

ACCESS TO THE EU MARKET: WHAT THE EURO-MED PARTNERSHIP MEANS TO YOU AND HOW IT FITS INTO THE DOMESTIC LEGAL FRAMEWORK

I. INTRODUCTION

Relations between the Mediterranean countries and the EU are regulated by two sets of agreements, which may be likened to two concentric circles: the Barcelona Partnership Process (the outer circle) provides a looser, multilateral political framework of co-operation, while the more detailed association agreements (the inner circle) establish a closer bilateral relationship between the EC and the individual states of the Mediterranean region.

To date, Association Agreements (“AAs”) have been concluded with most of the members of the Euro-Mediterranean Partnership.¹ The Association Agreement and the Interim Agreement with Lebanon were signed on 17 June 2002. The Association Agreement was ratified by the Lebanese Parliament on 2 December 2002 and by the European Parliament on 16 January 2003; it will enter into force once ratified by the EU Member States (normally this takes around three years).

The Interim Agreement entered into force on 1 March 2003.² Concessions on trade in Lebanese agricultural and processed agricultural exports took immediate effect, and the 12 year transition period for phasing out customs tariffs and other restrictions on trade began. The 1978 Co-operation Agreement, under which Lebanese industrial goods enjoyed duty and quota free access to EC markets, will be replaced when the Association Agreement is ratified.

In the last decades AAs have been concluded with several states, most of which have either already become members of the EC (e.g. Greece, Portugal) or are in the process of doing so, such as the Central and East European candidate countries (“CEEC”), and Turkey. The AAs with the members of the Euro-Mediterranean

¹ See http://europa.eu.int/comm/external_relations/euromed/med_ass_agreemnts.htm for the agreements.

² See SPEECH/02/288, Chris Patten, *Signing of the EU-Lebanon Association Agreement and the EU-Lebanon Interim Agreement*, 17 June 2002; Press Release IP/03/300, *EU-Lebanon: entry into force of the Interim Agreement on 1 March 2003*, 28 February 2003. See http://europa.eu.int/comm/external_relations/lebanon/intro/index.htm for a description of bilateral relations.

See http://europa.eu.int/comm/external_relations/lebanon/intro/ag.htm for the texts of the agreements.

Partnership at issue are, however, different, because they do not envisage the future accession of these nations to the EU.

II. WHAT THE AGREEMENTS GIVE AND WHAT THEY DO NOT

1. OVERVIEW

The AAs represent an important step in the development of the relationship between the EC and the Mediterranean states. In particular, they provide for the establishment of a free-trade zone through the gradual elimination of customs duties for industrial products and the abolition of quantitative restrictions and measures having an equivalent effect³. Thus they enable exporters in the Mediterranean states to gain improved access to the world's largest single market with 370 million customers, and soon some 450 million consumers.

The EC is Lebanon's main trading partner; it is its main supplier with 45 % of imports in 2001, and Italy, Germany and France are the leading suppliers. Lebanon for its part sells 30 % of its exports to the EC.

As far as other classical freedoms of the Common Market (free movement of people, services and establishment) are concerned, the AAs are, as a rule, more cautious and fall short of the corresponding provisions of the EC Treaty. By way of example, the relevant provisions refer to rights and obligations under multilateral agreements with respect to the right of establishment and the freedom to provide services⁴, state that public procurement contracts shall be gradually liberalised⁵, or merely authorise the Association Council to take concrete steps in the future.

2. THE BARCELONA PARTNERSHIP PROCESS

The Barcelona process is essentially a form of political co-operation between the EC and the countries situated on the southern shore of the Mediterranean basin. It is in itself of limited interest to companies and lawyers in the Mediterranean states. It does not provide any legal instruments, which could directly improve the competitive position of companies in these countries. The intergovernmental

³ Articles 3 et seq. Interim Agreement, Articles 6 et seq. AA, Title II, Chapter 1 for industrial products and Chapter 2 with respect to agricultural products. The articles in the Interim Agreement mention in brackets the corresponding article number of the AA.

⁴ Cf. Article 30 AA on the right of establishment and the supply of services, which shall be guaranteed according to GATS rules, once Lebanon acceded to the WTO.

⁵ Article 39 AA.

nature of the co-operation means that it does not directly affect the day-to-day work of a business lawyer. Nonetheless, the partnership is important, for several reasons.

Firstly, it provides an institutional framework for co-operation between the EC and the Mediterranean states, including financial transfers from the Community to its Mediterranean partners.⁶ Secondly, co-operation and mutual confidence-building in the Mediterranean partnership paves the way for the conclusion of AA, which provide tangible benefits to the enterprises in the region in terms of access to EC markets. Thirdly, it is the basis for funding programmes, such as the present one.

