



COMMISSION OF THE EUROPEAN COMMUNITIES

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COMMUNICATION FROM THE COMMISSION

**CONCERNING ARTICLE 95 (paragraphs 4, 5 and 6)
OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY**

1. INTRODUCTION

1. The Treaty of Amsterdam has introduced major changes in the new Article 95 of the EC Treaty concerning the possibility for Member States to maintain or introduce national provisions that are incompatible with a harmonisation measure adopted at Community level, where this is justified by fundamental requirements, in particular the protection of health or the environment. (Annex I)
2. The Treaty requires the Commission to approve or reject the national provisions notified to it under Article 95 TEC. However, if the Commission does not adopt a formal decision within six months from the date of notification, the notified measures are deemed to be approved.
3. The Commission's handling of these notifications is based on the text of the Treaty and takes into account the case law of the Court of Justice relating to the former Article 100a(4) of the EC Treaty in as far as it remains relevant to the interpretation of the new provisions¹.
4. The Commission will ensure that the provisions of Article 95 (paragraph 4-6) are applied in a full and well balanced manner so as to allow, where justified and without jeopardising the unity of the internal market, application of national measures which are incompatible with the Community rules.

2. SUBMISSION OF NOTIFICATIONS

5. Requests by Member States for derogations should refer to a harmonisation measure adopted under Article 95 TEC (ex Article 100a of the EC Treaty²).
6. Notifications should include the actual text of the national provisions which the Commission is being asked to approve together with a statement setting out the grounds justifying these provisions.
7. In the case of a request for an authorisation to **maintain** national provisions (Article 95(4) TEC), such provisions should have been adopted and have entered into force before the Community harmonisation measure was adopted or – as the case may be – an Accession Treaty enters into force, or before a derogation granted to a Member State by a measure based on Article 95 or an Accession Treaty expires. In the case of a request for an authorisation to **introduce** national provisions (Article 95(5) TEC), such provisions should not have been adopted or have entered into force before the harmonisation measure was adopted. Article 95(5) TEC

¹ Judgment of the Court of 17 May 1994, case C-41/93 *French Republic v Commission of the European Communities* ECR I-1829, opinion of Mr Advocate General Tesouro delivered on 26 January 1994. Judgment of the Court of 1 October 1998 in Case C-127/97 *Willi Burstein v Freistaat Bayern* (in the judgment the Court, taking account of its reply to the first reference for a preliminary ruling, does not reply to the questions relating to Article 100a(4), but these are dealt with in the opinion of Mr Advocate General Saggio delivered on 7 May 1998). Judgment of the Court of 1 June 1999 in Case C-319/97, *Criminal proceedings against Antoine Kortas*, opinion of Mr Advocate General Saggio delivered on 28 January 1999. Pending cases: C-512/99 *Germany v. Commission*, C-3/00 *Denmark v. Commission*.

² Commission Decisions of 17.5.2002 (OJ L 132) and 24.5.2002 (OJ L 138) were based on notifications related to Directive 76/116 based on Article 100 EEC

concerns national provisions that a Member State intends to introduce after the adoption of a harmonisation measure.

8. Any Member State wishing to **maintain** national provisions that are incompatible with a Community harmonisation measure should submit its notification to the Commission as soon as possible after the date on which the Community measure was adopted and before the date from which it applies, so that the Commission can take a decision before the Community measure becomes applicable.
9. Any Member State wishing to **introduce** national provisions that are incompatible with a Community harmonisation measure may notify the Commission at any time after the adoption of that measure.
10. The possibility of requesting a derogation from harmonised rules on the internal market must be interpreted in a restrictive manner, in line with the purpose of the provision in question. With regard to the former Article 100a(4), the Court has ruled that the procedure laid down by that provision is intended to ensure that no Member State may apply national rules derogating from the harmonised rules without obtaining confirmation from the Commission.³
11. It is clearly incumbent on Member States to submit a notification to the Commission promptly, once a harmonisation measure has been adopted and, in any event, in time for a decision to be made on the notification and for national law to be amended if this rejected ; all this must be completed by the date from which the Community measure is due to apply⁴.
12. According to the case law of the Court of Justice⁵, the submission of a request for a derogation does not authorise the Member State to apply the national provision until the Commission has approved it or, in the absence of a decision by the Commission, until six months have expired, when the request is deemed to have been approved.

3. HOW THE COMMISSION HANDLES NOTIFICATIONS

13. The Member State should submit together with its application all factual and legal information and, where appropriate, scientific evidence that may serve to justify the requested derogation, in order for the Commission to be able to assess the admissibility and justification of the request.
14. The Annex II contains a template for notifying, listing information that a notification should include, in particular the national provisions to be maintained (Article 95.4 TEC) or to be introduced (Article 95.5 TEC), and the advanced grounds on matters connected with the protection of health, the protection of the environment or the protection of the working environment. This template is indicative, designed to assist in setting out applications – it is not compulsory.

³ Paragraph 28 of the judgement in case C-41/93, see also paragraphs 27 and 28 of the judgement in case C-319/97 (Kortas).

