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türkiye ekonomi politikaları araştırma vakfı

Legal Opinion on the Commission Proposal for a Council Regulation on Special Conditions for Trade with Northern Cyprus ("Direct Trade Regulation")

21 May 2007, Ankara

Preliminary Remarks

Separate simultaneous referenda of the Annan Plan took place on 24 April 2004. Since the Greek Cypriot Community did not approve the Annan Plan and implementation of the plan was dependent on its approval by both communities, the Plan became null and void. Soon after referenda the Greek Cypriot Administration became a member of the European Union (hereinafter: EU) as a representative of the whole island on May 1, 2004. Membership of the Greek Cypriots to the Union as the representative of whole Cyprus established an unprecedented legal status and a politically asymmetric relation on the island. On 26 April 2004, the Council expressed its strong regret about the referenda and expressed its determination to put an end to the isolation of the Turkish Cypriot community. To encourage Turkish Cypriot community and to relieve its economic isolations, the European Commission formulated 'Financial Aid' and 'Direct Trade' regulations. Although the 'Financial Aid' regulation was adopted by the European Council on 27 February 2006, the 'direct trade' regulation is still pending due to controversial legal basis and legal consequences of the regulation's implementation.

Some Observations Concerning Opinions on the Commission Proposal for Direct Trade Regulation[1] are as follows:

1. The Commission Proposal aimed to put an end to isolation and to facilitate the reunification of Cyprus by encouraging the economic development of the Turkish Cypriot community and the areas of the Republic of Cyprus in which the government of Cyprus does not exercise effective control (hereinafter: Areas)

[1] COM (2004) 466 final, 2004/0148 (ACC)

2. As it is mentioned in the explanatory memorandum of the Proposal, Article133 EC, which covers Community's external trade relations, constituted the appropriate the legal basis for the Proposal.

3. As comprehensive settlement has not been reached prior to the Republic of Cyprus' (hereinafter: RoC) accession, the application of the acquis has been suspended in Northern Cyprus pursuant to Article 1(1) of Protocol 10 of the Act of Accession 2003. Article 1(1) of Protocol 10 refers to the Northern Cyprus as 'the areas of the Republic of Cyprus in which the government of Cyprus does not exercise effective control'. Pursuant to the Article 1(1) of Protocol 10, although the so-called Areas constitute EU territories, they are excluded from the Community's customs territory. Due to Northern Cyprus' exclusion form the Community's customs territory, the Commission Proposal based on Article 133 EC with reference to Gibraltar, Ceuta, Melilla, Büsingen, Helgoland and Campione d'Italia, which are also not included in the customs territory of the Community.

4. As Commission proposal based on Article 133 of EC Treaty would be subject to qualified majority, this would not only ease the adoption of the regulation in the Council but would also enable the Commission benefit extensive implementation competences, as neither RoC, nor any other Member State alone will have the right and possibility to veto or to impede the implementation of the Regulation.

5. RoC and the Legal Service of the European Council asserted that the correct legal basis for the proposal is Article 1(2) of Protocol 10 of the Act of Accession of the RoC (2003). Controversies on the legal basis of the abovementioned Protocol prevails.

6. RoC objects to choice of Article 133 EC as the appropriate legal basis for the proposals by the Commission, with a concern that it would result in recognition of Northern Cyprus as a separate legal entity.

A. Lawful Basis for the Commission Proposal

A.1. Why does Article 133 EC constitute appropriate legal basis for the Proposal?

As it is rightly recalled the case-law (C-300/89) of the European Court of Justice (hereinafter: ECJ) stated that "*the choice of the legal basis may not depend simply on an institution's conviction as to the objectives pursued but must be based on* ***objective factors*** *which are amenable to judicial review...Those factors include in particular* ***the aim and content*** *of the measure"*

However, the Legal Service of the Council did not take into consideration certain essential points in the ECJ case-law. In the ECJ case law 'Hellenic Republic v. Council of the European Communities' (C-62/88)[2], the Hellenic Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Regulation (EEC) No 3955/87 of 22 December 1987 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power-station. In support of its application the Hellenic Republic makes two submissions. The first concerns infringement of the EEC and The European Atomic Energy Community Treaties and misuse of powers by reason of the illegality of the legal basis of the contested regulation. The second submission is that the statement of the reasons on which the regulation is based is inadequate. The Hellenic Republic claims that, by basing Regulation No 3955/87 on Article 113 of the EEC Treaty, the Council infringed the EEC and EAEC Treaties. The Hellenic Republic states that the regulation is concerned exclusively with protection of the health of the general public in the Member States against the consequences of the Chernobyl nuclear accident and should therefore have been based on Article 31 of the EAEC Treaty or on Articles 130r and 130s of the EEC Treaty, possibly in conjunction with Article 235 of the EEC Treaty. Since procedural requirements of Article 113 are different from those of Article 31 of EAEC Treaty and Article 130s and 235 EEC Treaty, the legal basis of the contested regulation based on Article 113 is capable of influencing the content of the measure. The ECJ, in its judgment against Hellenic Republic's arguments recalled that *'the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review'* as it stated in C-45/86[3] case previously. As a result the ECJ came to the conclusion that *according to its objective and its content… the regulation is intended to regulate trade between the community and non-member countries accordingly it comes within the common commercial policy within the meaning of Article 113 of the EEC Treaty.*

