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Délégué : Emanuele Gazzo
chef : Ferdinando Riccardi
eurs en chef adjoints :
cques Loutsch et Michel Theys

1210 BRUXELLES-10, Bld Saint-Lazare - Bte 13
Tél. : 219.02.56 - Télex 21108 - Fax : 217.65.97

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BULLETIN
QUOTIDIEN EUROPE

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THE LIFTING OF BORDER CONTROLS

On Wednesday 6 May, on the initiative of its vice-president Martin Bangemann, the European Commission approved a "Communication on the lifting of internal border controls" in the Community on 1st January 1993 (see EUROPE of 7 May, pp.7/8, and 9 May, pp.11/12). Stating its interpretation of Article 8A, this document was addressed to the Council (who received it on 11 May, President Delors having presented it himself) and the European Parliament. Given the importance of this stance and the political debates it will arouse in the coming weeks (the United Kingdom in particular being totally opposed to the lifting of border controls). EUROPE is publishing it in full in EUROPE/Documents.

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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.

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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.

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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.

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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.