

Legal Service

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Brussels, **16 MARS 2012**

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LEGAL OPINION

Re: Proposal for a Council Decision on the conclusion of an additional Protocol to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, and the State of Israel on an Agreement between the European Community and the State of Israel on Conformity Assessment and Acceptance of Industrial Products

I. INTRODUCTION

1. By letter of 16 February 2012 (annexed), received by the Legal Service on 20 February 2012, the Chairman of the Committee on Foreign Affairs (AFET) Mr Elmar BROK sought the opinion of the Legal Service on the interpretation of Article 9 of the Additional Protocol to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, and the State of Israel on an Agreement between the European Community and the State of Israel on Conformity Assessment and Acceptance of Industrial Products (hereinafter: ACAA)¹.

II. BACKGROUND

The Association Agreement

2. The legal basis for Union's relations with Israel is the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part² (hereinafter: Association Agreement) that entered into force on 1 June 2000.

¹ COM(2009)559 final.

² OJ L 174, 21.6.2000, p 3.

3. Under Article 47 of the Association Agreement, "*[t]he Parties shall aim to reduce differences in standardisation and conformity assessment. To this end the Parties shall conclude where appropriate agreements on mutual recognition in the field of conformity assessment.*" Article 55 provides for the approximation of laws, holding that "*[t]he Parties shall use their best endeavours to approximate their respective laws in order to facilitate the implementation of this Agreement.*"
4. Article 83 of the Association Agreement stipulates that "*[t]his Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal And Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the territory of the State of Israel.*"

The ACAA

5. On 22 October 2009, the Commission adopted a proposal for a Council decision on the conclusion of the ACAA. The referral by Council to Parliament, requesting consent, was made on 17 May 2010, following Council's Decision on the signature of the agreement, dated 22 March 2010. The agreement is not provisionally applied.
6. The objective of the ACAA is to facilitate market access by eliminating technical barriers to trade with respect to industrial products. The ACAA is about the mutual acceptance of certain industrial products which are included in an Annex and their conformity assessment. The following are important elements to keep in mind:
 - the result of the ACAA will be that the Union and Israel allow products to be placed on their market if they fulfil the requirements for being lawfully placed on the market of the other (Article 5);
 - as provided in the Annex, Section II, 1, third subparagraph, products are covered "*irrespective of their origin*". Therefore, ACAA can apply to products placed on the Israeli market, but which originate in third states;³
 - as it stands, the ACAA will in the beginning only apply to pharmaceuticals products, but other Annexes with different products could be added at a later date.
7. The bodies responsible for the legal requirement on conformity assessments are the "Responsible Authorities" which are to be recognised by the other party in line with the procedures under Article 9 ACAA.

³ A product originating in Kenya, for example, which transits through Israel, can be certified in Israel and be put on the Union market without further certification required by Union authorities.

III. LEGAL ANALYSIS

Question 1

What are the effects, if any, including by way of subsequent practice, of including this stipulation in the ACAA in light of the above? In particular, does this mean that for the purpose of the Protocol, terms used in the ACAA, and terms in the Parent Agreement applied under the ACAA, including Article 83, shall have one meaning for the EU (given in relevant Community law) and another meaning for Israel (given in Israel's national law) should the two Parties' law be divergent?

8. Article 2, last subparagraph, of ACAA, holds that *"the terms used in this agreement shall have the meaning given in relevant Community law and Israel's national law"*.
9. The terms used in both agreements are interpreted by each of the Parties in accordance with their national laws, unless a definition is specifically provided in the agreement. In this regard, terms such as "industrial products" and "committee" are specifically defined in the ACAA Protocol itself and cannot be given a different definition by the each Party.
10. However, terms which are not specifically defined in the Protocol, or in the Association Agreement, are defined by each Party in accordance with its own laws. In practical terms, it is indeed not excluded that this can result in a specific term being given a definition by one Party which is not identical to the definition given to it by the other Party.
11. In this regard, in case of divergence of interpretation of the parent agreement or the ACAA, each of the Parties may refer the dispute to the Association Council, in conformity with Article 75 of the parent agreement.

Question 2

Do the terms of ACAA as it has been drafted provide for the possibility that the territory over which a given responsible authority has particular jurisdiction may be delimited differently from its actual delimitation in the nominating Party's legal framework, applicable implementing legislation, and resulting institutional practice? Must the nominating Party's statement be regarded as a statement of actual fact by the acknowledging Party?

