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*Committee on Legal Affairs
The Chair*

20.10.2010

President Buzek

Subject: Opinion on the legal basis of the proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control (COM(2004)0466 final – C7-0047/2010 – 2004/0148(COD))

Dear President Buzek,

Following the entry into force of the Lisbon Treaty, the above-mentioned proposal for a regulation was submitted to the Parliament under the ordinary legislative procedure. The proposal is now in its first reading in the Committee on International Trade, where the rapporteur is Mr Niccolò Rinaldi.

At its meeting of 16 June 2010, the Conference of Presidents asked the Committee on Legal Affairs to give its opinion on the appropriate legal basis for the proposal for a regulation, which had been brought to the attention of the Conference by the Chair of the Committee on International Trade, Mr Vital Moreira.

The situation was that whereas the Commission favoured Article 207 TFEU, under which the proposed regulation would be adopted under the ordinary legislative procedure and the Council would decide by a qualified majority, the Council Legal Service considered that the proper legal basis was Article 1(2) of Protocol No 10 on Cyprus to the Treaty of Accession of April 2003¹, which does not provide for any involvement of the European Parliament.

The Legal Affairs Committee asked Parliament's Legal Service to produce an advice on this

¹ Opinion of the Council Legal Service of 25 August 2004, Doc. No 11278/04.

question and it also came out in favour of Article 1(2) of Protocol No 10¹.

I. Background

After gaining independence from Britain in 1960, the joint Republic of Cyprus (with a population made up of approximately 80% Greek Cypriots and 20% Turkish Cypriots) broke down in 1963. In 1974, in response to a Greek Cypriot coup aimed at uniting the island with Greece, Turkey staged a military invasion and eventually occupied the northern 37% of Cyprus. Since then, Cyprus has been *de facto* divided into two parts.

On 24 April 2004, the two communities held separate referendums on a United Nations proposal known as the Annan Plan for Cyprus², which aimed at establishing a unified federal government for all of Cyprus. Since the plan's implementation was dependent on the approval by both communities, a "No" vote in the Greek Cypriot referendum led to its rejection.

On 1 May 2004, the Republic of Cyprus as a whole became a member of the European Union in accordance with the Treaty of Accession (2003). Protocol No 10 to the Accession Treaty (hereinafter "Protocol No 10") provides "for the suspension of the application of the *acquis* in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control". This suspension "shall be lifted in the event of a solution to the Cyprus problem", with the Council authorised to effect the withdrawal by a unanimous vote on the basis of a proposal from the Commission.

On 26 April 2004, the Council expressed its determination to encourage "the economic development of the Turkish Cypriot Community". Article 3 of Protocol No 10 aligns with this policy in providing that "nothing in this Protocol shall preclude measures with a view to promoting the economic development of the area".

On 29 April 2004, the Council adopted Council Regulation (EC) No 866/2004³ aimed, *inter alia*, at facilitating trade across the "Green Line" separating the two communities by a unanimous vote. Afterwards, the Commission adopted further implementing legislation in favour of the movement of goods across the Green Line.

However, according to successive annual reports from the Commission on the implementation of Council Regulation (EC) No 866/2004 and the situation resulting from its application⁴, even though the total value of goods crossing the Green Line has steadily increased, obstacles to Green Line trade still remain and, owing to the restricted scope of the Regulation (EC) No 866/2004, the scale of this trade is still limited. Moreover, goods crossing the Green Line are rarely subject to further intra-Community transactions with other Member States.

On 7 July 2004, taking up the invitation of both the Council⁵ and the United Nations⁶ and

¹ Opinion of Parliament's Legal Service of 14 October 2010, SJ - 0451/10.

² Basis for a comprehensive settlement of the Cyprus problem, 26 February 2003.

³ Regulation (EC) No 866/2004 on a regime under Article 2 of Protocol 10 to the Act of Accession, *OJL* 161, 30.4.2004, p. 128 (amended on 16 June 2008).

⁴ The most recent annual report dates from 14 September 2009: COM(2009)478.

⁵ Council statement of 26 April 2004.

