

**COMMISSION OF THE EUROPEAN COMMUNITIES**

SEC (92) 877 final

Brussels, 8 May 1992

**ABOLITION OF BORDER CONTROLS**

Commission Communication to the Council and to Parliament

## INTRODUCTION

1. Article 8a of the EEC Treaty provides that "the Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992"; it defines the internal market as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".

2. Following publication of the White Paper setting out the programme of work for implementing Article 8a and in keeping with the declaration annexed to the Single European Act, the Commission, in its annual reports, has drawn the attention of the Council and of Parliament to the progress made in implementing that programme. In accordance with Article 8b, the Commission has formally drawn the institutions' attention to the worrying delays in abolishing border controls for goods and individuals:<sup>1</sup>

- It is only in three of the four fields covered by Article 8a (goods, capital and services) that progress has been satisfactory, with the abolition of physical and tax controls at borders proceeding smoothly. However, in one field - that of goods - where the determination to give full effect to Article 8a is unquestioned and where the basic provisions for achieving that objective are in place, the complexity of the issues still to be dealt with by the Council and the delayed implementation by Member States of the instruments adopted suggest that practical difficulties will arise unless further impetus to the work is given at all political levels;
- The situation is worrying at all political levels where free movement of individuals is concerned. While considerable progress has been made since the Rhodes European Council in 1988 on the back-up measures for the abolition of border controls, the lack of political consensus on the actual scope of Article 8a is still apparent. The second meeting of the European Council at Rome on the subject of free movement of persons noted with regret that a delay has occurred in relation to the programme. It considers it necessary to give full scope to the provisions of the Single Act on the free movement of persons. It wants the necessary decisions, in particular on the crossing of external borders, to be taken at an early date to ensure that the 1 January 1993 deadline is met. The two conventions on the examination of applications for asylum and on the administration of the external frontier, the basic elements of which have been ready for more than a year, have not yet come into force for want of ratification in the case of the former and for want of signing in the case of the latter.

3. The abolition of border controls must be regarded as a whole and the Member States still have an obligation to produce results as regards the abolition of all controls at internal borders on 31 December 1992. What purpose would Article 8a serve if individuals were still to be subject to one or other of the current controls or formalities? How would they perceive the change if it were limited to the legal environment of firms?

---

<sup>1</sup> Commission communications COM(88) 650 of December 1988 and COM(90) 552 of November 1990.

4. Accordingly, the aim of this communication is:

- to determine the interpretation which the Commission intends to place on Article 8a (see Annex I);
- to urge the Council, Parliament and the Member States to ensure that all appropriate measures are adopted by the deadlines set.

1. SCOPE OF ARTICLE 8a OF THE EEC TREATY

5. Given the diversity of controls and formalities applied at internal borders, the need to abolish all of those formalities and controls in order to ensure freedom of movement and the lack of consensus on the central question of individuals' freedom to cross frontiers, the Commission's position on the legal interpretation of Article 8a needs to be made known.

6. The legal interpretation set out in Annex I can be summarized as follows:

- In defining the internal market as "an area without internal frontiers", the Single European Act was intended to give a new dimension to the operation of the different freedoms of movement provided for in the Treaty. The Community internal market must operate under the same conditions as a national market: just as there are no border controls between regions in a single Member State, goods, services, capital and individuals must therefore be free to move, unimpeded by any border controls, between Member States;
- This "area without internal frontiers" cannot be realized in practice unless all goods, services, capital and individuals moving within that area are covered; in the particular case of individuals, any interpretation of Article 8a that confined its effects to Community nationals only would deprive that Article of any practical effectiveness;
- The measures to achieve this objective are clearly set out in a timetable which runs until 31 December 1992 and adherence to which is underpinned by specific provisions (Articles 8b and 100b);
- Article 8a imposes on the Community, and therefore also on the Member States, an obligation to produce results; that obligation can be met only if all controls at internal frontiers are abolished.

7. Article 8a therefore establishes a clear and simple objective that allows no margin of discretion. But the abolition of border controls does not deprive the competent authorities of their power to act throughout their territory and up to the frontier of that territory. However, as the crossing of the frontier may no longer give rise to controls, such intervention must form part of internal monitoring arrangements covering the whole of the territory. Powers to impose controls or penalties which were exercised only on the occasion of, or in connection with, the crossing of an internal frontier would, therefore, be contrary to Article 8a.

