



EUROPEAN PARLIAMENT

2009 - 2014

---

*Committee on Legal Affairs  
The Chair*

---

20.3.2014

Mr Vital Moreira  
Chair  
Committee on International Trade  
BRUSSELS

**Subject:** Opinion on the legal basis for the proposal for a Council decision on the conclusion, on behalf of the European Union and its Member States, of the Protocol to the Agreement on Cooperation and Customs Union between the European Community and its Member States, of the one part, and the Republic of San Marino, of the other part, regarding the participation, as a contracting party, of the Republic of Croatia, following its accession to the European Union (COM(2013)0568 – 2013/0273(NLE))

Dear Mr Chair,

By letter of 20 February 2014, you asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to give its opinion on the appropriateness of the legal basis chosen by the Commission for the proposal, in particular as regards the inclusion of Article 352 TFEU in the legal basis.

The proposal for a Council decision on the conclusion, on behalf of the European Union and its Member States, of the Protocol to the Agreement on Cooperation and Customs Union between the European Community and its Member States, of the one part, and the Republic of San Marino, of the other part, regarding the participation, as a contracting party, of the Republic of Croatia, following its accession to the European Union (COM(2013)0568) was presented by the Commission on the basis Articles 207 and 352 TFEU, in conjunction with Article 218(6)(a) and Article 218(8), second subparagraph, TFEU and was accordingly submitted to Parliament in order to seek its consent.

AL\1024003EN.doc

PE532.290v01-00

## ***Context***

The purpose of the agreement<sup>1</sup> between the European Economic Community and the Republic of San Marino (which dates back to 1991) is to "establish a customs union between the two Parties and to promote comprehensive cooperation between them with the aim of contributing to the social and economic development of the Republic of San Marino and strengthening relations between the Parties" (Article 1 of the Agreement).

Following a Commission proposal of 1991, the Council adopted, in 2002<sup>2</sup>, a decision on the conclusion of the Agreement and a Protocol thereto, following the enlargement of 1995. Further Council decisions were adopted in 2005<sup>3</sup> and 2007<sup>4</sup> in order to adapt the agreement to the respective enlargements of 2004 and 2007. The legal basis for all three decisions consisted of Articles 133 EC and 308 EC, in conjunction with the second sentence of Article 300(2) EC and the first subparagraph of Article 300(3) EC.

In order to provide for the participation of Croatia, following its accession to the Union, in the agreement in question, the Commission proposed, on 2 August 2013, a Council decision on the conclusion of a Protocol regarding Croatia's participation in the agreement. The proposed decision is based on Articles 207 and 352 TFEU, in conjunction with Article 218(6)(a) and Article 218(8), second subparagraph TFEU.

## ***The legal bases in question***

### **1. Legal basis of the proposal**

The proposal is based on Articles 207 and 352 TFEU which read as follows:

"Article 207

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

---

<sup>1</sup> Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino, OJ L 84, 28.3.2002, p. 43.

<sup>2</sup> Council Decision 2002/245/EC of 28 February 2002 on the conclusion of an agreement on cooperation and customs union between the European Economic Community and the Republic of San Marino and of the Protocol thereto following the enlargement with took effect on 1 January 1995 (OJ L 84, 28.3.2002, p. 41).

<sup>3</sup> Council Decision 2005/663/EC of 18 January 2005 on the conclusion, on behalf of the European Community and its Member States, of a Protocol to the Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino, regarding the participation, as Contracting Parties, of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, pursuant to their accession to the European Union (OJ L 251, 27.9.2005, p. 1).

<sup>4</sup> Council Decision 2007/810/EC of 19 November 2007 on the conclusion, on behalf of the European Community and its Member States, of a Protocol to the Agreement on Cooperation and Customs Union between the European Economic Community and the Republic of San Marino, regarding the participation, as contracting parties, of the Republic of Bulgaria and Romania, following their accession to the European Union (OJ L 325, 11.12.2007, p. 83).

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."