⁶ Report of the Secretary-General on his mission of good offices in Cyprus of 28 May 2004, UN Doc S/2004/437.

with the intention of putting an end to the isolation of the Turkish Cypriot Community, the Commission presented the proposal for a regulation in order to facilitate trade between the northern part of Cyprus and the EU Customs Territory. The proposal would confer the status of "Community goods"¹ on goods originating in the Turkish Cypriot Area. Moreover, it would provide for a preferential tax regime taking the form of "a tariff quota system [...] established with a view to encouraging economic development while avoiding the creation of artificial trade patterns or facilitating fraud".

Direct Trade from ports in the northern part of Cyprus to European Union Member States already exists today, although without EU trade preferences. However, given the policy of non-recognition of the so-called "Turkish Republic of Northern Cyprus"² (hereinafter "TRNC"), trade is *de facto* impossible where the introduction of goods into the EU Customs territory requires the presentation of a document established by a recognised third-country authority; TRNC authority documents are not accepted by the EU Member States. Articles 2, 5 and 6 of the proposed regulation are designed to solve this problem by requiring, *inter alia*, certification documents to be issued by a body duly authorised to do so by the Commission.

II. Legal bases

The proposed legal bases are Article 207 TFEU, as recommended by the Commission, and Article 1(2) of Protocol No 10, as advocated by both the Council's and Parliament's Legal Service.

Option (a)

Article 207 TFEU

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open

¹ [Within the meaning of Articles 23 and 24 of Council Regulation \(EEC\) No 2913/92.](#)

² [Implemented, for instance, by the United Nations and the Council of Europe and recognised by the case-law of the Court of Justice \(Case C-432/92 *Anastasiou* \("*Anastasiou I*"\) \[1994\] ECR I-3087 and Case C-140/02 *Anastasiou* \("*Anastasiou II*"\) \[2003\] ECR I-10635\).](#)

the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

(a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;

(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.

6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

Option (b)

The Legal Services of both the Council and Parliament came out in favour of Article 1(2) of Protocol No 10¹, which is reproduced *in extenso* for the sake of convenience:

Protocol No 10 to the 2003 Treaty of Accession²

REAFFIRMING their commitment to a comprehensive settlement of the Cyprus problem, consistent with relevant United Nations Security Council Resolutions, and their strong support for the efforts of the United Nations Secretary General to that end,

CONSIDERING that such a comprehensive settlement to the Cyprus problem has not yet been

¹ Opinion of the Council Legal Service of 25 August 2004, Doc. No 11278/04

² OJ L 236, 23/09/2003, p. 955.

reached,

CONSIDERING that it is, therefore, necessary to provide for the suspension of the application of the acquis in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control,

CONSIDERING that, in the event of a solution to the Cyprus problem this suspension shall be lifted,

CONSIDERING that the European Union is ready to accommodate the terms of such a settlement in line with the principles on which the EU is founded,

CONSIDERING that it is necessary to provide for the terms under which the relevant provisions of EU law will apply to the line between the abovementioned areas and both those areas in which the Government of the Republic of Cyprus exercises effective control and the Eastern Sovereign Base Area of the United Kingdom of Great Britain and Northern Ireland,

DESIRING that the accession of Cyprus to the European Union shall benefit all Cypriot citizens and promote civil peace and reconciliation,

CONSIDERING, therefore, that nothing in this Protocol shall preclude measures with this end in view,

CONSIDERING that such measures shall not affect the application of the acquis under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus,

HAVE AGREED UPON THE FOLLOWING PROVISIONS:

ARTICLE 1

1. The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control.

2. The Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension referred to in paragraph 1.

ARTICLE 2

1. The Council, acting unanimously on the basis of a proposal from the Commission, shall define the terms under which the provisions of EU law shall apply to the line between those areas referred to in Article 1 and the areas in which the Government of the Republic of Cyprus exercises effective control.

2. The boundary between the Eastern Sovereign Base Area and those areas referred to in Article 1 shall be treated as part of the external borders of the Sovereign Base Areas for the purpose of Part IV of the Annex to the Protocol on the Sovereign Base Areas of the United Kingdom of Great Britain and Northern Ireland in Cyprus for the duration of the suspension of the application of the acquis according to Article 1.

ARTICLE 3

1. *Nothing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to in Article 1.*
2. *Such measures shall not affect the application of the *acquis* under the conditions set out in the Accession Treaty in any other part of the Republic of Cyprus.*

ARTICLE 4

In the event of a settlement, the Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the adaptations to the terms concerning the accession of Cyprus to the European Union with regard to the Turkish Cypriot Community.

