regulation;

Whereas it is incumbent on the Commission and the Council to act in respect of obstacles to trade adopted or maintained by third countries, within the framework of the Community's international rights and obligations, only when the interests of the Community call for intervention, and whereas, when assessing such interests, the Commission and the Council should give due consideration to the views by all interested parties in the proceedings;

HAS ADOPTED THIS REGULATION:

Article 1

Aims

This Regulation establishes Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization which, subject to compliance with existing international obligations and procedures, are aimed at:

(a) responding to obstacles to trade that have an effect on the market of the Community, with a view to removing the injury resulting therefrom;

(b) responding to obstacles to trade that have an effect on the market of a third country, with a view to removing the adverse trade effects resulting therefrom.

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These procedures shall be applied in particular to the initiation and subsequent conduct and termination of international dispute settlement procedures in the area of common commercial policy.

Article 2

Definitions

1. For the purposes of this Regulation, ‘obstacles to trade’ shall be any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.

2. For the purposes of this Regulation and subject to paragraph 8, ‘the Community's rights’ shall be those international trade rights of which it may avail itself under international trade rules. In this context, ‘international trade rules’ are primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but they can also be those laid down in any other agreement to which the Community is a party and which sets out rules applicable to trade between the Community and third countries.

3. For the purposes of this Regulation, ‘injury’ shall be any material injury which an obstacle to trade causes or threatens to cause, in respect of a product or service, to a Community industry on the market of the Community.

4. For the purposes of this Regulation, ‘adverse trade effects’ shall be those which an obstacle to trade causes or threatens to cause, in respect of a product or service, to Community enterprises on the market of any third country, and which have a material impact on the economy of the Community or of a region of the Community, or on a sector of economic activity therein. The fact that the complainant suffers from such adverse effects shall not be considered sufficient to justify, on its own, that the Community institutions proceed with any action.

5. The term ‘Community industry’ shall be taken to mean all Community producers or providers, respectively:

— of products or services identical or similar to the product or service which is the subject of an obstacle to trade, or
— of products or services competing directly with that product or service, or
— who are consumers or processors of the product or consumers or users of the service which is the subject of an obstacle to trade,

or all those producers or providers whose combined output constitutes a major proportion of total Community production of the products or services in question; however:

(a) when producers or providers are related to the exporters or importers or are themselves importers of the product or service alleged to be the subject of obstacles to trade, the term ‘Community industry’ may be interpreted as referring to the rest of the producers or providers;

(b) in particular circumstances, the producers or providers within a region of the Community may be regarded as the Community industry if their collective output constitutes the major proportion of the output of the product or service in question in the Member State or Member States within which the region is located provided that the effect of the obstacle to trade is concentrated in that Member State or those Member States.

6. The term ‘Community enterprise’ shall be taken to mean a company or firm formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Community, directly concerned by the production of goods or the provision of services which are the subject of the obstacle to trade.

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7. For the purposes of this Regulation, the notion of 'providers of services' in the context of both the term 'Community industry' as defined in paragraph 5, and the term 'Community enterprises' as defined in paragraph 6, is without prejudice to the non-commercial nature which the provision of any particular service may have according to the legislation or regulation of a Member State.

8. For the purposes of this Regulation, the term 'services' shall be taken to mean those services in respect of which international agreements can be concluded by the Community on the basis of Article 113 of the Treaty.

Article 3

Complaint on behalf of the Community industry

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of obstacles to trade that have an effect on the market of the Community may lodge a written complaint.

2. The complaint must contain sufficient evidence of the existence of the obstacles to trade and of the injury resulting therefrom. Evidence of injury must be given on the basis of the illustrative list of factors indicated in Article 10, where applicable.

Article 4

Complaint on behalf of Community enterprises

1. Any Community enterprise, or any association, having or not legal personality, acting on behalf of one or more Community enterprises, which considers that such Community enterprises have suffered adverse trade effects as a result of obstacles to trade that have an effect on the market of a third country may lodge a written complaint. Such complaint, however, shall only be admissible if the obstacle to trade alleged therein is the subject of a right of action established under international trade rules laid down in a multilateral or plurilateral trade agreement.

2. The complaint must contain sufficient evidence of the existence of the obstacles to trade and of the adverse trade effects, resulting therefrom. Evidence of adverse trade effects must be given on the basis of the illustrative list of factors indicated in Article 10, where applicable.

Article 5

Complaint procedures

1. The complaint shall be submitted to the Commission, which shall send a copy thereof to the Member States.

2. The complaint may be withdrawn, in which case the procedure may be terminated unless such termination would not be in the interests of the Community.

3. Where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.

4. The Commission shall take a decision as soon as possible on the opening of a Community examination procedure following any complaint made in accordance with Articles 3 or 4; the decision shall normally be taken within 45 days of the lodging of the complaint; this period may be suspended at the request, or with the agreement, of the complainant, in order to allow the provision of complementary information which may be needed to fully assess the validity of the complainant's case.

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Article 6

Referral by a Member State

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

2. It shall supply the Commission with sufficient evidence to support its request, as regards obstacles to trade and of any effects resulting therefrom. Where evidence of injury or of adverse trade effects is appropriate, is must be given on the basis of the illustrative list of factors indicated in Article 10, where applicable.