#### "Article 352

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

Article 218 TFEU contains the provisions for the negotiation and conclusion of international agreements. Its paragraph 6, point (a) reads as follows:

"6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

[...]

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. [...]"

Article 218(8) TFEU which is also referred to in the legal basis of the proposed Council decision relates to the voting requirements in Council.

#### 2. Proposed change of the legal basis

INTA has requested the opinion of the Legal Affairs Committee as to whether it is indeed appropriate to include Article 352 TFEU in the legal basis.

Owing to doubts about this matter, INTA had already asked the Commission, by letter of 27 November 2013, for clarification as regards its choice of legal basis. In her reply of 20 December 2013, the High Representative for Foreign Affairs and Security Policy had confirmed the legal basis including both Article 207 TFEU and Article 352 TFEU, mainly on the ground that both the initial conclusion of the agreement and the adaptations to earlier enlargements had been based on the corresponding predecessor provisions Articles 133 EC and 308 EC, the former covering the customs aspect, and the latter the cooperation and social aspect of the agreement. It would go beyond the scope of the present exercise, which was designed only to adapt the agreement to the accession of Croatia, to review the legal basis.

INTA had also requested the opinion of the Legal Service on the matter, who explained, in a note dated 6 February 2014, that Article 352 TFEU should not be included in the legal basis of the Council decision in question, as the Lisbon Treaty contains a specific legal basis on economic cooperation with third countries in Article 212 TFEU. The Legal Service concludes that Articles 207 and 212 TFEU should be the legal basis of the Council decision.

Article 212 TFEU reads as follows:

"1. Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211, the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action. The Union's operations and those of the Member States shall complement and reinforce each other.  
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures necessary for the implementation of paragraph 1. [...]"

Against this background, INTA informs the Legal Affairs Committee that it has decided to challenge the legal basis of the proposal and requests an opinion on the appropriateness of the legal basis under Rule 37.

## ***Analysis***

### **1. Principles established by the Court**

Certain principles emerge from the case law of the Court as regards the choice of legal basis. First, in view of the consequences of the legal basis in terms of substantive competence and procedure, the choice of the correct legal basis is of constitutional importance<sup>1</sup>. Secondly, under Article 13(2) TEU, each institution is to act within the limits of the powers conferred upon it by the Treaty<sup>2</sup>. Thirdly, according to the case-law of 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"<sup>3</sup>. Finally, as regards multiple legal bases, if examination of a EU measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component<sup>4</sup>. On the other hand, where a measure has several contemporaneous objectives or components which are indissolubly linked with each other without one being secondary and

---

<sup>1</sup> Opinion 2/00 *Carthage Protocol* [2001] E.C.R. I-9713, para. 5; Case C-370/07 *Commission v Council* [2009] E.C.R. I-8917, paras 46-49; Opinion 1/08, *General Agreement on Trade in Services* [2009] ECR I-11129, para. 110.

<sup>2</sup> Case C-403/05 *Parliament v Commission* [2007] E.C.R. I-9045, para. 49, and the case-law cited therein.

<sup>3</sup> See most recently Case C-411/06 *Commission v Parliament and Council* [2009] E.C.R. I-7585.

<sup>4</sup> Case C-42/97 *Parliament v Council* [1999] E.C.R. I-868, paras 39-40; Case-C 36/98 *Spain v Council* [2001] E.C.R. I-779, para. 59; Case C-211/01 *Commission v Council* [2003] E.C.R. I-8913, para. 39.

indirect in respect of the others, the measure must be based on the various relevant Treaty provisions<sup>1</sup>.

## 2. Aim and content of the measure

Since the purpose of the decision in question was the signing and the conclusion of the relevant Protocol on behalf of the Union, adapting the agreement to Croatia's accession, that decision should be examined in conjunction with the Agreement<sup>2</sup>.

As mentioned above, the purpose of the agreement is to establish a customs union and to promote comprehensive cooperation between the two parties with a view to contributing to the social and economic development of San Marino.