## 11. ABOLITION OF CONTROLS ON GOODS

8. The Commission's interpretation of Article 8a would not appear to pose any political problem of principle as regards its application to goods. The determination to give full effect to that Article has been clearly asserted in all Member States; the establishment of new monitoring arrangements in the field of indirect taxation permitting the abolition of the single administrative document in intra-Community trade testifies to that determination and is prompting a reorganization of all the other controls carried out by the customs or other authorities.

9. The only remaining task, therefore, is to ensure that the internal market functions satisfactorily; for that to happen, the Member States must adapt their control procedures without delay and the Council must adopt the final measures needed to reorganize certain controls at Community level:

- The Member States must enact the provisions of national law necessary to ensure that the frontier-free area functions smoothly. This requires firstly that the instruments adopted be transposed into national law and, in this regard, the Commission can only confirm its previous analyses concerning the transposition delays which specifically relate to the instruments connected with the abolition of internal frontiers. The adaptation of national systems also requires Member States to take unilateral measures to discontinue controls which are disproportionate to the objectives pursued; in this connection, the Commission will take all appropriate steps, on the basis of the Treaty or of secondary legislation, to challenge the controls which certain Member States are not prepared to abolish, although no additional harmonization measures appear necessary;
  
- It is for the Community Institutions to adopt as a matter of urgency the additional measures necessary to ensure that the frontier-free area functions smoothly; the Commission has still to put forward a limited number of proposals to that end. The Commission would refer in this regard to the work programme annexed to its communication of December 1991<sup>2</sup> (see Annex II); that communication will be updated to enable the Council to monitor closely itself each of the dossiers in question.

10. If the internal market is to function smoothly, new cooperation procedures must also be established between administrations. The Commission would refer here to its previous communications concerning telecommunications networks linking administrations and exchanges of officials between administrations; measures have been taken to ensure that these instruments are in place by the end of the year. It is necessary to establish a system whereby dangerous products imported from non-member countries are treated in such a way as not to expose the consumer to the consequences of different treatment of them in connection with the formalities for their release for free circulation.

---

<sup>2</sup> COM(91) 549 of 18 December 1991.

11. And so, Parliament, the Council, the Commission and the Member States all share responsibility for implementing Article 8a. But it is clear that the main responsibility lies with the Member States: it is they that must adapt their infrastructures; it is they that must bring their national control arrangements into line with Article 8a. Delays in the Community decision-making process are also a cause for concern where a number of sensitive matters are concerned (see Annex II).

12. It is for this reason that all the legal means available in the Treaty must be deployed to ensure that decisions are adopted, including:

- requests for Parliament to employ urgent procedures to ensure observance of the commitments made in the 1992 legislative programme;
- use of the Council's rules of procedure to request that special meetings of the Council (in its various formats) be convened;
- recourse to Article 169 to challenge controls considered to be disproportionate to the aims pursued;
- where appropriate, exceptional recourse to regulations to avoid delays in transposition.

### III. ABOLITION OF CONTROLS ON INDIVIDUALS

13. While the difficulties in doing away with controls on goods are chiefly due to the technical and administrative complexity of the measures to be taken, the difficulties still to be overcome as regards controls on individuals stem from the lack of consensus on the scope of Article 8a, reflecting the extreme sensitivity of the matter. Although the decision taken by the European Council in December 1988 to set up the Coordinators Group signalled the Member States' determination to make headway in this area too, it has not brought about the decisive progress expected by the European Council itself.

14. Thanks to the impetus given by the European Council in 1988, both at its meeting in Rhodes and through its decision to set up the Coordinators Group, efforts have been galvanized around the Palma programme, which the Coordinator's Group, in its report to the Maastricht European Council, considered to have been completed as regards those essential aspects sufficient for the abolition of internal controls. Moreover, a framework has been put in place in recent years for cooperation in the fight against terrorism, drugs and illegal immigration. The fact remains, however, that this progress has not been followed by the establishment of the instruments for giving practical effect to the results of this cooperation:

- the Dublin Convention determining the State responsible for examining applications for asylum has so far been ratified only by Denmark and Greece;
- the draft Convention on the crossing of external frontiers has not been signed because of the disagreement between the United Kingdom and Spain over the treatment of Gibraltar.

As the Member States have chosen to rely on intergovernmental instruments necessitating national ratification procedures, they and they alone are responsible for ensuring that those instruments enter into force by the end of the year.