12. The ACAA refers to two types of bodies: the "Responsible Authority" and the "Notified Bodies". According to Article 2(d), "Responsible Authority" means *"a body under the jurisdiction of one of the Member States of the European Union or of Israel which is responsible for the effective implementation of Community and national law in a specified industrial sector, and which where appropriate has the responsibility for notifying Notified Bodies"*. Under Article 2(e) "Notified Body" means *"a body notified, by a Responsible Authority under the respective jurisdiction of one of the Parties to this Agreement, to the other Party, as competent to assess conformity in relation to requirements of Community or national law"*.
13. Article 9(1)(a) ACAA provides that: *"a Party shall forward its nomination to the other Party in writing, stating the territory and title of the Annex to this Agreement under which the Responsible Authority is competent to carry out the tasks listed in Article 8.1, including as appropriate any limitations to such competence within the territory or the scope of the Annex"* (emphasis added). This provision means that when Israel nominates a Responsible Authority that ensures the conformity of industrial products, it also

determines the "territory" for which the Responsible Authority is competent to carry out its tasks. An acknowledgement by the European Union that the particular Responsible Authority shall be considered as competent to carry out the said tasks is then required. That acknowledgement must be in writing (Article 9(1)(b) ACAA).

14. Article 9(2) establishes the procedure to be followed when the parties notify each other of "Notified Bodies". In this regard, limitations may be placed on the Notified Body in terms of "*competence within the scope of the agreement*" (Article 9(2)(a)) but not in terms of territory. However, since the Notified Bodies are notified by the "Responsible Authority", the territory covered by the Notified Body must fall within the territorial limitation of the Responsible Authority as established under Article 9(1) ACAA. Acknowledgement by the European Union, in writing, is required also with regard to the "Notified Bodies". Without that acknowledgement, the body is not considered as notified and as competent to assess conformity in relation to the said requirements specified in the Annexes from that date.
15. In this regard, the Parties determine themselves who will act as "Responsible Authorities" and the "territory" covered by each Responsible Authority. The Agreement does not require that the territory for which an authority is responsible under the laws of Israel or of the European Union is exactly the same as that for which the authority acts as Responsible Authority under ACAA. Authority X can be responsible for a territory covering areas A, B, C, and D with regard to its responsibilities under national law, but only be considered as a Responsible Authority under ACAA for areas A, B and C.
16. Finally, considering the major effect of the delimitation of territory under which the Responsible Authority is competent, the ACAA does neither provide nor exclude that the respective acknowledgement of it by the other Party must be regarded only as a statement of actual fact.

Question 3

Can the EU consider that the territorial scope of the jurisdiction and market of Israel has a lesser extent than the territory in which Israel states its Responsible Authorities to be competent or can the EU maintain that the territorial scope of the parent Association Agreement's applicability by Israel has a lesser extent than the territory that Israel designates its Responsible Authority to be competent if the EU acknowledges Israel's statement as conforming to Article 9(1) of the ACAA?

17. The extent to which ACAA will apply depends on the extent to which the nominated Responsible Authorities and Notified Bodies are competent.
18. When Israel nominates a Responsible Authority, it must also state whether it will apply limitations on that authority with regard to "territory" or "scope", in conformity with Article 9(1) ACAA. In this way, when Israel nominates a Responsible Authority, the Commission on behalf of the European Union⁴ should be in a position to know which territorial areas are covered by that authority before acknowledging it.

⁴ Under Article 3 of the proposal for a Council Decision concluding the agreement, the Commission, after consultation with the special committee appointed by the Council, shall carry out the acknowledgement of the Responsible authority or Authorities nominated by Israel.

19. If Israel nominates the Responsible Authority (for example, the Israeli Ministry for Health) to be competent in whole Israel, which in Israel's definition of territory includes territories which came under Israeli administration in 1967, then the Commission is not in a position to acknowledge that nomination, but may request that the nomination clearly limits the competence of the nominated Responsible Authority so as not to cover those territories. The Commission is obliged to clarify the issue and follow the case-law of the European Court of Justice.
20. In this context, it should be noted that the Union has concluded two association agreements: with Israel, and with the "Palestine Liberation Organization for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip"⁵. Each of those two association agreements has its own territorial scope. Under Article 83 thereof, the EC-Israel Association Agreement applies to the "territory of the State of Israel". Under Article 73 thereof, the EC-PLO Association Agreement applies to the "territories of the West Bank and the Gaza Strip". The EC-PLO Association Agreement includes also Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation.
21. In its judgment of 25 February 2010, in the *Brita* case⁶, the Court of Justice recognised the relevance of both agreements and drew a dividing line between the two by holding that products originating from the West Bank or the territories covered by the EC-PLO Association Agreement cannot be granted preferential treatment under the EC-Israel Association Agreement. It held that *"to interpret Article 83 of the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, 'pacta tertiis nec nocent nec prosunt', as consolidated in Article 34 of the Vienna Convention"* (paragraph 52). In the same Judgement, the Court held that *"the European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment [...]"* (paragraph 64)
22. Following the same line of reasoning, the Commission cannot acknowledge a Responsible Authority nominated by Israel which is responsible also for the territories which fall under the EC-PLO Interim Association Agreement. If it did acknowledge such authority, it would be granting competence to Israeli authorities extended over territories which fall under the EC-PLO Association Agreement. This would also be incompatible with the EC-PLO Interim Association Agreement.