In abovementioned case, the ECJ dismissed Hellenic Republic's annulment claim due to the incorrect legal basis of the regulation by stating as folows:

> "*Recourse to Article 113 as the legal basis for the contested regulation cannot be excluded on the ground that Article 30 et seq . of the EAEC Treaty lay down specific rules governing the basic standards for protection of the health of the general public against the dangers arising from ionizing radiation" (para. 17)*
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> *"The fact that maximum permitted levels of radioactive contamination are fixed in response to a concern to protect public health and that the protection of public health is also one of the objectives of Community action in environmental matters, in accordance with the Article*

[2] C-62/88 Hellenic Republic v. Council of the European Communities, ECR (1990).
[3] C-45/86, Commission of the European Communities v Council of the European Communities, ECR (1987)

130r (1), likewise cannot remove Regulation No 3955/87 from the sphere of the common commercial policy' (para 18)"

Although the Protocol 10 of the Act of Accession 2003 also constituted the primary law of the Community likewise the EAEC Treaty[4], the ECJ decided that the appropriate legal basis for the contested regulation to be the article 113 of the EEC Treaty. According to the ECJ ruling, the regulation, according to its objective and its content, aims to regulate trade between the Community and non-member countries; therefore it has its legal basis within the common commercial policy within the meaning of Article 113 of the EEC Treaty. This is a crucial point ambiguously neglected by the Council's Legal Service. In the same line with our legal opinion, the Commission also advocated the Art. 133 EC as constituting appropriate legal basis due to the fact that the so-called direct trade regulation's content aims to regulate special conditions for trade with the Areas. The development of trade between Areas and Member States can therefore be devised on the legal basis of Art. 133 EC.

Furthermore, the European Council's Legal Service asserted that the effect of the Commission's proposal would amount to withdrawal of the suspension of the acquis in the Areas, which resulted to breach Art. 1(2) of the Protocol 10. However, the Commission proposal intended to establish 'special measures to promote the development of the Areas notwithstanding the suspension of the acquis' as stated in the proposal's recital. At this point, Council's Legal Service claimed that Article 3 of Protocol 10 is not designed to have the effect of withdrawing the suspension of the acquis. The Council's Legal Service also added that promoting economic development of the Areas via establishing autonomous economic assistance, for example (as in the case of the so-called 'financial aid regulation') would not amount to withdrawal of the suspension of the acquis. However, the Legal Service in that case left special rules governing trade relations based on Article 133 with the Areas categorically out of scope (special measures to promote economic development of the Areas notwithstanding the suspension of the acquis). On the other hand, the ECJ case-law (C-45/86) challenges Council's Legal Service's opinion.

According to the case-law (C-45/86), the Council asserted that the Council Regulation 3599/85 should also be based on Art. 235 of the EEC Treaty in addition to the Art. 113 as the regulation does not merely subjected to commercial policy, but also aid policy. ECJ ruled out the Council's contention by stating that: (paras. 15-20)

"...The Council contends that the aims pursued by the regulations with regard to development-aid policy go beyond the scope of the common commercial policy .

[4] It can be claimed that the provisions of a founding treaty can even be superior to Protocol 10 or its provisions in the context of Community law.

It must be pointed out in the first place that, as the court has already stated, the concept of commercial policy has the same content whether it is applied in the context of the international action of a state or in that of the community (opinion 1/75 of 11 november 1975 ((1975)) ECR 1355).

The link between trade and development has become progressively stronger in modern international relations ...

It was against that background that the model was evolved on which the community system of generalized preferences, partially implemented by the regulations at issue, was based . That system reflects a new concept of international trade relations in which development aims play a major role .