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

4. Where it becomes apparent after consultation that the request does not provide sufficient evidence to justify initiating an investigation, then the Member State shall be so informed.

5. The Commission shall take a decision as soon as possible on the opening of a Community examination procedure following any referral by a Member State made in accordance with Article 6; the decision shall normally be taken with 45 days of the referral; this period may be suspended at the request, or with the agreement, of the referring Member State, in order to allow the provision of complementary information which may be needed to fully assess the validity of the case presented by the referring Member State.

Article 7

Consultation procedure

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

2. Consultations shall be held immediately at the request of a Member State or on the initiative of the Commission, and in any event within a time frame which allows the time limits set by this Regulation to be respected. The chairman of the Committee shall provide the Member States, as promptly as possible, with all relevant information in his possession. The Commission shall also refer such information to the committee established by Article 113 of the Treaty so that it can consider any wider implications for the common commercial policy.

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

4. Where necessary, consultations may be in writing. In such case the Commission shall notify in writing the Member States who, within a period of eight working days from such notification, shall be entitled to express their opinions in writing or to request oral consultations which the chairman shall arrange, provided that such oral consultations can be held within a time frame which allows the time limits set by this Regulation to be respected.

Article 8

Community examination procedure

1. Where, after consultation, it is apparent to the Commission that there is sufficient evidence to justify initiating an examination procedure and that it is necessary in the interest of the Community, the Commission shall act as follows:

(a) it shall announce the initiation of an examination procedure in the *Official Journal of the European Communities*; such announcement shall indicate the product or service and countries concerned, give a summary of the information received, and provide that all relevant information is to be communicated to the Commission; it shall state the period within which interested parties may apply to be heard orally by the Commission in accordance with paragraph 5;

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(b) it shall officially notify the representatives of the country or countries which are the subject of the procedure, with whom, where appropriate, consultations may be held;

(c) it shall conduct the examination at Community level, acting in cooperation with the Member States.

2. (a) If necessary the Commission shall seek all the information it deems necessary and attempt to check this information with the importers, traders, agents, producers, trade associations and organizations, provided that the undertakings or organizations concerned give their consent.

(b) Where necessary, the Commission shall carry out investigations in the territory of third countries, provided that the governments of the countries have been officially notified and raise no objection within a reasonable period.

(c) The Commission shall be assisted in its investigation by officials of the Member State in whose territory the checks are carried out, provided that the Member State in question so requests.

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

4. (a) The complainants and the exporters and importers concerned, as well as the representatives of the country or countries concerned, may inspect all information made available to the Commission except for internal documents for the use of the Commission and the administrations, provided that such information is relevant to the protection of their interests and not confidential within the meaning of Article 9 and that it is used by the Commission in its examination procedure. The persons concerned shall address a reasoned request in writing to the Commission, indicating the information required.

(b) The complainants and the exporters and importers concerned and the representatives of the country or countries concerned may ask to be informed of the principal facts and considerations resulting from the examination procedure.

5. The Commission may hear the parties concerned. It shall hear them if they have, within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they are a party primarily concerned by the result of the procedure.

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

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

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

Article 9

Confidentiality

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.

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

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

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

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

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

Article 10

Evidence

1. An examination of injury shall involve where applicable the following factors:

(a) the volume of Community imports or exports concerned, notably where there has been a significant increase or decrease, either in absolute terms or relative to production or consumption on the market in question;

(b) the prices of the Community industry's competitors, in particular in order to determine whether there has been, either in the Community or on third country markets, significant undercutting of the prices of the Community industry;

(c) the consequent impact on the Community industry and as indicated by trends in certain economic factors such as: production, utilization of capacity, stocks, sales, market share, prices (that is depression of prices or prevention of price increases which would normally have occurred), profits, return on capital, investment, employment.

2. Where a threat of injury is alleged, the Commission shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual injury. In this regard, account may also be taken of factors such as:

(a) the rate of increase of exports to the market where the competition with Community products is taking place;

(b) export capacity in the country of origin or export, which is already in existence or will be operational in the foreseeable future, and the likelihood that the exports resulting from that capacity will be to the market referred to in point (a).

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

4. Where adverse trade effects are alleged, the Commission shall examine the impact of such adverse effects on the economy of the Community or of a region of the Community, or on a sector of economic activity therein. To this effect, the Commission may take into account, where relevant, factors of the type listed in paragraphs 1 and 2. Adverse trade effects may arise, *inter alia*, in situations in which trade flows concerning a product or service are prevented, impeded or

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diverted as a result of any obstacle to trade, or from situations in which obstacles to trade have materially affected the supply or inputs (e.g. parts and components or raw materials) to Community enterprises. Where a threat of adverse trade effects is alleged, the Commission shall also examine whether it is clearly foreseeable that a particular situation is likely to develop into actual adverse trade effects.

5. The Commission shall also, in examining evidence of adverse trade effects, have regard to the provisions, principles or practice which govern the right of action under relevant international rules referred to in Article 2 (1).

