COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 06.03.1996
COM(96) 38 final

Proposal for a

COUNCIL DECISION

drawing up a non-exhaustive, indicative list of the names of agricultural products and foodstuffs regarded as being generic, as provided for in Article 3(3) of Council Regulation (EEC) No 2081/92

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. *Reasons for delay in presenting the proposal*

Under Article 3(3) of Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, the Commission was to present the Council with a list of generic names before the Regulation came into force, on 26 July 1993.

DG VI drafted a proposal in May 1993, the written procedure (E/774/93) for which should have been completed on 2 June 1993. However, that procedure was blocked; as it had still not been completed by 20 January 1995, it was terminated when the new Commission took office. This explains why the proposal could not be presented to the Council in time.

Following the accession of three new Member States, the proposal was updated to take account of their contributions; it has also been revised in the light of the remarks of the Legal Service.

II. *The justification for the proposal from the point of view of subsidiarity* lies in the fact that the action being taken is exclusively a matter for the Community. It is required by the Council, under the above-mentioned Article 3 of Regulation (EEC) No 2081/92.

III. *Situation, criteria adopted and specific problems*

1. Council Regulation (EEC) No 2081/92 of 14 July 1992, which came into force on 26 July 1993, is intended to provide protection throughout the Community for the geographical indications and designations of origin of certain agricultural products and foodstuffs. To qualify for such protection, it must be proved that there is a link between the characteristics of the product concerned and the geographical area from which it comes. Protection is granted once the product has been registered and included on a Community list. However, names which have become generic cannot be registered.

2. Article 3 of Regulation (EEC) No 2081/92 provides for an obligation on the Commission to present a proposed list of generic names to the Council in the following terms: "Before the entry into force of this Regulation, the Council, acting by a qualified majority on a proposal from the Commission, shall draw up and publish in the Official Journal of the European Communities a non-exhaustive, indicative list of the names of agricultural products or foodstuffs which are within the scope of this Regulation and are regarded under the terms

of paragraph 1 as being generic and thus not able to be registered under this Regulation."

In this respect, Article 3(1) of the Regulation lays down the following definition: "a "name that has become generic" means the name of an agricultural product or a foodstuff which, although it relates to the place or the region where this product or foodstuff was originally produced or marketed, has become the common name of an agricultural product or a foodstuff."

The Regulation requires that all factors be taken into account when determining whether a name has become generic at Community level, such as the situation in the Member State of origin, in areas where it is consumed and in other Member States, and the relevant national and Community laws. These criteria are to be considered together. It should be noted in this connection that in its recent judgment of 10 November 1992 in Case C-3/91 (Exportur SA v. LOR SA and Confiserie du Tech), (paragraph 37), the Court took as a criterion the status of the name in the Member State of origin with a view to establishing whether it had become generic.

3. It should be stressed that under the Regulation names which have become generic cannot be registered. As a result, the issue of generic names is a sensitive one and has always met with strong reactions. When a geographical name is registered, its use is restricted to enterprises in the area concerned and forbidden to all others.

It follows from these arrangements that declaring a name to be generic has very important consequences, particularly of an economic nature, which affect the interests of private individuals. Great caution should accordingly be exercised in this area and Article 3 should be applied in an unbiased and objective fashion.

As a result, in order to gain as comprehensive an overall view as possible of the situation before making proposals concerning generic names in accordance with Article 3(3) referred to above, the Commission considered it vital to request the cooperation of the Member States. By letter of 22 July 1992 and reminder of 12 November, and by letter of 23 March 1995 to the three new Member States, it requested that lists of names of products which the Member States regard as likely to be recognized as generic names should be forwarded to it.

4. The lists notified differ substantially as regards the names suggested and the number thereof, which reflects the divergent, or even (in certain cases) conflicting, approaches of the Member States. In addition, the lists forwarded by the Member States provide no information enabling applications to be assessed on the basis of the criteria set out in Article 3(1) of the Regulation.

Under these circumstances, the Commission has drawn up an initial list of names which may at first sight be regarded as generic on the basis of lists forwarded by the Member States and applying, as far as possible, the criteria laid down in Article 3(1) of the Regulation, by taking into account the relevant legislation and suggestions from the Member State of origin and the other Member States.

The Commission has therefore selected as potentially generic names which meet the following conditions:

(a) They have been put forward by at least eight Member States.

Where a majority of Member States has not requested that a name be declared generic, it cannot easily be presumed prima facie that the name has become the common name of a product across the Community.

(b) The Member State of origin is a Contracting Party to the International Convention of Stresa and/or has itself included the name in the list sent to the Commission.

The Convention of Stresa does not explicitly declare the cheeses listed in Annex II thereto to be generic. However, it does lay down their production method and permits their production outside the Contracting Party where the name originates. The fact that the Member State of origin is a Contracting Party to the Convention is a prima facie indication that it has agreed for decades that the name can be used by third parties. It can therefore be assumed that the name has become the common name for the cheese in the meantime.

The Court of Justice (in *Exportur*, 37) made extending national protection of a name to other Member States conditional on the fact that the name in question had not become generic in the Member State of origin.