15. The work undertaken in the intergovernmental framework creates a problem of coherence with that being carried out in the Community framework in so far as concerns the organisation of controls in the airports. While the Community work aims at the abolition of all the controls on goods on 31 December 1992, the draft convention on the external borders allows the continued existence of an ambiguity regarding the deadline for abolition of controls on persons travelling by aeroplane between two Member States. For the Commission, this ambiguity could not bring into question the scope of Article 8 A which imposes itself on the text of an intergovernmental convention that only draws consequences from the abolition of internal borders for the management of the external borders.

16. The European Council has, on several occasions, stressed its determination to ensure that Article 8a takes full effect. Most recently, in Maastricht, it restated the hope that Member States would find a solution as quickly as possible to the last problem still holding up the signing of the draft Convention on external frontiers; it urged them, as soon as the Convention was signed, to set ratification procedures in motion so that it could enter into force at the beginning of 1993. In addition, the European Council once again urged Member States to embark on the procedures for ratifying the Dublin Convention without further delay. The Commission fully endorses the stance taken by the European Council but would note that those commitments have not yet been put into practice.

However, over and above those commitments, the Commission calls on the European Council to make an unequivocal political declaration to the effect that the Member States will take the measures necessary to abolish controls at internal frontiers by 31 December 1992, in accordance with the obligations laid down in Article 8a.

#### CONCLUSIONS

17. Article 8a provides for the effective abolition by 31 December 1992 of all controls applied at internal frontiers. The Member States and the Community institutions are required to take all the measures necessary for achieving that objective; the Commission, as guardian of the Treaty, will have to ensure that this obligation is fulfilled and hereby declares that it is resolutely determined to use all the legal and political means at its disposal to ensure that the work programme stemming from Article 8a is carried out in full.

18. As far as movements of goods are concerned, responsibilities are shared between all the Community institutions and the Member States. It is the Commission's duty to see to the removal of any border control which, in the light of Article 30 and of secondary legislation, is already incompatible with the Treaty; it is for the Community institutions to complete the legislative process for the necessary back-up measures; and it is the responsibility of the Member States to speed up the rate of transposition.

19. As regards individuals, the Commission calls on the European Council to make an unequivocal political declaration to the effect that the Member States will take the measures necessary to abolish controls at internal frontiers by 31 December 1992, in accordance with the obligations laid down in Article 8a.

Moreover, it is for the European Council once again to impart the necessary momentum, in particular in order to secure entry into force of the Conventions still to be ratified so that the area without frontiers can operate satisfactorily, notably on the basis of common management of the external frontier as the necessary counterpart to the application of Article 8a. Any delay in implementing the Conventions would jeopardize Member States' fulfilment of their obligations under Article 8a.

20. In more general terms, fulfilment of the obligations deriving from Article 8a and the resulting change in the dimension of Community integration will, in the months ahead, call for the close involvement of policymakers at all levels in the Member States. The European Council must therefore give clear support to this objective in order to guarantee the political success of the Single European Act. Failure to do away with border controls would be seen, both by public opinion in the Community and by the world outside, as a failure for the Community itself at a time when the Maastricht Treaty should enable it to take a fresh step forward in its development.

COMMISSION POSITION  
ON THE INTERPRETATION OF ARTICLE 8a OF THE EEC TREATY

1. In its communication of 18 December 1991 (COM(91) 549), the Commission highlighted the many different checks and formalities at internal frontiers and hence the wide range of measures to be adopted. It stressed that all these checks and formalities must be abolished if Article 8a is to be fully effective since the continued existence of just one of them would undermine the political dimension of the objective laid down in that Article.

It is therefore necessary to clarify now the implications of Article 8a, by defining its scope and object.

A. The frontier-free area

2. The first task is to clarify the meaning of the concept of "internal market", which is the objective being pursued.

In the case-law established by the Court of Justice prior to the Single European Act, the common market was defined in very broad terms as involving "the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market" (Judgment in Case 15/81 Schul [1982] ECR 1409, ground 33). The Court thus equated the internal market with a national market.

The concept of an "internal market" is, in principle, the logical extension of a common market - the operation of the Community-wide market under conditions equivalent to those of a national market.



This approach is confirmed by the definition of the internal market in the second paragraph of Article 8a: "[it] shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty".