⁴ Paragraph 35 of the judgement in case C-319/97 states that “it is incumbent on Member States under Article 10 EC (ex Article 5) to notify as soon as possible the provisions of national law which are incompatible with a harmonisation measure and which they intend to maintain in force”.

⁵ *ibid.*

15. The notification, duly signed, with all submissions should be sent to the **European Commission**, Secretariat General, BREY , **B-1049 Brussels**.
16. The Commission will inform all Member States of each notification it receives by forwarding a 'Notice' containing the main elements of the notification. The 'Notice' will also be published in the Official Journal. The Commission reserves the right to pass on to the notifying Member State observations that may be submitted to the Commission by other Member States or other third parties. Member States are requested to inform the Commission if any document submitted is to be considered confidential. Other Member States may have access to all the documents in a notification file except those that are considered confidential.
17. To enable it to assess the scientific arguments put forward by the Member State in support of its notification, the Commission may call upon the services of independent experts who are competent in the matter at issue.
18. Where the Commission finds a notification inadmissible or manifestly unfounded, it reserves the right to take a decision without following any of the above procedures⁶.

4. THE DECISION TO APPROVE OR REJECT NOTIFIED NATIONAL PROVISIONS

19. Article 95(6) sets a deadline of six months for the Commission to decide on a request for a derogation under Article 95(4) or (5) TEC. The time is counted from the day following the reception of the notification. The notifying Member State will receive a letter of acknowledgement indicating this date.
20. If the notification concerns a complex matter and there is no danger to human health, the deadline may be extended for a further period of up to six months (Article 95(6) third subparagraph). Such an extension will be notified to the Member State concerned and published in the Official Journal.
21. Authorisation to **maintain** a national provision incompatible with a harmonisation measure can be granted only if it is justified on the grounds of major needs in the notifying Member State as referred to in Article 30 TEC or relating to the protection of the environment or the working environment (Article 95(4) TEC).
22. Authorisation to **introduce** a national provision incompatible with a harmonisation measure can be granted only if the request is based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to the notifying Member State and arising after the adoption of the harmonisation measure (Article 95(5) TEC).
23. In all cases, authorisation can be granted only if the national provisions are not a means of arbitrary discrimination or a disguised restriction on trade between the Member States. The Commission will also verify whether or not the national provisions constitute an obstacle to the functioning of the internal market given that such an obstacle cannot be disproportionate vis-à-vis the stated objective.

⁶ See for example the Commission Decision of 25 July 2000 (OJ L 205/2000).

24. The Commission's decision approving or rejecting the national provisions in question will take the form of a reasoned decision, which will be notified to the Member State concerned and published in the Official Journal. The Commission Decision will be reviewable by the Court of Justice.

ANNEX I

New Article 95 of the Treaty establishing the European Community

Article 95 (ex Article 100a)

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.

In the absence of a decision by the Commission within this period, the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission, which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

ANNEX II

TEMPLATE FOR NOTIFICATIONS UNDER ARTICLE 95 TEC

1. Identification elements

– **Harmonisation measure:**

- identification of the harmonisation measure concerned

2. Essential elements constituting the notification

– **National provisions:**

- the national provisions to be maintained (Article . 95.4)
- the national provisions proposed to be introduced (Article 95.5)

– **Grounds:**

- the advanced grounds or explicatory memorandum with regard to maintaining a derogation (Article 95.4)
- the advanced grounds or explicatory memorandum with regard to introducing a derogation (Article 95.5)

3. Elements addressing the substantive conditions

- the advanced grounds referred to in Article 30 EC Treaty or relating to the protection of the environment or the working environment which in the notifying Member State justify the maintaining of the national provisions (Article 95.4)
- the advanced grounds, based on specific problems in the notifying Member State, relating to the protection of the environment or the working environment for introducing the national provisions (Article 95.5)
- the advanced new scientific evidence relating to the protection of the environment or the working environment for introducing the national provisions (Article 95.5)

Socio-economic data:

a) background: available economic data (economic sectors concerned, production, export/import, consumption, waste), likely trends

b) evaluation of socio-economic impact: identification of at-risk groups; projected effects of the Community measure.

Scientific data:

a) available scientific data on the risks (i.e. description of intrinsic and exposure hazards) where the Community harmonisation measure is not adequate, e.g.:

- evaluation of the risks for health/environment/working environment, bearing in mind the effects of Community provisions that have already been adopted;
- risks associated with the use of increased amounts of substitute products;
- new scientific information/studies and/or possible research in progress.

b) scientific data on the specific situation of the Member State, e.g. data for the Member State compared with data for other Member States or a Community average on:

- quantities produced (if any), consumption and waste, past and likely future trends;
- emissions, exposures (for humans and various aspects of the environment), preferably measured, otherwise estimated;
- anticipated benefits (in terms of reducing the risk/danger, exposure, impact on humans or the environment), particularly in comparison with the effects of the Community provisions (what are the additional benefits expected from applying national measures?).