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COMMISSION OF THE EUROPEAN COMMUNITIES

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Brussels, 16 June 1978

Commission communication to the Council
on the improvement of the conditions for
negotiating international customs conventions

Commission communication to the Council
on the improvement of the conditions for negotiating international
customs conventions

For several years now the Member States and the Commission have jointly been making greater efforts to put forward a common or at least concerted view-point in the international forums dealing with matters affecting the customs union. The essential aim has been to extend what has been the accepted practice since the beginning of the sixties in the context of the GATT tariff negotiations, to the whole body of customs law; where necessary, special rules of procedure have also been applied.

An ad hoc negotiating procedure was in fact defined by the Permanent Representatives Committee, after long discussions, at its meeting of 23-25 January 1974. This procedure is annexed to document R/243/74 (COMER 49) (ECO 32) (JUR 13).

The procedure is as follows :

Without prejudice to the legal positions of the Commission and the Member States :

1. Problems arising at the negotiation of customs conventions will be examined at coordination meetings chaired by a representative of the Member State holding the presidency of the Council (assisted by representatives of the General Secretariat and bringing together representatives from the Member States and from the Commission. These meetings will deal with any matter relating to customs conventions, with the exception of questions of competence. They will aim at reaching a common position in line with the objectives and policies of the Community. Any major disagreement should be notified to the Permanent Representatives Committee and, if necessary, to the Council.
2. The common position will be stated by a single spokesman; the spokesman will normally be the Commission's representative, except where the nature of the matters dealt with is such that the Commission's representatives

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and the representatives of the Member States would arrive at different conclusions. The designation of a single spokesman does not prevent the Member States' representatives from making individual statements, provided that they pay due regard for the common line adopted on substantive and procedural questions.

3. If a vote is taken, the Member States' representatives will vote in accordance with the overall package of common guidelines adopted.

This procedure has been used for three years now and can be said to have effectively enabled the Community as such to participate in the various international organizations dealing with customs matters and, in most cases, to express common positions in those forums.

However, it is undeniable that the ad hoc procedure is often considered extremely cumbersome in view of the conditions under which it has hitherto operated.

There are two main reasons why the procedure is so cumbersome :

- (a) First, since the term "customs convention" is not defined in the procedure itself, the Member States have insisted right from the start that the procedure could only be used if the Council first acknowledged that a particular proposal of an international organization actually comes under that head and therefore falls within Community jurisdiction. For this reason, the Commission has so far always made a recommendation to the Council that it be authorized to negotiate whenever it has learnt of work in an international organization which might affect the operation of the customs union.

Except where the Commission has already been able at this stage of developments to assess the Community's needs in the particular context in question (for example, the need to insert a customs union clause in a draft convention), the recommendation has never included any proposal

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for negotiating directives; for such proposals cannot normally be drafted until after the Member States' positions have been coordinated and account has been taken of the trend of discussions in the international organization concerned.

The authorization given by the Council to negotiate is therefore largely a matter of form and without great practical scope, since in most cases the Council merely instructs the Commission to arrive at the conclusion of an agreement (the Annexes to the Kyoto Convention on the Simplification and Harmonization of Customs Procedures being a case in point). It also causes fairly considerable losses of time because the Council's Economic Questions Group is prone to disallowing any common position until this formality has been completed.

- (b) Council authorization is necessary only for the opening of actual negotiations. The Term "negotiation" has not been defined by the ad hoc procedure. In fact, ever since the procedure was first applied, the tendency has been to consider this term as covering all work that can derive from the drafts produced by international organizations. Consequently, since the meetings that are traditionally "chaired by a representative of the Member State holding the presidency of the Council (assisted by representatives of the General secretariat) and bringing together representatives from the Member States and from the Commission" are the same meetings which take place in the Council itself, the Council's Economic Questions Group has from the outset been considered the appropriate body for discussing all matters arising from the drafts in question, irrespective of the point work has reached in a particular field in an international organization. However, in order to avoid excessively long discussions in the Economic Questions Group, it has been agreed that "technical" pre-coordination meetings organized and chaired by the Commission should normally take place before the Group adopts its position. Thus, whatever point work has reached in the

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international organization concerned, and even if this work is only exploratory, the Economic Questions Group has, in practice, to arrive at a common position which can be presented and defended by the Commission representative.

However, the work involved in preparing a draft convention generally differs greatly from phase to phase :

- A first phase, which can be termed the "preparatory phase", mainly involves exchanges of views between experts. It is on the basis of these exchanges that the international organization will in due course produce its draft convention. Whatever the circumstances, the Council could hardly issue precise directives on the basis of these discussions since they relate to a fluid subject where substantial changes may be made in the light of the views expressed. Consequently, the "common positions" adopted at this stage in the Economic Questions Group are practically valueless, and finalizing them is simply time-wasting.
- In a second phase, which consists of the negotiations proper and which can be termed the "final phase", the representatives of the member countries of the international organization concerned have to finalize a draft text for adoption by the contracting countries. At this point the Community representatives must be able to present and defend a common position so that Community interests are taken into consideration in the draft finally adopted by the international organization.

The duration and importance of each of these two phases obviously vary according to the case and the working methods of the international organization in question, but a distinction can always be made between them.