By referring to the four freedoms, Article 8a clearly defines the internal market as an extension of the common market. However, the first part of the definition introduced a new element and set a new objective for the Treaty - an area without internal frontiers; under the Single European Act, all obstacles to the operation of the common market arising from the existence of internal frontiers must be eliminated by 31 December 1992 at the latest.

In its White Paper on completing the internal market, the Commission drew a distinction between physical, technical and fiscal frontiers. This document will concentrate on physical frontiers.

3. If the Community is to become a genuine internal market and if this market is to operate under the same conditions as a national market, physical frontiers must be abolished. This means the abolition of all controls, formalities, procedures, checks, examinations, inspections, etc. (hereinafter called "controls") at internal frontiers, just as there are no border controls between regions in national markets.

This is a clear and straightforward objective. It imposes an obligation to produce results and leaves no margin of discretion. All internal border controls in the Community must be abolished, including those established under Community legislation and those carried out by Member States, whatever their form and whatever their justification.

Naturally, as in a national market, the abolition of controls at internal frontiers will not deprive the authorities of the right to exercise their powers over the whole of their territory. The existence of controls in an area close to an internal frontier may even be considered compatible with the internal market provided that they are carried out according to the same rules - in particular as regards their frequency, intensity and the penalties imposed - as those applied to controls carried out over the whole territory.

At all events, the crossing of an internal frontier will no longer in itself give rise to a control.

B. A frontier-free market for all goods

4. There can be no doubt that Article 8a covers all goods, irrespective of their origin or nature. The Community is based on a customs union (Article 9 et seq.), in which goods originating from third countries are treated in the same way as products originating in Member States once they have been released for free circulation in the Community.
5. This does not mean that there will be complete freedom of movement for all goods. As happens in a national market, the Community or, where appropriate, Member States may prohibit or restrict the placing of certain products on the internal market within the limits laid down in Article 36 EEC but the exercise of these powers may not involve controls at internal frontiers.

C. A frontier-free area for all persons

6. The phrase "free movement of ... persons" in Article 8a refers to all persons, whether or not they are economically active and irrespective of their nationality. The internal market could not operate under conditions equivalent to those in a national market if the movement of individuals within this market were hindered by controls at internal frontiers.

Of course, the free movement of persons in the common market must not be confused with the rights which flow directly from Articles 48 to 66, and in particular the taking-up of economic activities as self-employed or employed persons and hence the right of residence, and which, subject to the second paragraph of Article 59, apply only to nationals of Member States.

Article 8a is found in Part One of the EEC Treaty, entitled "Principles", as is Article 3(c), a general provision which applies not only to the persons referred to in Articles 48 to 66 but also to nationals of Member States who are not economically active and to nationals of non-member countries.

The Council accepted this approach as regards nationals of Member States who are not economically active by its recent adoption of Directive 90/364/EEC, which grants such persons the right of residence: the Directive's recitals contain specific references to Articles 3(c) and 8a. There is no objective legal reason to differentiate between nationals of Member States and nationals of non-member countries. The Court's Judgment in Demirel (Case 12/86 [1987] ECR 3719) confirms that the Community has the power to adopt legal acts concerning workers from non-member countries.

7. The final words of Article 8a - "in accordance with the provisions of this Treaty" - do not lead to any other conclusion. This phrase merely acts as a complement to the verb "ensure", laying down the conditions under which the objective of Article 8a should be achieved. In other words, it makes it clear that Article 8a does not in itself confer new powers on the Community: the desired objective should be pursued in accordance with the rules of the Treaty and through the powers conferred by other Articles of it, including some which are specifically mentioned in the first paragraph of Article 8a.

Nor can this interpretation be contradicted by referring to the General Declaration on Articles 13 to 19 of the Single European Act, which states that "Nothing in these provisions [relating to the internal market] shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques".

A declaration can never deprive an article of the Treaty of its practical effectiveness. In any case, the Declaration in question does not give rise to a different interpretation from Article 8a. It refers to the distribution of powers between the Community and the Member States, and that cannot affect the definition of the objective to be achieved. The abolition of controls on goods and persons at internal frontiers will certainly have some implications for the matters referred to in the Declaration. But the sole purpose of the Declaration is to leave open the question of which powers must be exercised in order to achieve the objective laid down in Article 8a.

Finally, although it has not yet been ratified, the text of the Treaty on European Union does not give rise to any other interpretation. Although Member States will now regard certain areas, such as immigration policy, as being of common interest - without prejudice to the Community's powers - and although the Council can adopt common positions and Joint measures and can draw up agreements, this does not alter the conclusion that the objective set by Article 8a is a frontier-free area for all persons.