6. The Commission shall further examine any other relevant evidence contained in the complaint or in the referral. In this respect, the list of factors and the indications given in paragraphs 1 to 5 are not exhaustive, nor can one or several of such factors and indications necessarily give decisive guidance as to the existence of injury or of adverse trade effects.

Article 11

Termination and suspension of the procedure

1. When it is found as a result of the examination procedure that the interests of the Community do not require any action to be taken, the procedure shall be terminated in accordance with Article 14.

2. (a) When, after an examination procedure, the third country or countries concerned take(s) measures which are considered satisfactory, and therefore no action by the Community is required, the procedure may be suspended in accordance with the provisions of Article 14.

(b) The Commission shall supervise the application of these measures, where appropriate on the basis of information supplied at intervals, which it may request from the third countries concerned and check as necessary.

(c) Where the measures taken by the third country or countries concerned have been rescinded, suspended or improperly implemented or where the Commission has grounds for believing this to be the case or, finally, where a request for information made by the Commission as provided for by point (b) has not been granted, the Commission shall inform the Member States, and where necessary and justified by the results of the investigation and the new facts available any measures shall be taken in accordance with Article 13 (3).

3. Where, either after an examination procedure, or at any time before, during and after an international dispute settlement procedure, it appears that the most appropriate means to resolve a dispute arising from an obstacle to trade is the conclusion of an agreement with the third country or countries concerned, which may change the substantive rights of the Community and of the third country or countries concerned, the procedure shall be suspended according to the provisions of Article 14, and negotiations shall be carried out according to the provisions of Article 113 of the Treaty.

Article 12

Adoption of commercial policy measures

1. Where it is found (as a result of the examination procedure, unless the factual and legal situation is such that an examination procedure may not be required) that action is necessary in the interests of the Community in order to ensure the exercise of the Community's rights under international trade rules, with a view to removing the injury or the adverse trade effects resulting from obstacles to trade adopted or maintained by third countries, the appropriate measures shall be determined in accordance with the procedure set out in Article 13.

2. Where the Community's international obligations require the prior discharge of an international procedure for consultation or for the

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settlement of disputes, the measures referred to in paragraph 3 shall only be decided on after that procedure has been terminated, and taking account of the results of the procedure. In particular, where the Community has requested an international dispute settlement body to indicate and authorize the measures which are appropriate for the implementation of the results of an international dispute settlement procedure, the Community commercial policy measures which may be needed in consequence of such authorization shall be in accordance with the recommendation of such international dispute settlement body.

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

(a) suspension or withdrawal of any concession resulting from commercial policy negotiations;

(b) the raising of existing customs duties or the introduction of any other charge on imports;

(c) the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.

4. The corresponding decisions shall state the reasons on which they are based and shall be published in the *Official Journal of the European Communities*. *Publication* shall also be deemed to constitute notification to the countries and parties primarily concerned.

Article 13

Decision-making procedures

1. The decisions referred to in Article 11 (1) and (2) (a) shall be adopted in accordance with the provisions of Article 14.

2. Where the Community, as a result of a complaint pursuant to Articles 3 or 4, or of a referral pursuant to Article 6, follows formal international consultation or dispute settlement procedures, decisions relating to the initiation, conduct or termination of such procedures shall be taken in accordance with Article 14.

3. Where the Community, having acted in accordance with Article 12 (2), has to take a decision on the measures of commercial policy to be adopted pursuant to Article 11 (2) (c) or pursuant to Article 12 the Council shall act, in accordance with Article 113 of the Treaty, by a qualified majority, not later than 30 working days after receiving the proposal.

Article 14

Committee procedure

1. Should reference be made to the procedure provided for in this Article, the matter shall be brought before the Committee by its chairman.

2. The Commission representative shall submit to the Committee a draft of the decision to be taken. The Committee shall discuss the matter within a period to be fixed by the chairman, depending on the urgency of the matter.

3. The Commission shall adopt a decision which it shall communicate to the Member States and which shall apply after a period of 10 days if during this period no Member State has referred the matter to the Council.

4. The Council may, at the request of a Member State and acting by a qualified majority revise the Commission's decision.

5. The Commission's decision shall apply after a period of 30 days if the Council has not given a ruling within this period, calculated from the day on which the matter was referred to the Council.

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Article 15

General provisions

1. This Regulation shall not apply in cases covered by other existing rules in the common commercial policy field. It shall operate by way of complement to:

— the rules establishing the common organization of agricultural markets and their implementing provisions, and

— the specific rules adopted pursuant to Article 235 of the Treaty, applicable to goods processed from agricultural products.

It shall be without prejudice to other measures which may be taken pursuant to Article 113 of the Treaty, as well as to Community procedures for dealing with matters concerning obstacles to trade raised by Member States in the committee established by Article 113 of the Treaty.

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2. Regulation (EEC) No 2641/84 is hereby repealed. References to the repealed Regulation shall be construed as references to this Regulation where appropriate.

Article 16

Entry into force

This Regulation shall enter into force on 1 January 1995.

It shall apply to proceedings initiated after that date as well as to proceedings pending at that date and in relation to which Community examination procedures have been completed.

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