In defining the characteristics and the instruments of the common commercial policy in Article 110 et seq ., the treaty took possible changes into account . accordingly, Article 110 lists among the objectives of commercial policy the aim of contributing "to the harmonious development of world trade", which presupposes that commercial policy will be adjusted in order to take account of any changes of outlook in international relations . Likewise, Articles 113 to 116 provide not only for measures to be adopted by the institutions and for the conclusion of agreements with non-member countries but also for common action "within the framework of international organizations of an economic character", an expression which is sufficiently broad to encompass the international organizations which might deal with commercial problems from the point of view of a development policy .

The Court has already acknowledged that the existence of a link with development problems does not cause a measure to be excluded from the sphere of the common commercial policy as defined by the Treaty" .

The ECJ's judgment revealed commercial policy's role in economic development. Accordingly, the 'direct trade regulation' should be elaborated in the context of Art. 3 of the Protocol 10 stating that: "*Nothing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to Artcile 1* (Northern Cyprus: added)." Accordingly the Council's Legal Services' argument that Article 3 of the Protocol should be read in conjunction with Article 1(2)[5] is disputable.

A.2. Why does 1(2) of Protocol 10 constitute inappropriate legal basis for the Proposal?

The Council Legal Service's main argument is understood to be based on the reasoning that the proposed Regulation amounts to (partial) withdrawal of the suspension of the *acquis* in the Areas,

[5] Article 1(2) of the Protocol stated that the Council shall withdraw the suspension acting unanimously.

which could only legally be realized by way of Art. 1(2) of Protocol 10. As already mentioned by the Commission legal service clearly, the Proposal has neither an intention to withdraw the suspension brought by Protocol 10, nor to extent the acquis to the Areas, however, the issue still needs further elaboration:

The Commission's proposed Regulation brings special conditions and rules for trade with the Areas which cannot be regarded as tantamount to trade liberalization schemes such as trade agreements, free trade areas etc., which the EC enters with third countries under Article 133, even though the former is also based on the same legal basis. The 'direct trade regulation' has severe limitations as argued by the Commissions legal service compared to other trade arrangements, and that its scope can only entitle it as a 'special arrangement'.

The Council's Legal Service however claims that this arrangement already suffices to consider the case as withdrawal of the suspension of the acquis contrary to the Article 1(2) of the Protocol 10. This, according to the Service, is circumvention by the Commission of the Council decision "*for the purpose of achieving effectively the same result as a withdrawal of the suspension of the acquis, albeit partial*". The Council's legal service when recalling the reason as to why Areas are not within the customs territory of the Community states that this is due to the fact that the application of the acquis has been suspended by Protocol 10.

However, in addition to the Commission's Legal Service's arguments, it is worthwhile to consider that the Protocol suspends the application as a result of the fact that the acquis cannot be applied in northern Cyprus since there is no comprehensive settlement. Indeed, Protocol 10 itself in recital 2 reveals that 'a comprehensive settlement to the Cyprus problem has not yet been reached' and in recital 4 "*in the event of a solution to the Cyprus problem this suspension shall be lifted*". Therefore Article 2(1) should be read in conjunction with the recital of the Protocol, just like Article 3 in conjunction with Article 1 as proposed by the Legal Service, so it is not used to deprive the purpose of the Protocol.

B. Opinion concerning the designation of the Turkish Cypriot Chamber of Commerce as a competent authority for the implementation of the Regulation

Council Legal Service proposes that designation by the Commission of the competent authority within the context of Art. 2 (2) of the Proposal shall not be possible without the agreement of the Government of the Republic of Cyprus. By referring to the EC Treaty system, the service claims that "*each Member State (in that case Cyprus) has the right to determine the competent authority which is responsible for the implementation of* ***any act of Community law on its own territory***".

However, this approach of the service is open to criticism because it is dubious to what extent the Areas (areas in which the government of RoC does not exercise effective (!) control) can be regarded as a part of its own territory in the context of the implementation of Community acquis. As the Government of RoC has no effective control, it is not physically or practically possible to designate authorities in the Areas, nor to exert an effective enforcement on them. Proposed 'Direct Trade Regulation' (as an act) is a part of Community law which form part of what is known as Community acquis[6]. The acquis is suspended in the Areas by Protocol 10 itself. This brings about the question **whether the Government of the RoC is competent to determine the competent authorities in this respect**. The case is ambiguous and is not as clear as in the normal situations whereby Member States apply Community law in their territories for which there are no such disputed sovereignty problems. However, it is obvious that the RoC authorities do not have authority in the north due to the de facto situation.

