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OPINION OF THE LEGAL SERVICE

Subject : 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
- Doc. n° 11278/04

Introduction

At the meeting on 8th July 2004 of the ad hoc Working Party on the follow-up to the Council conclusions on Cyprus of 26 April 2004, the Council Legal Service was asked for a written opinion on the following questions relating to the above proposal, which concerns trade between the areas in northern Cyprus where the Government of the Republic of Cyprus does not exercise effective control (hereinafter referred to as "the areas") and EU Member States other than Cyprus: ¹

- 1) Is Article 133 of the EC Treaty a suitable legal basis for the proposal ?
- 2) Does the proposal present problems with regard to international law or Community law (principle of loyal cooperation in Article 10 EC), in view of the fact that the Government of the Republic of Cyprus has declared the closure of ports in the areas ?

¹ Trade in goods between the areas and the rest of Cyprus is covered by Council Regulation (EC) n° 866/2004 on a régime under Article 2 of Protocol n° 10 to the Act of Accession 2003 (the 'Green Line' Regulation) (OJ L 161 of 30.4.2004).

- 3) Would Article 2(1) of the proposal ('standstill' condition for customs duties levied in the areas on imports of goods from EU Member States) constitute official recognition by the Community of an authority in the areas other than the Government of the Republic of Cyprus?
- 4) Is Article 2(2) of the proposal legally correct, insofar as it would allow for the Commission on its own, without the agreement of the Government of the Republic of Cyprus, to designate the Turkish Cypriot Chamber of Commerce or other body as a competent authority for implementation purposes?

First question: is Article 133 EC a proper legal basis ?

According to the settled case-law of the Court of Justice: "*the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective 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.*"²

The aim of the proposal is "*to facilitate trade between [the] areas and Member States other than Cyprus*" (3rd recital). The essential content of the proposal is to provide in Article 1(1) thereof that products which "*originate in the Areas and are transported directly therefrom, may be released for free circulation into the customs territory of the Community with exemption from customs duties and charges having equivalent effect within the limits of annual tariff quotas...*"³ These tariff quotas are to be determined by the Commission "*in such a way as to encourage the development of trade*", and taking into account "*the existing production capacities and their potential growth*": Article 4(1). The only limit prescribed is the need for "*avoiding the creation of artificial trade patterns or facilitating fraud*" (ibid).

² Case C-300/89 [1991] ECR I, p. 2898.

³ Certain products are excluded or prohibited, i.e. agricultural products eligible for export refunds or intervention measures, live animals and animal products for the time being, feedingstuff, figs and various nuts, as well as goods subject to anti-dumping measures: see Article 1(1)-(6).

The Commission has based its proposal on Article 133 of the EC Treaty, pointing out (see the end of its explanatory memorandum) that there are precedents for cases where Article 133 has been used as a basis for regulating customs duties on imports from Member States' territories which are outside the Community customs territory: that is the case for Gibraltar and Ceuta and Melilla.⁴

However, the Legal Service would recall, firstly, that the reason why the areas are not within the customs territory of the Community is that the application of the *acquis* has been suspended there by virtue of Article 1(1) of Protocol n° 10 to the Accession Treaty 2003 and, secondly, that Article 1(2) of the same Protocol provides a specific legal basis and procedure for withdrawing the suspension: "*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*".

The Legal Service also recalls that according to Article 3(1) (a) of the EC Treaty: "*the activities of the Community shall include ... the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect*".⁵

In the view of the Legal Service, the effect of the Commission's proposal would amount in substance to a withdrawal of the suspension of the *acquis* in the areas, with regard to a fundamental area of the common market (free movement of goods: the prohibition of customs duties and quantitative restrictions as referred to in Article 3(1) (a) EC). The Legal Service would point out in this connection that there is nothing to prevent the Council from withdrawing the suspension of the *acquis* partially or in stages. Equally, there is nothing to prevent the Council from deciding on such a partial withdrawal of the suspension of the *acquis*, before a comprehensive settlement is reached in Cyprus.

⁴ See respectively Council Regulation (EC) n° 2501/2001 applying a scheme of generalised tariff preferences (OJ L 346 of 31.12.2001), and Council Regulation (EC) n° 1140/2001 suspending the autonomous Common Customs Tariff duties on certain fishery products originating in Ceuta and Melilla (OJ L 222 of 23.06.2004).

⁵ Note that according to Article 23 (2) EC, the Treaty provisions on the prohibition of quantitative restrictions between Member States apply not only to goods originating in the latter, but also to imported goods which are put into free circulation in the Community customs territory. That is the case for imported goods, once the import formalities have been complied with and customs duties paid: see Article 24 EC. The Court of Justice has also ruled that "*as regards free circulation of goods within the Community, products entitled to 'free circulation' are definitively and wholly assimilated to products originating in Member States*" (our underlining, Case 41/76 [1976] ECR p. 1935).

