



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.12.2007
COM(2007) 796 final

2007/0277 (ACC)

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 3286/94 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

(presented by the Commission)

EXPLANATORY MEMORANDUM

Council Regulation (EC) No 3286/1994 ("Trade Barrier Regulation") is one of the trade policy instruments available to monitor the respect by our trading partners of obligations arising from international trade agreements with the objective of removing barriers to trade. To this end, the Trade Barrier Regulation provides to Community enterprises, "Community industry" or their associations the right to lodge a complaint with the Commission on obstacles to trade. When admissible, the complaint triggers an investigation into the existence of the alleged obstacles and of adverse trade effects or injury to "Community Industry". If the allegations are confirmed and an amicable solution cannot be reached, the procedure may ultimately result in the Community deciding to enter into formal dispute settlement procedures under an international agreement with the trading partner.

The conditions to bring a complaint under the Trade Barrier Regulation differ for Community enterprises and Community industry, which opens two tracks.

The first is for the "Community Industry", i.e. producers that account for a major proportion of total Community production of identical, similar or directly competing goods or services and who have been affected by the trade barrier. This track concerns trade barriers causing injury (or threat thereof) on the Community market, and may be brought against trade practice in respect of which any international agreement between the Community and the third country establishes trade rules and a right of action. This track is not affected by this proposal.

The second is open to any Community enterprise. It can be used for obstacles causing adverse trade effects on the market of the third country, but Article 4(1) limits the admissibility of complaint to trade practice in respect of which a multilateral or a plurilateral agreement between the Community and the third country establishes trade rules and a right of action. This means in practice that complaints alleging violations of bilateral agreements by a third country are only admissible to the extent that they also allege a violation of multilateral rules, in particular those of the WTO.

In 2005, the European Commission ordered a study on the use of the Trade Barrier Regulation in its first ten years and on improvements that could be brought to this trade policy instrument. One of the recommendations was to remove the prohibition for a Community enterprise to rely exclusively on bilateral agreements to bring a complaint under the Trade Barrier Regulation. This recommendation was endorsed by the European Commission in its Communication *Global Europe: a stronger partnership to deliver market access for European exporters*¹ as one of the proposals to tackle barriers to trade and thus improve market access for our exporters and growth and jobs in the Community.

This prohibition effectively excludes the possibility to rely on bilateral agreements to act against violations of so-called "WTO plus obligations", in particular those concerning non-tariff barriers not already regulated by WTO rules.

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Global Europe – A stronger partnership to deliver market access for European exporters, COM(2007) 183 final, 18.4.2007.

This restriction can be explained by historical reasons. Before the trade agreement concluded with Mexico in 2000, the mechanism to settle disputes under the bilateral agreements was the traditional diplomatic approach, which very much depended on the capacity of the parties to agree on the solution and therefore lacked efficiency in enforcing trade rules. These historical reasons do not stand anymore. Since the enactment of the Trade Barrier Regulation, the Community has indeed entered into a number of bilateral agreements which set out substantive rules applicable to trade between the Community and the third country, and include effective and binding dispute settlement mechanisms modelled out of the WTO dispute settlement mechanism to enforce those rules². The Community is also currently engaged in the negotiations of bilateral trade agreements, whose objective is to define substantive obligations to offer enhanced market access opportunities, and to ensure observance of these obligations with similar binding dispute settlement mechanisms³.

In light of the development of bilateral agreements containing substantive trade rules and "judicial-type" dispute settlement mechanisms, there is no justification anymore to require Community enterprises to include a WTO claim in their TBR complaints in order to be able to rely on obligations deriving from bilateral agreements against trade barriers causing adverse trade effects.

² See *for e.g.*, Decision No 2/2000 of the EC-Mexico Joint Council on liberalisation of tariff and non-tariff barriers to trade in goods (OJ L 157, 30.6.2000, p. 10); Decision No 2/2001 of the EU-Mexico Joint Council on liberalisation of trade in services (OJ L 70, 12.3.2001, p. 7); Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (OJ L 352, 30.12.2002, p. 3); Association agreements with the EuroMed countries to be completed by a judicial-type Dispute Settlement Mechanism, currently under negotiations.

³ Without being exhaustive, negotiations are ongoing with ACP countries, South Korea, India, countries of the ASEAN, the Gulf Cooperation Council, Mercosur, the Andean Community, Central America.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission⁴,

Whereas:

- (1) Regulation (EC) No 3286/94⁵ provides to any Community enterprise procedural means to request that the Commission investigates obstacles to trade adopted or maintained by a third country, when those obstacles have an effect on the market of that third country and adverse trade effects on the Community enterprise.
- (2) However, pursuant to Article 4(1) of Regulation (EC) No 3286/94, a complaint by a Community enterprise is admissible only if the alleged obstacle to trade is the subject of a right of action established under international trade rules laid down in a multilateral or plurilateral trade agreement. This means that complaints alleging violations of bilateral obligations by a third country need to refer also to violations of multilateral or plurilateral rules in order to be admissible.
- (3) Since the enactment of Regulation (EC) No 3286/94, the Community has concluded a number of bilateral agreements which contain substantive rules on trade between the Community and third countries that go significantly beyond WTO rules. Furthermore these agreements include efficient and binding dispute settlement mechanisms to adjudicate disputes on those "WTO plus" obligations.
- (4) Reliance by Community enterprises on bilateral agreements to bring complaints under Regulation (EC) No 3286/94 would contribute to monitoring the respect of the

⁴ OJ C , , p. .

⁵ 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.

obligations contained in those agreements and to tackling barriers to trade, thus improving market access for exporters and growth and jobs in the Community⁶.

- (5) In light of these developments, and in order to reduce the administrative burden on Community enterprises, the right of those enterprises to bring complaints on obstacles to trade should be extended to include alleged obstacles to trade, which are solely the subject of a right of action established under international trade rules laid down in a bilateral trade agreement,

HAS ADOPTED THIS REGULATION:

Article 1

In Article 4 of Regulation (EC) No 3286/94, paragraph 1 is replaced by the following:

'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.'

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels,

For the Council
The President

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Global Europe – A stronger partnership to deliver market access for European exporters, COM(2007) 183 final, 18.4.2007.