Title I of the agreement establishes a customs union, i.e. a tariff and trade agreement between San Marino and the European Union, including the establishment of a free trade area, and the application of common (EU) rules in relations to third countries. Title II of the agreement is entitled "Cooperation" and is aimed at "strengthening existing links" (Article 14) in certain priority areas, namely in the industrial and services sectors (Article 15), environmental protection and improvement (Article 16), in the tourism sector (Article 17) and as regards communications, information and cultural matters (Article 18). Title III finally is entitled "Social provisions" and in particular provides for free movement of workers between the European Union and San Marino and mutual non-discrimination of workers.

## 3. Appropriate legal basis

It seems undisputed that the relevant legal basis for matters relating to the customs union (Title I) is Article 207 TFEU (previously Article 133 EC), which allows for the adoption of measures defining the framework for implementation of the common commercial policy.

The elements of the agreement contained in Title II and III do not fall under the common commercial policy as they concern cooperation in areas other than trade, and the free movement of workers. In accordance with the jurisprudence quoted above, recourse to an additional legal basis would be necessary if these different components are equivalent in weight to the commercial policy elements. A predominance of the customs union element cannot be inferred either from the definition of the purpose of the agreement (Article 1 enumerates the different purposes without any weighting) or from the drafting of the provisions of the agreement as such. Therefore, recourse to an additional legal basis would be necessary.

Now, the Commission proposes recourse to Article 352 TFEU as additional legal basis. According to established case law of the Court, action pursuant to Article 352 is however justified only where no other Treaty provision gives the Union the necessary competence<sup>3</sup>. The specific legal basis which might be relevant here is Article 212 TFEU.

---

<sup>1</sup> Case C-165/87 *Commission v Council* [1988] E.C.R. 5545, para. 11; Case C-178/03 *Commission v. European Parliament and Council* [2006] E.C.R. I-107, paras 43-56.

<sup>2</sup> Cf. Advocate General Bot in his opinion of 30 January 2014 in Case C-658/11, para. 38.

<sup>3</sup> Case 45/86 *Commission v Council* [1987] ECR 1493, para. 13; Case C-436/03 *European Parliament v Council* [2006] ECR I-3733, paras 36-46; Case C-166/07 *European Parliament v Council* [2009] ECR I-7135, paras 40-41.

Article 212 TFEU provides for the adoption of "economic, financial and technical cooperation measures" with "third countries other than developing countries"<sup>1</sup>. The measures dealt with in Title II of the agreement, concerning cooperation in various sectors, clearly qualify as such cooperation measures under Article 212 TFEU.

As regards the measures on free movement of workers contained in Title III of the agreement, the Legal Service, in its note of 6 February 2014, raises the question whether Article 45 TFEU concerning the free movement of workers should be added to the legal basis<sup>2</sup>, but concludes that it could be argued that this aspect of the agreement is also covered by the economic cooperation foreseen in Article 212 TFEU.

Two additional aspects confirm that Article 212 TFEU fully covers the measures in question: firstly, the social aspect is reflected in the definition of the purpose of the agreement (Article 1) in close conjunction with economic development; there is no specific mention of free movement and non-discrimination of workers. Secondly, there is reason to construe the scope of cooperation policy broadly, given that the Court has held, when determining the scope of the Union development policy in contrast to Member States' competences, that the broad objectives of the cooperation policy allow "the measures required for their pursuit to concern a variety of specific matters"<sup>3</sup>. There is good reason to argue – in particular given that the measures of the cooperation policy are to be consistent with the development policy according to Article 212 TFEU – that such a broad approach would also apply to cooperation with third countries. The variety of matters would in this case include the free movement and non-discrimination of workers. As regards Title III of the agreement, it therefore does not appear necessary to have recourse to any additional legal basis, be it a provision related to free movement of workers such as Article 45 TFEU<sup>4</sup> or possibly a provision concerning the adoption of measures in certain areas of the common immigration policy such as Article 79 TFEU<sup>5</sup>. Given that Article 212 TFEU already fully covers the measures in question, it is irrelevant whether such measures might qualify as relating to immigration policy or rather as relating to an external dimension of the free movement of workers.