III. Analysis of the legal bases proposed

According to the Court of Justice, "the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure"¹.

The proposal for a regulation is intended to facilitate direct trade between the Turkish Cypriot area and the rest of the European Union. It purports to do this, *inter alia*, by creating the conditions under which trade of goods can take place. In addition, it would establish a preferential tax regime taking the form of a tariff quota system in order to promote the economic development of the area.

Article 207 is located in Part V of the TFEU which deals with "External Action by the Union". More specifically, it appears in Title II, "Common Commercial Policy". Recourse to Article 207 implies that the proposed regulation is aimed at regulating trade between the Member States and a third country. But it must be recalled in this context that the whole of the island of Cyprus has been part of the European Union since 1 May 2004 and that a strict policy of non-recognition of the so-called "Turkish Republic of Northern Cyprus" has been implemented by the United Nations and Council of Europe and recognised in the case-law of the Court of Justice². This policy has been rigorously endorsed by the Member States.

The Commission justifies the choice of Article 207 TFEU via Article 3 of Protocol No 10. The Commission characterises Article 3 as a derogating provision that creates an exception to Article 1 of the Protocol, thereby allowing "special measures" to be adopted to promote the Turkish Cypriot economy without the need to withdraw the suspension of the *acquis* in that area. Consequently, the Commission considers that Article 207 TFEU can be used as the legal basis for the proposed regulation as such a "special measure".

One problem with this is that, according to the case-law of the Court of Justice, derogations have to be strictly interpreted and Article 3 of the Protocol refers to measures with a view to

¹ See, most recently, the judgment of 8 September 2009 in Case C-411/06 *Commission v. Parliament and Council*, not yet reported in the ECR, at para. 45.

² See the cases cited in n.8.

"promoting the economic development" of the areas referred to in Article 1. Even though the Commission's proposal provides for a preferential tax regime in the form of a tariff quota system, it can be argued that this does not constitute direct promotion of economic development, but rather a partial lifting of the suspension of the *acquis* or a method of avoiding the consequences of that suspension. On the basis of this argument were accepted, the legal basis proposed by the Commission has to be regarded as unlawful. For its part, however, the Commission argues that the proposal does not aim at withdrawing the suspension of the *acquis*, but instead at establishing a preferential tax regime for certain goods through a tariff quota system which is different from the general principle of free movement of goods incorporated in the *acquis*. In fact, it maintains that this is akin to the preferential regimes granted to developing third countries.

The Commission further argues that the scope of the proposal is quite narrow since it does not grant the benefit of the preferential tax regime to every kind of goods. Indeed, many goods are excluded from the application of this regime. Moreover, Article 7 and Recital 5 of the proposed regulation provide for temporary or permanent withdrawal in cases where fraud or other irregularities are suspected or established. The Commission therefore considers that it has been very cautious in drafting the proposal and that the draft regulation should not be regarded as effecting a partial reinstatement of the *acquis*.

The Council's Legal Service, for its part, considers that Article 3 of the Protocol is properly construed as referring to and elaborating on measures taken under Articles 1 and 2. It argues that Article 3 clarifies the scope of the Council's actions under Protocol No 10. Council Regulation (EC) No 866/2004¹, a precursor following the same line of policy pursued by the current proposal, provides a clear precedent for this interpretation. That regulation is based on Article 2 of Protocol No 10 and is expressly justified in its recitals by reference to Article 3².

The Council's Legal Service further argues that since the proposed regulation sets out to treat Northern Cyprus, as far as possible, as part of the Customs Union, its implementation will amount in substance to a partial re-instatement of the *acquis* as regards measures prohibiting customs duties and quantitative restrictions on the import of goods into the Member States.

The question is, therefore, whether or not the withdrawal of the suspension of the *acquis* for which provision is made in Article 1(2) of Protocol No 10 must be absolute. In light of the politically sensitive nature of such an action, the Council argues that the Member States intended Protocol No 10 to be a mechanism for the gradual integration of Turkish Cyprus.

As regards the Commission's claims that Article 1 of Protocol No 10 should be read together with Recital 4, which provides that "in the event of a solution to the Cyprus problem this suspension shall be lifted", it is contended that it would be contradictory to maintain that the suspension must be lifted in that event and yet require the Council to vote unanimously in order to do so. The Council Legal Service considers that it would be inappropriate to read

¹ Cited in n.3.