The Legal Service of the Council referenced to the ECJ case law (C-432/92)[7] by stating that "*it is not possible to allow for the Commission to designate national competent authorities on its own without the consent of the Member State concerned*". The reasoning of the ECJ with regard to the non-acceptance of the relevant certificates issued by the unrecognised Turkish Republic of Northern Cyprus authorities were mainly concerned with the lack of cooperation between competent authorities of TRNC and those in the EU due to the fact that the TRNC was an unrecognised entity. However, international non-recognition does not necessarily preclude cooperation between the authorities of the unrecognised and non-recognising states as long as such cooperation does not imply *de jure* recognition. There is no principle of international law to preclude cooperation between the authorities for administrative purposes. The designation of Turkish Cypriot Chamber of Commerce by the Commission to issue certificates is not for a function *de iure imperii,* on the contrary as argued by the Commission legal service, such certificates have no binding effect and has only a value of private declaration. Therefore, this designation should not be regarded as a type of cooperation constituting an 'explicit recognition' for TRNC. Instead, this can only render an administrative cooperation taking into account of the special situation in the island where settlement has not been achieved.

Furthermore, there are existing examples of such cooperation between the authorities of the EU and that of the entities not recognised by the EU as a sovereign state. A prominent example has already been cited in the explanatory memorandum of the Proposal, namely the case with Ceuta and Melilla. Ceuta and Melilla are considered to be part of the territories of the EU however they are not included

[6] For official definition of Community law and Community acquis, see http://europa.eu./scadplus/glossary/community_law_en.htm and http://europa.eu./scadplus/glossary/community_acquis_en.htm respectively.
[7] C-432/92, The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others, ECR (1994).

in the customs territory of the Community. The Council Regulation 1140/2004 [8], in suspending the autonomous Common Customs Tariff duties on certain fishery products originating in these territories, depends on Article 133 as the legal basis. This regulation, in suspending the Community's Common Customs Tariff for products listed, cites Regulation 82/2001[9]. The latter is titled as the 'Council regulation concerning the definition of the concept of originating products and methods of administrative cooperation in trade between the customs territory of the Community and Ceuta and Melilla'. This Regulation is based on the Act of Accession of Spain and in particular Protocol 2 thereto. The similarity with the Protocol 10 of the Treaty of Accession of the Republic of Cyprus is evident. As its name explicitly reveals, the regulation admits administrative cooperation with the authorities in these territories, and it even goes one step forward by allowing competent customs authorities of Ceuta and Melilla to issue EUR.1 movement certificates (official documents)[10]. This provision reveals that this is not necessarily a function of Spanish customs authorities. However, the competence of the Ceuta and Melilla authorities thereto do not in any way constitute an 'explicit recognition' of these entities as sovereign powers.

[8] OJ L 222, 23.6.2004, p.1.
[9] OJ L 20, 20.1.2001, p.1.
[10] Art. 17 of Reg. 82/2001.

Conclusive Remarks

The following points should be taken into consideration, in addition to the arguments raised by the Commission legal service, in deciding about the proposed Regulation 2004/148:

1. Making a corollary to C-62/88 Greece vs. Council case, recourse by the Commission to Article 133 as the legal basis for DTR should not be excluded on the ground that Protocol 10 brings special rules for the withdrawal of suspension. The adoption of the Regulation should not be considered as a misuse of the powers if it is laid down in accordance with Article 133.

2. **a.** The Regulation intends to develop trade in order to contribute to the process of economic development of northern Cyprus. This can be considered to fulfill the desire (in rec.7) that the accession of Cyprus to the EU shall benefit *all Cypriot citizens* (*italics* added) and promote peace and reconciliation. Otherwise, the wording in the Protocol would only cover citizens where the Republic of Cyprus does exercise effective control.

b. Article 1(2) of the Protocol 10 shall be meaningful only when read in conjuction with the whole recital putting the general purpose of the Protocol. Article 3 of Protocol 10 can be used for measures promoting economic development of the Areas and it does not constitute a breach of loyalty vis-à-vis the RoC by withdrawing the suspension of the acquis in Areas.

3. Administrative cooperation between the authorities should not be regarded as rendering an explicit recognition. This should be assessed in the light of the facts in the cases of Ceuta and Melilla as proposed above and by distinguishing the difference between intergovernmental and administrative cooperation.

4. As ECJ stated in many judgments, Article 308 (ex-235) can only be justified where no other provision of Treaty gives Community institutions necessary power to adopt a measure. The choice of Article 308 as the legal basis for the Commission Proposal, therefore, shall not constitute the appropriate legal basis for trade relations as long as Article 133 exists.

5. Non-adoption of the direct trade regulation in the Council seems to be due more to political reasons and concerns than to legal reasoning and will be at odds with the principle of the rule of law on which the EU is based.