Since the proposal amounts to a partial withdrawal of the *acquis* in the areas, it may only be adopted by following the procedure laid down in Article 1(2) of Protocol n° 10 to the Act of Accession, which has the value of primary law and of *lex specialis* in relation to the EC Treaty, and which requires that in order for the suspension of the *acquis* to be withdrawn in the areas, the Council has to act unanimously on a proposal from the Commission.

The above requirement for a unanimous Council decision cannot be circumvented by having recourse to another legal basis such as Article 133 EC, for the purpose of achieving effectively the same result as a withdrawal of the suspension of the *acquis*, albeit partial. That would amount to a misuse of powers (*détournement de pouvoir*) and would render the adoption of the act illegal (Article 230 EC).

The Legal Service notes that according to Article 3(1) of Protocol n° 10: "*Nothing in this Protocol shall preclude measures with a view to promoting the economic development of the areas referred to in Article 1.*" However, that provision does not relate to measures connected with the suspension of the *acquis*; it envisages autonomous economic and technical assistance such as that provided under Articles 177 and 181a EC. But in any event, Article 3 of the Protocol has to be read in conjunction with Article 1, and cannot be used to deprive Article 1 of its useful purpose. This still leaves room for measures which would promote the economic development of the areas in northern Cyprus, whilst not amounting at the same time to a withdrawal of the suspension of the *acquis* there. That is the case for the other proposal which the Commission has presented at the same time (proposal for a Regulation establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community, based on Article 308.EC).

The Legal Service therefore considers that, in so far as the content of the above proposal amounts to the (partial) withdrawal of the suspension of the *acquis* in the areas of northern Cyprus, the correct legal basis for it is Article 1 (2) of Protocol n° 10 to the Treaty of Accession, and not Article 133 EC. That said, it would be possible for the Council to take a general decision based on Article 1(2) of Protocol n° 10, whereby it would approve the principle that the effects of the suspension of the *acquis* be cancelled or mitigated with regard to the import of goods from the areas, whilst allowing for more detailed rules on the matter to be adopted subsequently by qualified majority (unlocking mechanism).

Second question: Does the proposal present problems with regard to international law or Community law (Article 10 EC), in view of the fact that the Government of the Republic of Cyprus has declared the ports in the areas to be closed ?

Given that the proposal concerns direct trade between the areas and EU Member States other than the Republic of Cyprus, it necessarily envisages that goods will be exported from ports and airports in the areas. However, the Government of Cyprus issued a notice in 1974, declaring the ports in the areas to be closed.⁶

In international law, there is no obligation requiring a State to keep its ports open, and there is no general right of access to the ports of another State; customary international law only obliges the coastal State to grant entry to ships in distress or in cases of *force majeure* (a right of access can also be established by treaty or by the consent of the coastal State). Every State is therefore entitled to regulate access to its ports, and this has been confirmed by the International Court of Justice: "*It is also by virtue of its sovereignty that the coastal State may regulate access to its ports.*"⁷

It follows that the Government of the Republic of Cyprus was entitled to declare the closure of the ports in the areas, and every State has a duty under international law to respect this decision. As for Community law, there is also a specific duty of loyal cooperation between the Community and the Member States enshrined in Article 10 EC. The Court of Justice has said that: "*the duty to cooperate in good faith governs relations between the Member States and the institutions.*"⁸ The Court also emphasized that this obligation "*imposes on Member States and the Community institutions mutual duties to cooperate in good faith.*"⁹

⁶ Order by the Council of Ministers declaring the ports closed as from 3rd October 1974, communicated to the International Maritime Organisation on 12th December 1974 for distribution to its Member States.

⁷ Judgment of 27 June 1986 in the case concerning military and paramilitary activities in Nicaragua, para. 213. There have been numerous cases where States have forbidden access to their ports in order to protect their vital interests, without this being contested.

⁸ Judgment of 16 October 2003 in Case C-339/00 (not yet published).

⁹ Ibid.

In the view of the Legal Service, the adoption of the proposal would be *prima facie* contrary to the above rules of international and Community law, insofar it would ignore the sovereign right of the Government of Cyprus to declare the closure of the ports in the areas.¹⁰ Such a step would only be legitimate if the Government of Cyprus gave its consent to the opening of those ports for such purpose, or if it could be shown that Cyprus was bound as a matter of EU law to accept decisions of the EU which had that effect. The Legal Service considers that Article 1(2) of Protocol n° 10 to the Accession Treaty does allow for that, and so the above problem would be resolved if the proposal were adopted on the basis of this provision.

Third question: Would Article 2(1) of the proposal ('standstill' condition for customs duties levied in the areas on imports of goods from EU Member States) imply recognition of an authority in the areas other than the Government of the Republic of Cyprus ?

It goes without saying that the EU or its institutions cannot recognise any authority in the areas other than the Government of the Republic of Cyprus. As far as international law is concerned, the UN Security Council in Resolution 541 (1983) called upon "*all States not to recognise any Cypriot State other than the Republic of Cyprus*" and in Resolution 550 (1984) it called upon "*all States not to recognise the purported State of the 'Turkish Republic of Northern Cyprus'*." Equally, it is explicitly laid down in EU primary law (the Treaty of Accession and Protocol n° 10) that the Republic of Cyprus includes the whole island, with a single government (the Government of the Republic of Cyprus), even though the latter does not exercise effective control over the whole country.