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International organizations can even initiate work which never goes beyond the "preparatory phase" (for example, where the discussions reveal that too few countries are interested for a convention to be concluded in a given field). They can also initiate work not intended to lead to a draft convention, but relating only to the administration of existing conventions.

It would therefore be highly desirable to make distinctions bases on the nature of the work undertaken by international organizations and the stage reached in that work. However, the ad hoc procedure has been hitherto so applied as to prevent the making of such distinctions. Consequently, the Council's Economic Questions Group is pointlessly being burdened with an increasing volume of coordination work, to the detriment of the examination of Commission proposals for Community provisions vital for completing the customs union.

Moreover, the fact that there exists an "appeal body" at the level of the Council's Economic Questions Group means that, where differences of opinion occur in pre-coordination meetings organized by the Commission, Member States' representatives tend to bring the problems before that body rather than try to work out a compromise in the pre-coordination meeting itself. This places a further burden on the Economic Questions Group.

It would therefore seem vital to reconsider how the ad hoc negotiating procedure operates so that it can be simplified as far as possible and used judiciously, though this by no means implies calling into question the scope of the procedure. On the basis of the last three years' experience, the Commission proposes henceforth to be guided by the following principles :

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(a) As regards the scope of the ad hoc procedure, the notion "customs convention" should be considered as covering any multilateral international act containing provisions which could have consequences for the operation of the customs union, if applied by the Community. These may be acts set up and adopted either by international organizations specialising in customs matters (Customs Cooperation Council) or by international organizations dealing incidentally with customs matters in the fields which they cover (Economic Commission for Europe, Council of Europe, UNESCO, etc.). Such acts may relate solely to one area of customs law or merely contain one or more customs provisions among measures relating to other matters.

(b) Furthermore, the Council should not be required to authorize negotiations at too early a stage. As pointed out above, premature authorization is pointless and is a major cause of delay. As soon as they are informed that an international organization intends to draw up a multilateral international act containing provisions which could have consequences for the operation of the customs union, the Commission's and the Member States representatives should immediately be able to take part in the work of that organization. Their participation could in no way commit the Community since they would be involved in the "preparatory phase" described above.

(c) As regards the actual operation of the ad hoc negotiating procedure, more account should be taken of the point reached in the international organization's work in a particular field :

- during the "preparatory phase", which in practice covers all discussions before the international organization actually draws up the draft to be formally submitted to the organization's member countries for approval, a common position should be sought

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at consultation meetings organized by the Commission. Any common position arrived at, should be stated similarly by the Commission's representative and the Member States representatives. In the event of a difference of opinion on some point, the Commission's representative and those of the Member States should display the utmost discretion in their statements and even refrain from taking up a position in certain cases.

- Upon completion of the "preparatory phase" (i.e. once, on the basis of the preliminary discussions, the international organization concerned has drawn up a draft act on which the organization's member countries will have to vote), the Commission should make a recommendation to the Council that it be authorized to negotiate. This recommendation would include proposed directives for the negotiations. Examination of the recommendation by the Council would follow the usual pattern (viz. Economic Questions Group, Permanent Representatives Committee, Council). The resulting decisions would constitute the common position which the Commission representative would have to present and defend, as prescribed by the ad hoc negotiating procedure, when the draft was being examined in the international organization concerned. Any additional coordination meetings necessary would, in accordance with the procedure, be held on the spot.

Naturally, the Commission could if necessary bring important matters before the Council even during the "preparatory phase", if it considered they required a common position. However, in view of the conditions under which international organizations normally work, this should only occur exceptionally.

- (d) The procedure described above regarding the "preparatory phase" should normally suffice so far as provisions limited to the administration of existing conventions (notes, interpretative provisions) are concerned. The international organization would be informed direct by the Commission, acting on behalf of the

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Community and the Member States, of the common position defined at a Commission meeting. However, if no agreement could be reached at a Commission meeting, the matter would go to arbitration before the Council (Economic Questions Group and, possibly, the Permanent Representatives Committee). Since such provisions are generally unimportant, arbitration should be very infrequent.

The Commission considers that this approach cannot in any way detract from the Council's powers as regards the negotiation of customs conventions, for the Community position in the final stage of negotiations is decided by the Council alone. This approach is in fact fully comparable to the usual procedure for negotiating international conventions in the other areas within Community jurisdiction. Moreover, it fully preserves the respective responsibilities of the Commission and the Council in the preparation of Community decisions and spares the Council from having to act on Commission recommendations containing no precise proposals.

The main advantage of this approach is that the Economic Questions Group will no longer have to examine minor problems, and will be spared from having to take untimely decisions on provisions which, depending on the stage reached, might be considerably changed in the light of ongoing work in the international organization concerned. This will mean that the examination of various Commission proposals for Council regulations or directives in areas which are of crucial importance for the actual achievement of the customs union can be resumed under suitable conditions.

In conclusion, the Council is requested to approve the Commission's position on streamlining the ad hoc negotiating procedure :

- by considering "customs convention" to mean any multilateral international act containing provisions which could have consequences for the operation of the customs union, if applied by the Community;

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- by distinguishing, for the purposes of the ad hoc negotiating procedure, between the "preparatory phase" and the "final phase", with the latter alone involving a Council decision based on a Commission recommendation.

It should be noted that this Communication on the operation of the ad hoc procedure only concerns customs provisions in areas other than customs valuation and the tariff nomenclature. Other proposals will be made in due course regarding these two areas.

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