⁵ The Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part. OJ L 187, 16.7.1997, p. 3.

⁶ Judgment of the Court of 25 February 2010, Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen*, ECR (2010) I-01289.

Question 4

Could the EU demand that the entry into force of the ACAA be subject to a restricted territorial scope without contradicting the vigent parent agreement?

23. ACAA has been negotiated as an additional Protocol to the EU-Israel Association Agreement. Protocols are an integral part of international agreements. For this reason, the definition of the Parties cannot be different in a Protocol to what it is in the "parent" agreement, namely Article 83 thereof.
24. Considering the subject matter of ACAA, the problem is not about granting benefits to the State of Israel for products originating in the territories brought under Israeli administration in 1967, because the ACAA is applicable to products irrespective of their origin. It is rather about the Union acknowledging, under Article 9(2) ACAA, Israeli authorities to extend their authority to the territories brought under Israeli administration in 1967, in breach of the Union's obligations under international law. Two options may be considered for responding to this issue:
 - a) in the written acknowledgment of a Responsible Authority under Article 9 ACAA, the Commission can specifically state that the acknowledgment is granted on the basis that the territory covered by the Responsible Authority does not include the territories brought under Israeli administration in 1967. The Union would thus be reiterating its position with regard to the territorial scope of the Association Agreement, including its protocols. This is a matter of implementation of the agreement which does not require its modification.
 - b) the Commission could refuse to acknowledge a Responsible Authority unless Israel limits the competence of that authority. Such limitation is legally possible under Article 9(1)(a) of ACAA which provides that a Party nominating a Responsible Authority can limit its competence "within the territory". Israel could do this by, for example, including all the postcodes covered by the Responsible Authority. This would avoid the problem of the Union recognising a body which in fact operates, at least partially, over the territories brought under Israeli Administration in 1967. This is a matter of implementation of the ACAA which does not require a modification of the agreement.

IV. CONCLUSIONS

25. Having regard to the above, the Legal Service comes to the following conclusions:

Response to question 1:

- a) Terms which are not specifically defined in the Protocol, or in the Association Agreement, are defined by each Party in accordance with its own laws. In practical terms, it is indeed not excluded that this can result in a specific term being given a definition by one Party which is not identical to the definition given to it by the other Party;

Response to question 2:

- b) The Parties determine themselves who will act as "Responsible Authorities" and the "territory" covered by each Responsible Authority. The Agreement does not require that the territory for which an authority is responsible under the laws of Israel or of the European Union is exactly the same as that for which the authority acts as Responsible Authority under ACAA. Authority X can be responsible for a territory covering areas A,B,C, and D with regard to its responsibilities under national law, but only be considered as a Responsible Authority under ACAA for areas A, B and C;

Response to question 3:

- c) If Israel nominates one Responsible Authority for the whole territory of Israel, then the Commission could raise the concerns about territories which came under Israeli administration in 1967. The Commission cannot acknowledge a Responsible Authority nominated by Israel which is responsible also for the territories which fall under the EC-PLO Interim Association Agreement. Such acknowledgement would be incompatible with the EC-PLO Interim Association Agreement, in particular the foreseen discussion between the Union and the PLO on mutual recognition arrangements;

Response to question 4:

- d) ACAA has been negotiated as an additional Protocol to the EU-Israel Association Agreement. Protocols are an integral part of international agreements. For this reason, the definition of the Parties cannot be different in a Protocol to what it is in the "parent" agreement. Considering the subject matter of ACAA, the problem is rather about the Union acknowledging, under Article 9(2) ACAA, Israeli authorities to extend their authority to the territories brought under Israeli administration in 1967, in breach of the Union's obligations under international law. Two options may be considered for responding to this issue:
 - i. in the written acknowledgment of a Responsible Authority under Article 9 ACAA, the Commission can specifically state that the acknowledgment is granted on the basis that the territory covered by the Responsible Authority does not include the territories brought under Israeli administration in 1967. This is a matter of implementation of the agreement which does not require its modification.
 - ii. the Commission could refuse to acknowledge a Responsible Authority unless Israel limits the competence of that authority. Such limitation is legally possible under Article 9(1)(a) of ACAA which provides that a Party nominating a Responsible Authority can limit its competence "within the territory". Israel could do this by, for example, including all the postcodes covered by the Responsible Authority. This would avoid

the problem of the Union recognising a body which in fact operates, at least partially, over the territories brought under Israeli Administration in 1967.



