COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.05.2001
COM(2001) 266 final

Proposal for a

COUNCIL REGULATION

supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92

(presented by the Commission)

EXPLANATORY MEMORANDUM

On 14 July 1992 the Council adopted Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

Under the simplified procedure established by Article 17 of Regulation (EEC) No 2081/92, the German authorities notified the name "Bayerisches Bier" for registration as a protected geographical origin within the statutory time limit. The Commission examined the request for registration for conformity with Articles 2 and 4 and concluded that the name met the criteria of the Regulation and should therefore be protected. In addition, the name was already protected by bilateral agreements between Germany and other Member States (France, Spain, Italy and Greece) and had demonstrated a reputation.

Article 7 of Regulation (EEC) No 2081/92 provides for a detailed objection procedure to take account of acquired rights or other relevant factors, but this does not apply under the procedure laid down in the above Article 17. Any objections to registration of a name must therefore be made by Member States to the Regulatory Committee. The proposal to register the name "Bayerisches Bier" has provoked various comments on the part of several Member States:

Those comments refer to:

– the existence of trade marks also bearing the term "Bayerisches Bier" or a translation, or

– the fact that the term "Bayerisches" or its translation is deemed to have become generic.

Bearing the above in mind, the Commission has carried out a thorough analysis of those questions and possible solutions within the provisions of Community legislation.

Thus, Article 13 of that Regulation stipulates that registered names are protected against any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated. That means that after registration and the transitional period laid down in Article 13(2) the name concerned can no longer be used by third parties not forming part of the protected geographical indication.

However, Article 14 of the Regulation provides for a series of rules to take account of the fact that trade marks may, despite falling within the scope of Article 13, continue to be used provided they satisfy certain conditions precisely defined in paragraph 2 of that Article. It should be noted that Commission Regulation (EC) No 1107/96 explicitly refers in its seventh recital to Article 14(2) and therefore to the possibility of a brand and a geographical indication coexisting under certain conditions. Thus the principle is well established in the Council Regulation and repeated in the Commission Regulation by which the first names were registered under the Article 17 procedure.

However, because certain Member States insisted on retaining a reference in the present draft to Article 14(2) for certain brands which could *a priori* fall within the scope of that provision, the recitals cite the example of certain brands which could be in such a situation, without prejudice to what a national judge would rule in application of the Community provision. A formal examination of those brands was undertaken, covering dates of lodging and registration and the conditions required by Council Directive 89/104/EEC to approximate the

laws of the Member States relating to trade marks, and of a series of proofs furnished by the holders of those marks.

Article 3 lays down a definition and precise criteria for the decision on the generic nature of a name. According to that Article, the assessment must be based on the Community situation, i.e. the situation in the Member States. Since generic names cannot be registered this is an essential element of the Regulation which must be subject to detailed assessment when the question is raised with regard to a name. The Danish, Finnish and Swedish authorities informed the Commission that the term Bayerisches or its translations into the corresponding languages had become generic in their languages and territories.

Therefore, all the Member States were asked to supply additional information as to the possible generic nature of that name and/or its translations so that a decision could be arrived at taking account of the Community situation. After examining the replies it was clear that the name "Bayerisches" had not become a common term on Community territory. It is true that certain evidence indicated that the translation of the term into Danish was becoming a common name in Danish, but only in that language since the same evidence was not found in the other languages, neither in Swedish nor in Finnish, despite the information supplied. In view of that fact and taking account of Article 3, the generic nature of the name "Bayerisches Bier" could not be demonstrated. The fact that it may have become generic in one Member State is not sufficient to conclude that it is generic within the meaning of Article 3.

Therefore, a draft Commission Regulation on the registration of the name "Bayerisches Bier" was presented to the Regulatory Committee on Geographical Indications and Designations of Origin on 30 March 2001.

The result of the vote was: 58 votes for, 10 against and 19 abstentions, which meant that no opinion was delivered.

The votes were as follows:

For: Belgium, Germany, Greece, Spain, Italy, Luxembourg, Netherlands, United Kingdom, Ireland.

Against: Denmark, Sweden, Finland.

Abstention : France, Austria, Portugal.

Reasons for the votes against and abstentions:

(a) The name "Bayerisches" with its translations into Danish, Swedish and Finnish has become generic in those languages. Consequently, either "Bayerisches" should not be registered or a solution would have to be found so that the term and/or its translations could continue to be used despite registration (Denmark, Sweden, Finland).

(b) Recital (5) on the question of generic nature does not solve the problem, neither does it take account of the generic nature in Swedish and Finnish (Denmark, Sweden, Finland).

(c) Recital (4), which mentions certain marks formally satisfying the conditions of Article 14(2) by way of example, is unnecessary and it is for a national judge, not the Commission, to assess it (France, Portugal).

(d) Registration of “Bayerisches” must not prevent the term from being used for a type of beer (Austria).