3. THE AA WITH LEBANON

a) Comparison with other agreements

The AAs give a privileged (“associated”) status to the partner states in their relations with the EC. In order to understand the importance of this, it is worth briefly recalling the trade regulation in today’s world.

The basic international agreement for trade issues is the General Agreement on Tariffs and Trade (GATT) signed in 1947 and amended thereafter several times. The GATT was instrumental in ushering in an era of rapid economic growth after World War II and in turning away from the mentality of protectionism and economic isolationism prevalent between the two World Wars. The EC Treaty was inspired by the GATT, but went further in two aspects.

Firstly, the subject matter of the GATT is restricted to trade in goods (and, since the conclusion of the GATS and TRIPS agreements in 1994, in services as well), while the EC Treaty also covers free movement of persons and capital.

Secondly, the objective of the GATT was merely the elimination of non-tariff barriers and the gradual reduction of tariffs. By contrast, the EC Treaty aimed at establishing a customs union,⁷ which is evolving towards full economic and monetary union. Even though the final outcome of the European construction remains to be seen, one can probably say that, in the economic sphere at least, the objective is the eventual creation of an economic area, where the level of integration approaches that in a large federal state – the U.S.A. being referred to

⁶ In the period 1995-99, the European Union has provided over € 4.6 billion in grants to the Mediterranean region, while, in addition, the European Investment Bank granted loans of over € 4.6 billion, cf. *Report from the Commission – Annual Report on the MEDA Programme 1999*; COM(2000) 472 final, p. 4. In the year 2002, some € 760 million were committed (see Euromed No 35, 18 February 2003).

⁷ Cf. Article XXIV paragraph 5 of the GATT.

most often as the “role model”. However, language and cultural barriers will remain an important “non-tariff barrier”: By way of example, Italians do not exactly have the same taste as Swedes.

The GATT may be compared to an effort to open doors through the walls isolating the national economies. By like token, one can say that the EC Treaty, in a more ambitious manner, aimed at knocking down these walls altogether – at least as far as the relationship between the Member States is concerned.

The AAs are undoubtedly less ambitious than the EC Treaty, but go substantially further than the GATT.

b) Structure

As already stated above, the AAs provide for the establishment of a free-trade zone. Thus as far as trade in industrial products is concerned, the associated Mediterranean states will enjoy practically the same access to the EC market as do Member States. It is regrettable that agricultural products, which make up a considerable part of the exports of the Mediterranean states, are subject to special provisions, which establish a less generous regime.

It comes as little surprise that the movement of workers is the area where the AAs take the most conservative approach. Free movement is not provided for, nor is it envisaged in the future. On the other hand, the AAs enshrine the principle of non-discrimination in the treatment of workers lawfully employed in the territory of the other Contracting Party.⁸

III. THE AGREEMENTS AND THE DOMESTIC LEGAL SYSTEM – SOME POTENTIAL PROBLEMS

The provisions in the first AAs (Morocco, Tunisia, Algeria, Egypt) dealing with competition and state aid practically replicate the corresponding provisions of the EC Treaty (Articles 81, 82 and 87 EC Treaty). The Interim Agreement and AA with Lebanon are modelled on the competition provisions of the EC Treaty without however replicating them entirely.⁹ An explicit reference to state aid is lacking.

Moreover, the provisions in the first AAs require that “any practices contrary to this Article shall be assessed on the basis of the criteria arising from the

⁸ Cf. Articles 64 - 66 AA regarding dialogue and cooperation in the social field on the one hand and Articles 68 – 70 AA on the other regarding cooperation for the prevention and control of illegal immigration.

⁹ Article 27 Interim Agreement and Article 35 AA respectively.

application of [the above Articles]...”¹⁰ Thus, in a manner rather unusual in international agreements, certain AAs provide for the application of the law of one jurisdiction (the EC) in another Mediterranean country. It is true that the so-called Europe Agreements (“EA”) concluded with the CEEC include similar provisions but these were adopted with the objective of preparing these countries for accession. Membership for the Mediterranean states is, however, not. Yet, certain Mediterranean countries are required to apply the competition legislation of the EC and thus implicitly to accept, albeit in a closely circumscribed field, the supremacy of EC law over their domestic legal systems.¹¹ By way of comparison, Article 35 (2) AA (or 27 Interim Agreement) require that “the Parties will enforce their respective competition legislation”; it is understood that the Lebanese legislation is on its way.

Certainly, the current trend is for creating one set of competition rules world-wide. However, care should be taken to ensure that the particular local and regional regimes are respected. In this regard it is questionable whether using the EC’s system as a model in certain AAs will prove to be a good idea. At any rate, the agreements with Lebanon provide that the country should develop its own competition legislation and control.