All in all, the legal basis for the Council decision concerning the adaptation of the agreement in question to the accession of Croatia should be Articles 207 and 212 TFEU. Given that all aspects of the agreement can be covered by specific legal bases provided in the Treaty, there

---

<sup>1</sup> It is worth mentioning that a legal basis for such economic, financial and technical cooperation measures was introduced by the Treaty of Nice (formerly Article 181a EC) and served since then as a legal basis for a whole series of measures which were formerly adopted under Article 308 EC (now Article 352 TFEU), possibly in combination with Article 133 EC (now Article 207 TFEU). The Treaty of Lisbon aligned the applicable procedure (formerly consultation of the Parliament, now ordinary legislative procedure) to the procedure already applicable for development measures in order to remedy the remarkable situation that the involvement of the European Parliament depended on the degree of development of the third country concerned.

<sup>2</sup> Paragraph 26 of the Legal Service's note dated 6 February 2014.

<sup>3</sup> Case C-268/94 *Portuguese Republic v Council of the European Union* [1996] ECR I-6177, paras 37 to 39.

<sup>4</sup> Article 45 (1) TFEU: "Freedom of movement for workers shall be secured within the Union". Article 46 TFEU provides for the adoption of certain measures by the European Parliament and the Council under the ordinary legislative procedure.

<sup>5</sup> Article 79 (1) TFEU: "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings." Paragraph 2 provides for the adoption of certain measures by the European Parliament and the Council under the ordinary legislative procedure.

is no need to have recourse to Article 352 TFEU. Any reference to previous agreements and their legal basis – as made by the Commission in the letter of 20 December 2013 – must be considered as obsolete as the adoption of the decision in question would need to be based on the Treaties in force today.

This conclusion is in line with the conclusion of the Legal Service in its note of 6 February 2014. The Legal Service recommends that the Council be asked to modify the legal basis.

#### 4. Procedural aspects

It is worth mentioning that the change in legal basis does not entail a change in Parliament's involvement in this case: both a legal basis composed of Articles 207 and 352 TFEU as proposed by the Commission and a legal basis composed of Articles 207 and 212 TFEU as advocated by the Legal Service and in the present note would trigger, in the context of the conclusion of an international agreement under Article 218 TFEU, the application of Article 218(6)(a)(v) TFEU which requires consent of the European Parliament.

For the sake of completeness it should be mentioned that there would be a difference between the two legal bases as regards the voting in Council: whereas Articles 207 and 352 TFEU in conjunction with Article 218(6)(a)(v) and Article 218(8), second subparagraph would require unanimity in Council, Articles 207 and 212 TFEU in conjunction with Article 218(6)(a)(v) and Article 218(8), first subparagraph would require the Council to act by a qualified majority.

In any event, it is clear that the principle of conferral as laid down in Article 5 TEU as one of the fundamental principles of the Union requires a clear and specific definition of the provision in the Treaties conferring the relevant competence on the Union.

#### ***Legal Affairs Committee recommendation***

The Legal Affairs Committee considered the above question at its meeting of 19 March 2014. At this meeting, it accordingly decided, by unanimity<sup>1</sup>, to recommend that the appropriate legal basis for the proposal for the decision in question should be Articles 207 and 212 TFEU. The Legal Affairs Committee further endorsed the recommendation of the Legal Service in its note of 6 February 2014 to INTA that the Council be asked to modify the Council Decision as regards the legal basis before Parliament gives its consent.

Yours sincerely,

Evelyn Regner

---

<sup>1</sup> The following were present for the final vote: Evelyn Regner (Acting Chair, rapporteur), Luigi Berlinguer, Françoise Castex (Vice-Chair), Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Annette Koewius, Eva Lichtenberger, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Francesco Enrico Speroni, Rebecca Taylor, Alexandra Thein, Axel Voss, Rainer Wieland, Cecilia Wikström, and pursuant to Rule 187(2)), Paolo Bartolozzi, Richard Howitt.