² See recital 8: "Article 3 of Protocol No 10 explicitly states that measures promoting economic development in the abovementioned areas are not precluded by the suspension of the *acquis*. This regulation is intended to facilitate trade and other links between the abovementioned areas and those areas in which the Government of the Republic of Cyprus exercises effective control, whilst ensuring that appropriate standards of protection are maintained as set out above."

Article 1 as being designed to be applied only in the event of a solution to the Cyprus problem. Again, it argues that a gradual withdrawal of the suspension is possible under Article 1.

Lastly, the Council Legal Service draws attention to the procedural consequences of the choice of legal basis. Given that access to the common market is the core incentive for accession States, to construe Article 3 as an exception to Article 1 would leave Article 1 devoid of almost any substance. If the proposal for a regulation were to be adopted on the basis of Article 207 TFEU, this would result in qualified majority voting in the Council whereas Article 1(2) of Protocol No 10 requires a unanimous vote. Such a construction of Article 3 would be tantamount to a circumvention of the safeguard of unanimity laid down in Protocol No 10 as regards the regulation of trade between the Turkish Cypriot area and the Member States of the European Union.

Parliament's Legal Service reached the same conclusion of the Council arguing that Article 207(2) TFEU is not the appropriate legal basis on the ground that the common commercial policy falls under Part Five of the TFEU whose title is "External action of the Union". Measures adopted on the basis of the Union's common commercial policy relate to the Union's external action. Using that article would imply that *de facto* the line separating the territory of Cyprus would be tantamount to an external border of the Union.

The Legal Service considered that Article 1(2) of the Protocol can be considered the appropriate legal basis for the proposal. The proposal endeavours to achieve effectively the same result as a partial withdrawal of the suspension of the *acquis*. Such a partial withdrawal can only be decided by the Council on the basis of Article 1(2) of Protocol No 10. It further argues that, according to Article 3 of the Protocol "*[n]othing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to in Article 1.*" This provision should be interpreted in such a way that the procedure foreseen in Article 1 is fully applied, otherwise the very *effet utile* of Article 1 of the Protocol would be undermined.

It may further be considered that the fact that Article 207(2) TFEU would give Parliament the benefit of the ordinary legislative procedure cannot be determinative of the matter. The crucial fact is that Article 207(2) comes under EU external policy, which makes it inappropriate as the legal basis. The difference between the position of Cyprus and that of territories such as, for instance, Ceuta and Melilla and Helgoland was that the latter were voluntarily placed outside the customs territory of the Union. Legally, Cyprus is part of the customs territory, factually part of Cyprus is not in that territory. Moreover, the rationale of Article 1(2) of the Protocol (and of the unanimous vote in the Council) is to guarantee that the Union may not apply preferential customs measures to the areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control without the consent of the Republic of Cyprus.

IV. Conclusion and recommendation

In the light of the foregoing, it is considered that the appropriate legal basis for the proposed regulation is Article 1(2) of Protocol No 10 on Cyprus to the Treaty of Accession of April 2003.

At its meeting of 18 October 2010 the Committee on Legal Affairs accordingly decided by 18 votes in favour, 5 against and 1 abstention¹ to recommend to you as follows: the appropriate legal basis for the proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control is Article 1(2) of Protocol No 10 on Cyprus to the Treaty of Accession of April 2003.

Yours sincerely,

Klaus-Heiner Lehne

c/c Mr Vital Moreira
Chair of the Committee on International Trade

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Jan Philipp Albrecht, Emine Bozkurt, Françoise Castex, Ismail Ertug, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Luis de Grandes Pascual, Takis Hadjigeorgiou, Sajjad Karim, Metin Kazak, Maria Eleni Koppa, Georgios Koumoutsakos, Kurt Lechner, Eva Lichtenberger, Antonio López-Istúriz White, Sarah Ludford, Antonio Masip Hidalgo, Jiří Maštálka, Kyriakos Mavronikolas, Alajos Mészáros, Angelika Niebler, Antigoni Papadopoulou, Georgios Papastamkos, Bernhard Rapkay, Nikolaos Salavrakos, Francesco Enrico Speroni, Emil Stoyanov, Alexandra Thein, Eleni Theocharous, Kyriacos Triantaphyllides, Diana Wallis, Cecilia Wikström, Zbigniew Ziobro, Tadeusz Zwiefka