

## **THE DRAFT "DIRECT TRADE" REGULATION: A SHORT LEGAL ANALYSIS**

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In July 2004, in the aftermath of the referenda on the Annan Plan for a comprehensive settlement of the Cyprus problem, which resulted in a positive vote by the Turkish Cypriot community and a negative one by the Greek Cypriot community, the European Commission tabled before the EU Council two draft regulations aiming at rewarding the Turkish Cypriots for their positive vote and at giving them a clear signal that their future lies within the European Union. The first draft regulation, which provided a framework for granting a 259 million euro financial assistance to the Turkish Cypriot community, was adopted by the Council with the support of the Cyprus Government. The second one, the so called "direct trade" regulation has still not been adopted six years later. Considered to be dormant since 2007, it was recently revived when the Commission, invoking the change of procedure brought about by the Treaty of Lisbon as regards the adoption of acts on the basis of article 207 of the Treaty on the Functioning of the EU<sup>1</sup>, submitted the draft regulation to the European Parliament for discussion.

This draft regulation, which provides for a preferential treatment of goods originating in the occupied areas of Cyprus, within specific tariff quotas, when these goods are transferred to another EU Member State, is highly problematic both from a political and a legal point of view. The present analysis will be confined to the main legal issues.

As it stands today, the draft regulation proposed by the Commission completely ignores the suspension of the application of the Union's *acquis* in the areas of the Republic of Cyprus where the Government of the Republic does not exercise effective control, as well as the existence of a State, the Republic of Cyprus, which has sovereignty over the entire island of Cyprus.

As regards the first issue, it is reminded that under the provisions of article 1 of Protocol No 10 to the Act of Accession of Cyprus to the European Union, the application of the Union's *acquis*, i.e. EU law, is suspended in the areas of the Republic of Cyprus where the Government does not exercise effective control. The same article provides for a procedure for lifting the suspension. This can be done through a unanimous decision of the EU Council upon a proposal by the European Commission. Thus, the application – and provisional non application – of EU law in the areas of Cyprus where the Government does not exercise effective control is fully regulated by Protocol No 10 and no legal act which is part of EU law can apply in those areas if this is not done in conformity with the provisions of Protocol No 10.

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<sup>1</sup> The Commission considers that the proposed regulation primarily concerns external trade and should, therefore, be adopted on the basis of article 207 TFEU. This article regulates the Common Commercial Policy and provides for a system of co-decision of the European Parliament and of the Council, the latter deciding by qualified majority.

It is, I believe, extremely difficult to argue that if the draft "direct trade" regulation were to enter into force it would not result in any part of EU law being applied in the occupied areas of Cyprus. It appears quite obvious that the Turkish Cypriot Chamber of Commerce, which would be authorized by the Commission under the provisions of articles 3 and 6 of the regulation to issue a document certifying the origin of goods, would, when issuing such document, be applying provisions of the regulation and, thus, provisions of EU law in an area where the application of EU law is suspended. The same is true regarding the phytosanitary inspection and reporting that experts appointed by the Commission are supposed to be doing in the occupied areas. In article 7 of the draft regulation it is clearly stated that these experts should carry out inspections in the areas where the Government of the Republic of Cyprus does not exercise effective control and verify that goods produced there comply with the provisions of the said article and of Directive 2000/29/EC.

Given that under the provisions of article 1 of Protocol No 10 the application of the *acquis* is suspended in the areas of the Republic of Cyprus where the Government does not exercise effective control, it is not possible to apply the *acquis*/EU law there without following the prescribed procedure in order to lift the suspension, that is to say without a unanimous decision of the Council taken on the basis of article 1, paragraph 2, of the same Protocol. The draft regulation proposed by the Commission ignores the need for such decision, as it does not have article 1 of Protocol No 10 as part of its legal basis.

Beside this issue pertaining to the legal basis of the regulation, the other major legal issue relates to the complete disregard shown in the Commission's proposal for the sovereignty of the Republic of Cyprus.

The draft regulation is designed so as to function without any role or intervention of the authorities of the Member State primarily concerned, i.e. the Republic of Cyprus. According to the Commission's proposal, a legal person (the Turkish Cypriot Chamber of Commerce) which is incorporated under the laws of the Republic of Cyprus, is to be authorized to carry out functions within the territory of the Republic of Cyprus for the purpose of implementing an EU regulation concerning goods produced in the Republic of Cyprus and, nevertheless, the authorities of the Republic of Cyprus should have no say on the authorization of that legal person and no role regarding future control of whether this legal person does its job correctly. It should be reminded here that the Member States have the primary overall competence for the implementation of EU law in their territory. This competence is completely ignored by the draft regulation proposed by the Commission.

The draft regulation actually goes one step further: it completely disregards the sovereign right of the Republic of Cyprus to designate within its territory the ports and airports which are open to international traffic. Following the Turkish invasion of summer 1974, on the 4<sup>th</sup> of October of the same year, the Cyprus Government decided to close all ports that were previously functioning in the northern part of the island. Since then these ports have never been reopened and the airports that were built in the occupied areas were never

designated under the Chicago Convention as open to international flights. While these facts are not contested by the European Commission, its draft "direct trade"<sup>2</sup> regulation aims at regulating trade which can only be carried out through these closed ports and airports. This inconsistency in the Commission's positions could only, from a legal point of view, have as its basis the ill founded premise that, somehow, along with the *acquis*, the rights of the Republic of Cyprus under international law to close its ports to international navigation or to designate its customs airports have also been suspended in the areas where its Government does not exercise effective control.

It is to be hoped that, ultimately, the Commission will see the value of the Republic of Cyprus's political and legal arguments and will not insist on the adoption of its draft regulation. If this does not happen and the Commission manages to get the regulation adopted by a qualified majority on the basis of article 207 TFEU despite the strong opposition of the only Member State directly concerned, it is likely that the regulation will be annulled by the Court of Justice of the European Union, after having in the meantime seriously harmed the trust of the majority of the Cypriot population towards the European Union as well as the prospects of reunification of the island.

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<sup>2</sup> The fact that what is sought to be achieved is characterized as "direct trade" is, in itself, not insignificant. If one considers, as is unanimously accepted by the international community, that the territory of the Republic of Cyprus extends to the whole island of Cyprus, then the ports of Famagusta, Kyrenia, Limassol and Larnaca are all within that territory. That being the case, why should trade of goods produced in the occupied territories of Cyprus, shipped through Famagusta and arriving in another EU port be considered as more "direct" than the trade of the same goods shipped through Limassol and arriving in the same EU port? If trade through Famagusta is considered as "direct" while trade through Limassol is not, then it must be that the occupied areas of Cyprus are not considered by the authors of the draft regulation as being "quite" within the territory of the Republic of Cyprus and, therefore, goods produced there and passing to the government-controlled areas in order to be shipped through Limassol are considered to have, somehow, transited through the territory of a country other than the one where they have been produced!