It can be acknowledged prima facie that any Member State which considered one of its own names a likely candidate for protection would not propose that it be declared generic.

(c) The names are not protected by international agreements (bilateral or other conventions) in Member States other than the Member State of origin.

The said international agreements are regarded as extending outside its territory the protection of names belonging to a Member State of origin. They include clauses which prohibit the protected names from becoming generic. Even where conditions (a) and/or (b) above are fulfilled, it would

be difficult to maintain the resulting prima facie case if the names referred to were protected by these agreements.

The list proposed in the Annex is therefore of necessity short.

5. The name "Feta"

The name "Feta" was communicated by the Greek Government for registration under the Regulation as a designation of origin, and Commission departments have received many strongly-worded responses to the question whether it has become a generic name. It is therefore essential to proceed with extreme caution when dealing with this name, and indeed to back up any decision taken with very convincing evidence, since the economic interests at stake are considerable.

In view of the traditional practice of the Courts in Great Britain and Germany in cases of this type, which consists in conducting a survey to determine public opinion on the matter, a Eurobarometer survey of consumers in the twelve Member States of the Union at that date was carried out in May 1994.

Under Regulation (EEC) No 2081/92, for a name to be declared generic, it must have become the common name of a product, i.e. it now means the product as such, without the public being aware of a reference to the geographical origin of the product.

The *conclusions of the survey*, which reflect the public perception of the name "Feta" in the Union, are as follows.

(a) The name "Feta" is not well known in the Union (only one person in five had heard of it).

According to legal tradition in Great Britain and Germany, with which the Legal Service of the Commission concurs, ignorance of a name cannot be invoked as an argument for that name's being generic.

(b) Most of the consumers who knew or had heard of Feta thought that it was a product originating in Greece.

In view of the foregoing, it would appear that the name "Feta" has not become the generic name of a product, but that it continues to connote Greek origin for most of those who know it. If this is so, the name "Feta" does not match the definition of a generic name in Article 3(1) of Regulation (EEC) No 2081/92.

The question was also put to the *Scientific Committee* assisting the Commission with the application of Regulation (EEC) No 2081 92, which delivered the *following opinion.*

1. In the light of the information presented by the Commission, and in particular the results of the opinion survey, the Committee takes the view that the name "Feta" has not become a generic name. However, it should be stressed that the Committee considered only the question whether "Feta" was a generic name (unanimous opinion of seven voting members), without prejudice to the question of products legally existing on the market in Member States other than Greece, or in third countries. Article 13 of Regulation (EEC) No 2081/92 provides that products may continue to use registered names for a period of up to five years.

   The Committee draws a clear distinction between generic names on the one hand, and the names of products legally marketed on the other. As the public may understand certain names to refer to a product with a specific geographical origin, even when those names are legally used in trade for products of other origins, the rules distinguish between arrangements for generic names (which may not be registered) and those for expressions legally used in trade (which can continue to be used temporarily once the name has been registered).

2. In view of the specifications presented by the Greek Government, the name "Feta" qualifies as a designation of origin within the meaning of Article 2(3) of Regulation (EEC) No 2081/92 (4 votes for, 3 against, 7 voting members).

Consequently, on the basis of the results of the survey and of the opinion of the Scientific Committee, the name "Feta" has not become generic within the meaning of Article 3 of the Regulation, and it is not included in the Decision.

6. It was not considered necessary to draw up this list by means of a Regulation. As the list is indicative, a Decision would appear to suffice.

The list must of necessity be indicative without having legal implications erga omnes given that a definitive decision on the generic nature of a name must be made only as part of a procedure where exercise of the various rights in question is guaranteed, such as that provided for in the Regulation in respect of registration.

On the other hand, the list must be non-exhaustive in so far as it is not the intention to identify all names that might be declared generic; as a consequence,

a name not included is this list could well be considered generic at some future time.

7. In addition, names will be regarded in future as generic within the meaning of Regulation (EEC) No 2081/92 on condition that the application for registration has been rejected, either in the normal course of events (Articles 6(2) and 17(2)) or after lodgment of an objection (Article 7(5)(b) of Regulation (EEC) No 2081/92) because the name has become generic.

COUNCIL DECISION
drawing up a non-exhaustive, indicative list of the names of agricultural products and foodstuffs regarded as being generic, as provided for in Article 3(3) of Council Regulation (EEC) No 2081/92

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to the proposal from the Commission[1],

Having regard to Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs[2], and in particular Article 3(3) thereof,

Whereas, pursuant to Article 3(3) of Regulation (EEC) No 2081/92, before that Regulation enters into force the Council is to draw up a non-exhaustive, indicative list of the names of agricultural products and foodstuffs which fall within the scope of that Regulation and which are regarded as being generic,

HAS ADOPTED THIS DECISION:

Article 1

The following non-exhaustive, indicative list shall be regarded as names that have become generic.

- Brie
- Camembert
- Cheddar
- Edam
- Emmentaler
- Gouda

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1 OJ No , , p.
2 OJ No L 208, 24.7.1992, p.1.

Article 2

This Decision is addressed to the Member States.

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