The issue of copying the EC approach into bilateral relations cannot be explored here in its full complexity but the issue of state aid provides an instructive example. The concept of state aid is peculiar to the EC; its prohibition of state aid is arguably much wider than what is at issue in the GATT rules on subsidies. It basically means that Member States are barred from distorting the conditions of competition within the Common Market by providing financial assistance to certain undertakings or for the production of certain goods.¹² While the anti-trust provisions of the Treaty (Articles 81 and 82) seek to prevent the distortion of competition by private actors through the formation of cartels or the abuse of its

¹⁰ Article 36(2) of the AA with Morocco.

¹¹ It should be added that said provisions do not appear to be entirely unproblematic in the law of the CEEC either, cf. for instance Decision 30/1998 (VI.30.) of the Hungarian Constitutional Court, which declared the implementing provision of a similar clause in the EC-Hungarian Association Agreement to be unconstitutional.

¹² The complete text of the relevant provision (Article 87(1) of the EC Treaty reads as follows: “*Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, shall, in so far as it affects trade between Member states, be incompatible with the common market.*” The Court of Justice has generally adopted a wide interpretation of the concept of “aid”, thus, for instance, it has consistently held that aid “*embraces not only positive benefits...but also interventions, which mitigate the charges which are normally included in the budget of an undertaking.*”, cf. Case 30/59 *Steenkolenmijnen/High Authority* (1961) ECR I at paragraph 19.

position by one or more dominant undertakings, the prohibition of state aid addresses the same concerns with respect to the public authorities.

State aid has been a thorny issue in the accession negotiations of the CEEC13 and it may raise similar problems for the Mediterranean states, for at least two reasons. Firstly, productivity in the region is often low and after the removal of tariff and non-tariff trade barriers many companies will not be able to compete effectively with EC companies without some form of public assistance. Secondly, once free trade in industrial products becomes a reality, investors from industrialised nations will be increasingly tempted to set up manufacturing facilities in the region and use it as an export base to the EC. Yet, they may be more willing to invest if offered tax and other investment incentives, which, however, fly in the face of state aid rules in the EC.

If governments in the region want to attract investment and thereby fully exploit the potential benefits of the AA, they have to provide incentives for the investors but in doing so they may well incur the wrath of Brussels.

The mentioned considerations may be a reason for not including such an explicit provision in the AA with Lebanon. However, any distortion of competitive conditions may be addressed in the Co-operation and later Association Council, as well as through the WTO channels, once applicable.

Moreover, one should mention in respect of further competition issues, the provisions in Articles 36 and 37 of the AA (Articles 28 and 29 Interim Agreement) on discrimination by state monopolies of a commercial character on the one hand, and companies that enjoy special or exclusive rights on the other.

Similarly, several important procedural aspects of the mentioned AAs could be clarified. Competition provisions of the Treaty as well as implementing legislation (most of which is in the form of a regulation) enjoy direct effect, which means that they can be invoked by private parties before the Court of Justice. It is settled case law that AAs are different, because they do not have the same purpose as the EC Treaty.¹⁴ Yet, some of their provisions may have direct effect, provided that they are unconditional, sufficiently precise and their direct application is within the purpose of the agreement.¹⁵

¹³ See the sharp statement made by Competition Commissioner Monti, who claimed that a number of tax incentive and investment support schemes adopted in the applicant countries are “in flagrant violation of the undertakings they made within the framework of the Europe Agreements” and that “it would be totally unacceptable for the applicant countries to continue their current practices”, BULLETIN QUOTIDIEN EUROPE N° 7885, Saturday, 20 January 2001, p. 11.

¹⁴ Cf. *inter alia* Case 270/80, *Polydor/Harlequin* [1982] ECR 329 at paragraph 18.

¹⁵ Cf. Case 104/81 *Hauptzollamt Mainz/Kupferberg* [1982] ECR 3641.

The AAs have evolved since the first agreements that were concluded with Morocco and Tunisia, and which were modelled more on those with the East European countries. The AA with Lebanon refrains from requesting the country to simply reproduce as national legislation the European Community's internal market rules. It was the intention of the negotiations that the Lebanese legislator should be obliged to draft own rules of competition. Nonetheless, the EC has the option to seek performance on competition to an acceptable level through Article 27 (2) and (3) Interim Agreement, which provides for consultation via the Co-operation (later, Association) Council. Accordingly, the adoption of measures could be requested, where judged necessary, when national legislation and its application falls short of expectations.

IV. CONCLUSION

The AAs represent an important step forward towards bridging the socio-economic gap between the two shores of the Mediterranean. There are, however, several issues, which could be improved in the future, such as free movement of persons or which need to be fleshed out by decisions of the Association Council, such as more specific rules on competition and maybe state aid. Thus it can be predicted with some certainty that the AA will continue to provide material for future conferences of this kind.