Ignacio DÍEZ PARRA, Head of Unit



Daniela GAUCI

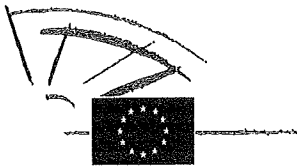
Visa: *By delegation of the Jurisconsult,*



Ricardo Passos
Director

Annex: Letter of 16 February 2011 from Mr Elmar BROK, Chairman of the Committee on Foreign Affairs

Copy: Mr Vital MOREIRA, Chairman of the Committee on International Trade



Committee on Foreign Affairs
The Chair

Arrivé Service Juridique
le 20 -02- 2012

200969 16.02.2012

Ref: D(2012)7652

Dr Christian Pennera
Jurisconsult

Subject: **Request for a legal opinion** (EU-Israel Agreement on Conformity Assessment and Acceptance of Industrial Products)

Dear Jurisconsult,

The Parliament is currently considering consent to the *Proposal for a Council Decision on the conclusion of an additional Protocol to the Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, and the State of Israel on an Agreement between the European Community and the state of Israel on Conformity Assessment and Acceptance of Industrial Products* (hereafter "the ACAA").

A number of articles in the ACAA refer to territorial applicability of the agreement and to responsible authorities having jurisdiction over the respective territories as stated by each party.

In particular, Article 2 of the ACAA stipulates that "the terms used in this Agreement shall have the meaning given in relevant Community law and Israel's national law". The Protocol is an integral part of its parent Agreement, the EU-Israel Association Agreement.

Article 83 of the ACAA's parent Agreement, defines the territorial scope of that Agreement's applicability with regard to Israel as "the territory of the State of Israel".

According to Israel's national law (Area of Jurisdiction and Powers Ordinance, 5708-1948) the term "territory of Israel" includes the territories its army occupies.

Based on its position regarding the status in international law of the territories it has occupied since 1967, Israel has unilaterally applied the EU-Israel Association Agreement, and each of its predecessor agreements with the European Community, to those territories.

In other areas of the EU-Israel relationship, the EU does not recognise Israel's legislative acts extending the application of Israel's domestic legislation to those territories, mandating and implementing the settlement of Israeli nationals in them, or effectively annexing parts of them.

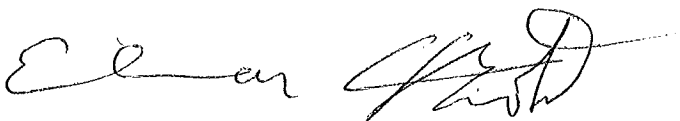
However, the disputed interpretation of Article 83 remains unresolved, and neither Party has elected to invoke the compulsory dispute settlement mechanism provided in Article 75 of the parent Agreement.

The Committee on Foreign Affairs would like to request the assistance of the legal service to assess certain concerns regarding the outcomes and consequences to EU interests stemming from the Parties' implementation of the procedure for the recognition of Responsible Authorities as set out in Article 9.1.a and 9.1.b, in light of the circumstances and provisions of the Agreement described below:

1. What are the effects, if any, including by way of subsequent practice, of including this stipulation in the ACAA in light of the above? In particular, does this mean that for the purpose of the Protocol, terms used in the ACAA, and terms in the Parent Agreement applied under the ACAA, including Article 83, shall have one meaning for the EU (given in relevant Community law) and another meaning for Israel (given in Israel's national law) should the two Parties' law be divergent?
2. Do the terms of ACAA as it has been drafted provide for the possibility that the territory over which a given responsible authority has particular jurisdiction may be delimited differently from its actual delimitation in the nominating Party's legal framework, applicable implementing legislation, and resulting institutional practice? Must the nominating Party's statement be regarded as a statement of actual fact by the acknowledging Party?
3. Can the EU consider that the territorial scope of the jurisdiction and market of Israel has a lesser extent than the territory in which Israel states its Responsible Authorities to be competent or can the EU maintain that the territorial scope of the parent Association Agreement's applicability by Israel has a lesser extent than the territory that Israel designates its Responsible Authority to be competent if the EU acknowledges Israel's statement as conforming to Article 9(1) of the ACAA?
4. Could the EU demand that the entry into force of the ACAA be subject to a restricted territorial scope without contradicting the vigent parent agreement?

In view of the legislative calendar set by the lead Committee INTA, I should be grateful if the legal opinion could reach AFET within two weeks.

Yours sincerely,



Elmar Brok

CC: Mr Vital Moreira, Chair of INTA Committee