That having been said, one could argue that Article 2(1) of the Commission's proposal does not imply recognition of any other or separate administrative authority in the areas, but that it simply takes account of a factual situation by providing for the measure to be withdrawn if ever there were to be an increase in duties levied on imports into the areas. If it were considered appropriate, a recital could be added to make clear that this provision in no way implies recognition of any authority in the areas other than the Government of the Republic of Cyprus.

¹⁰ Some might object that such a step has already been taken, since the 'Green Line' Regulation applies not only to products wholly obtained in the areas of north Cyprus, but also to products which have undergone their last, substantial, economically justified processing or working there (see Article 4(1) thereof). However, this objection is unfounded: it by no means follows that such products must have first arrived in the areas (in an unfinished state) through ports deemed to be closed there. On the contrary, any such product should have entered the areas by crossing the 'Green Line', either having originated in the rest of Cyprus or having transited through there from a third country.

Fourth question: Is Article 2(2) of the proposal legally correct, insofar as it would allow for the Commission on its own, without the agreement of the Government of the Republic of Cyprus, to designate the Turkish Cypriot Chamber of Commerce or other body as a competent authority for the purpose of implementation?

It is one thing to take account of a situation of fact (see above), but it would be something quite different for the Commission actually to designate a body in the areas for the purpose of implementing the proposed measure, without the consent of the Government of the Republic of Cyprus (according to Articles 2 and 5 of the proposal, this body would be responsible for issuing certificates of origin and carrying out the necessary controls).

Firstly, designating such a body would constitute explicit recognition of another authority in the areas than the Government of the Republic of Cyprus, which would be contrary to both international law and EU primary law (see above). Secondly, it is inherent to the system of the EC Treaty and the division of powers between the Community and the Member States, that each Member State has the right to determine the 'competent authority' which is responsible for the implementation of any act of Community law on its own territory. 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.¹¹

The precise status of the Turkish Cypriot Chamber of Commerce makes no difference in this respect (apparently it is a private body, but it would have functions of *ius imperii* conferred upon it by the proposed measure). The determining factor is that the Government of the Republic of Cyprus must give its consent, in order for the Turkish Cypriot Chamber of Commerce or any other body to be designated as responsible for purposes of implementation.

¹¹ The Court of Justice has already ruled, in respect of the 1972 Association Agreement between the Community and Cyprus and Directive 77/93/EEC on phytosanitary protection measures, that the provisions therein "are to be interpreted as precluding acceptance by the national authorities of a Member State, when citrus fruit and potatoes are imported from the northern part of Cyprus, of movement and phytosanitary certificates issued by authorities other than the competent authorities of the Republic of Cyprus." Case C-432/92 [1994] ECR I-3138.

The Council has recently accepted this principle, by stipulating in Article 4(5) of the 'Green Line' Regulation¹² that the designation by the Commission of the Turkish Cypriot Chamber of Commerce for the purpose of that Regulation must be done in agreement with the Government of the Republic of Cyprus: "*Goods shall be accompanied by a document issued by the Turkish Cypriot Chamber of Commerce, duly authorised for that purpose by the Commission in agreement with the Government of the Republic of Cyprus, or by another body so authorised in agreement with the latter*" (our underlining).

It is equally clear, however, that the authorisation and agreement referred to therein were only for the purpose of the 'Green Line' Regulation itself ("*duly authorised for that purpose*"), which has an entirely different scope from the measure on 'direct trade' now being proposed. Therefore one cannot argue that by agreeing to the designation of the Turkish Cypriot Chamber of Commerce as a competent authority for the purpose of the 'Green Line' Regulation, the Government of the Republic of Cyprus has already agreed to the same body being designated as competent authority for the purpose of this subsequent proposal as well.

It is therefore necessary to amend Article 2(2) of the Commission's proposal, by replacing the relevant part with the wording cited above in Article 4(5) of the 'Green Line' Regulation.

Conclusions

The Legal Service is of the opinion, for the reasons given above, that:

- 1) The correct legal basis for the above proposal is Article 1(2) of Protocol n° 10 to the Act of Accession 2003, and not Article 133 of the EC Treaty;
- 2) Insofar as the above proposal envisages the trade of products through ports in the areas which the Government of the Republic of Cyprus has declared to be closed, it gives rise to difficulties under international law and Community law, which would however be overcome by using Article 1(2) of Protocol n° 10 as the legal basis;
- 3) It could be argued that Article 2(1) of the proposal does not amount to recognition of any other authority in the areas than the Government of the Republic of Cyprus;

¹² Council Regulation (EC) n° 866/2004 (see footnote (1), page 1).

- 4) Article 2(2) of the proposal is not correct legally, insofar as it would allow for the Commission to designate the Turkish Cypriot Chamber of Commerce or other body as a competent authority for the implementation of the proposed measure, without the agreement of the Government of the Republic of Cyprus.
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