8. Moreover, even the argument that Article 8a applies only to the persons referred to in Articles 48 to 66 would lead to the same conclusion.

The complete abolition of physical frontiers for individuals exercising their right to freedom of movement necessarily implies the complete abolition of controls on all individuals who cross internal borders, irrespective of their nationality. Any other interpretation of the objective of abolishing physical frontiers would render Article 8a ineffective. If, after 31 December 1992, Member States are still able to check whether a person wishing to cross a border is a national of a Member State and whether he or she constitutes a danger to public order, public security or public health, nothing will have changed and Article 8a will be a dead letter.

D. Free movement of services and capital

9. It goes almost without saying that the frontier-free area must also cover services and capital. Although Community legislation still requires or allows some controls on the observance of Community or national law in respect of the provision of certain services (e.g. transport) or the holding of capital, this does not alter the fact that these controls may not be carried out at internal frontiers. Not only would such controls inevitably constitute barriers to the free movement of persons and goods, they would also run counter to the objective of Article 8a, the second paragraph of which makes specific reference to these freedoms.

E. Conclusion

10. The Single European Act introduced into the Treaty the concept of an internal market and thereby set the Community a new objective - an area without internal frontiers. Article 8a states clearly that this objective must be achieved by the end of 1992.

The completion of the internal market requires the abolition of all physical frontiers between Member States so as to ensure the free movement of goods, persons, services and capital under the terms of Article 8a. This objective will not be achieved if some goods or persons are still subject to controls when they cross internal frontiers. If, for whatever reason, some controls do remain after 1 January 1993, the Community and the Member States will have failed to fulfil their obligation to produce the results laid down in the Single European Act.

**ABOLITION OF PHYSICAL CONTROLS  
AT FRONTIERS**

**WORK PROGRAMME**

**Free movement of persons**

- Ratification of the Dublin Convention to allow its coming into force at 1 January 1993.
- Conclusion, ratification and implementation of the convention on the external frontiers for 1 January 1993

**Free movement of goods**

Area	Proposal	Parliament	Council
<b>A. ABOLITION OF FISCAL CONTROLS</b>			
<u>VAT</u>			
- accompanying measures : . gold . transport of passengers . second hand goods	May 92 May 92 COM (88)846	June 92 June 92 opinion given	September 92 September 92 June 92
<b>B. ABOLITION OF VETERINARY CONTROLS</b>			
- "all embracing" directive	COM (89)500 COM (89)658 COM (88)836	opinion given	June 92
- accompanying animals	June 92	July 92	September 92
- production and marketing of dairy products	COM (89)667	opinion given	June 92
- milk and milk products	COM (89)672	opinion given	May 92
<b>C. ABOLITION OF CONTROLS LINKED TO THE COMMON AGRICULTURAL POLICY</b>			
- abolition of compensatory amounts	May 92	June 92	September 92
- adjustment of the common organisation of the market in cereals, milk and sugar	Commission decision : September 92		
- adjustment of the controls linked to the Act of Accession	May 92	June 92	September 92

Area	Proposal	Parliament	Council
<b>D. ABOLITION OF HEALTH CONTROLS</b>			
- control on the production and the marketing of drug precursors	COM (90)597	Opinion given	June 92
- medical devices	COM (91)287	May 92	July 92
<b>E. ABOLITION OF ECONOMIC AND COMMERCIAL CONTROLS</b>			
- organisation of the market for bananas	July 92	September 92	November 92
- control of means on transport registered in third countries	COM (92)105	June 92	September 92
<b>F. ABOLITION OF SECURITY CONTROLS</b>			
- controls on the export of strategic goods	May 92	July 92	October 92
- control, marketing and mutual recognition of agreements on explosives	COM (92)123	July 92	October 92
- radio-active nuclear materials	May 92 <sup>1</sup>	July 92	October 92
<b>G. ABOLITION OF ENVIRONMENTAL CONTROLS</b>			
- shipment of waste	COM (90)415	Opinion given	June 92
<b>H. ABOLITION OF CONTROL ON CULTURAL GOODS</b>			
- restitution of national treasures and controls on exportation	COM (91)447 COM (91)446	June 92	June 92

<sup>1</sup> Subject to the results of the work in progress