The Commission regards those reasons as unjustified on account of the following:

(a) Article 3 states that the generic nature has to be assessed on the basis of the Community situation, i.e. the situation in the Member States. The fact that the name in question (and/or its translations) might have become generic in a single Member State is not sufficient to demonstrate and conclude that it has become generic within the meaning of the Regulation.

(b) Evidence of a possible generic nature was supplied and considered proven within the definition in Article 3 solely in Danish, and not in Swedish or Finnish. In addition, the legal framework of the Regulation does not allow, when the product is marketed, a generic term to be used in one Member State when the same term has been registered under the Regulation and therefore reserved solely for certain producers satisfying the technical specifications. That is only permitted when the term is a trade mark: in that case, coexistence is possible under certain conditions. Certain marks notified by way of example are in such a situation. In contrast, other notified marks were not accepted because the conditions for coexistence had not been satisfied. The mark must have been registered in good faith before the date on which the application for registration of the geographical indication was made and it must not satisfy the grounds for revocation in Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks. In addition, the fact that the name is generic in one Member State may not prevent its being registered if it conforms to the criteria of the Regulation, as is the case here.

(c) It is without doubt the national judge who must assess, in disputes, the possible application of Article 14(2) to a given trade mark case by case and taking all factors into account. However, by way of indication, the Commission may provide more justification, clarification and explanation for a certain situation at the request of one or more Member States which have supplied the necessary factors, as was the case with the Netherlands, Denmark or Sweden. In the particular case of Sweden, the delegation initially requested the inclusion of certain Swedish marks in recital (4); one was finally deemed to satisfy *a priori* the conditions of Article 14(2), but the delegation then asked for the Swedish mark not to be cited in the text and it was therefore removed. Article 14(2) applies despite the fact that a mark is not included in that recital, which is merely indicative and has no legal effect.

(d) Article 13 protection applies in cases where the registered name is translated, but also where the expressions “style”, “type”, “method”, “as produced in”, “imitation” or similar are used.

Since no opinion was delivered on the draft Commission Regulation, the Commission, pursuant to the fourth paragraph of Article 5 of Council Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, hereby presents this proposal for a Regulation to the Council and informs the Parliament thereof.

This proposal has no impact on the Community budget.

Proposal for a

COUNCIL REGULATION

supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 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,

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[1], as last amended by Commission Regulation (EC) No 1068/97[2], and in particular Article 17(2) thereof,

Whereas:

(1) Additional information was requested for a name notified by Germany under Article 17 of Regulation (EEC) No 2081/92 in order to ensure that it complied with Articles 2 and 4 of that Regulation. That additional information shows that the name complies with the said Articles. It should therefore be registered and added to the Annex to Commission Regulation (EC) No 1107/96[3], as last amended by Regulation (EC) No 813/2000[4].

(2) Following notification of the application by the German authorities to register the name "Bayerisches Bier" as a protected geographical indication, the Dutch and Danish authorities informed the Commission of the existence of trade marks used for beer which include that name.

(3) The information provided confirms the existence of the name "Bavaria" as a valid trade mark. In view of the facts and information available, it was, however, considered that registration of the name "Bayerisches Bier" was not liable to mislead the consumer as to the true identity of the product. Consequently, the geographical indication "Bayerisches Bier" and the trade mark "Bavaria" are not in the situation referred to in Article 14(3) of Regulation (EEC) No 2081/92.

(4) Since they are trade marks strictly meeting the conditions laid down in Article 14(2) of the above Regulation, it would appear that the use of trade marks such as, for example, the Dutch trade mark "Bavaria" and the Danish trade mark "Høker Bajer" may

---

1 OJ L 208, 24.7.1992, p. 1.
2 OJ L 156, 13.6.1997, p. 10.
3 OJ L 148, 21.6.1996, p. 1.
4 OJ L 100, 20.4.2000, p. 5.

continue notwithstanding the registration of the geographical indication “Bayerisches Bier”, provided that the public is not misled as to the geographical origin of the products.

(5) In accordance with Article 3 of Regulation (EEC) No 2081/92, the generic nature of a name hindering its registration must be assessed with regard to the Community situation as a whole. In this particular case, despite evidence to the effect that the terms “bajersk” and “bajer”, Danish translations of the name “Bayerisches”, are becoming synonyms for the term “beer” and hence a common name, the generic nature of the name “Bayerisches” or its translations in other languages and Member States has not been demonstrated.

(6) The Committee established under Article 15 of Regulation (EEC) No 2081/92 has not delivered an opinion within the time limit set by its chairman.

HAS ADOPTED THIS REGULATION:

Article 1

The name in the Annex to this Regulation is added to the Annex to Regulation (EC) No 1107/96.

Article 2

This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

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

Done at Brussels,

For the Council
The President

ANNEX

PRODUCTS LISTED IN ANNEX I TO REGULATION (EEC) No 2081/92

Beer

GERMANY

Bayerisches Bier (PGI)