CHAPTER 198

Article 198 TFEU on Association with Non-European Countries and Territories; Purpose of Associations

Salvatore F. Nicolosi[*]

SYNOPSIS

§ 198.01 Text of Article 198 TFEU

PART FOUR ASSOCIATION OF THE OVERSEAS COUNTRIES AND TERRITORIES

Article 198

(ex Article 182 TEC)

The Member States agree to associate with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the 'countries and territories') are listed in Annex II.

The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole.

In accordance with the principles set out in the preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.

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§ 198.02 Text of TEC, Article 182[1]

The Member States agree to associate with the Community the non-European countries and territories that have special relations with Denmark, France, the Netherlands and the United Kingdom. These countries and territories (hereinafter called the "countries and territories") are listed in Annex II to this Treaty.

The purpose of the association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.

In accordance with the principles set out in the Preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.

§ 198.03 Overseas Countries and Territories

[1] Scope of Application

Article 198 of the TFEU reiterates an old EC law provision concerning overseas countries and territories, which are not part of the territory of the European Union, but given their special relations with four of the EU Members States (Denmark, France, the Netherlands and the United Kingdom), they have been associated to the EC and now the EU since the Treaty of Rome of 1957.[1] Nonetheless, despite reproducing the same wording of its predecessor, Article 182(1) of the TEC, following the adoption of the Lisbon treaty, Article 198 is to be read in the light of the renewed EU approach to overseas countries and territories. Such an approach aims to preserve the special relations that overseas countries have with the four Member States, taking into account a new paradigm of partnership. From this perspective, the association with overseas territories must not be exclusively finalised to development cooperation but especially to the wider inclusion of these territories within the EU as a source of economic opportunities and cultural diversity.[2]

The overseas countries and territories covered by Article 198 are listed in Annex II to the TFEU. According to the latter Annex, the countries and territories to which the provision of Part Four of the TFEU apply are: Greenland (DK); New Caledonia and Dependencies (FR); French Polynesia (FR); French Southern and Antarctic Territories (FR); Wallis and Futuna Islands (UK)*; Saint Pierre and Miquelon (FR)*; Aruba (NL); former Netherlands Antilles[3] (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten);

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[1] Former Article 131.

[1] As to the historical developments, *see* Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 182, para. 1.

[2] COM (2008) 383.

[3] Pursuant to the Kingdom Act amending the Charter for the Kingdom of the Netherlands (*Rijkswet wijziging Statuut in verband met de opheffing van de Nederlandse Antillen*) of 11 November 2009, The Netherlands Antilles was dissolved on 10 October 2010 and its constituent islands have acquired a new

Anguilla (UK)*; Cayman Islands (UK); Falkland Islands (UK); South Georgia and the South Sandwich Islands (UK); Montserrat (UK)*; Pitcairn (UK); Saint Helena and Dependencies (UK)*; British Antarctic Territory (UK); British Indian Ocean Territory (UK); Turks and Caicos Islands (UK)*; British Virgin Islands (UK); Bermuda (UK). As of 1 January 2012, Saint Barthélemy (FR),[4] a former outermost region, changed its status to overseas country and territory, while Mayotte (FR) became an outermost region with effect from 1 January 2014.[5]

The French overseas departments (*départements d'outre-mer*) of Martinique, Mayotte, Guadeloupe, French Guiana and Réunion as well as the French overseas collectivity (*collectivité d'outre-mer*) of Saint-Martin do not belong to the overseas countries and territories under Article 198 of the TFEU and constitute instead outermost regions to which EU law applies, pursuant to Articles 349 and 355 of TFEU. Currently there are nine outermost regions which include also the Portuguese autonomous regions (*regiões Autónomas de Portugal*) of Madeira and the Azores; and the Spanish autonomous community (*comunidad autónoma*) of the Canary Islands.[6]

It is worth mentioning that, following the notification by the United Kingdom of its intention to withdraw from the EU and Euratom based on Article 50 of the TFEU received by the European Council on 29 March 2017, the British overseas countries and territories will be outside the association regime as of the date in which the withdrawal of the UK from the EU comes into effect, this will most probably be 30 March 2019, if no agreement on any possible extension is concluded.[7]

In the context of the 2021–2027 Multiannual Financial Framework, outlined by the European Commission, a new Overseas Association Decision has been seen as a Priority for the EU external action Programmes. Accordingly, the European Commission submitted a Proposal for a New Overseas Association Decision for the period 2012–2017, which also reflects the post Brexit scenario and its impact on overseas countries and territories. This proposal, in fact, is presented for a Union of 27 Member States, in line with It therefore does not apply to the 12 overseas countries and territories linked to the United Kingdom. The association of the 13 remaining overseas countries and territories with the EU flows from the constitutional relations that these countries and territories have with Denmark, France, and the Netherlands.

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constitutional status: Curaçao and Sint Maarten became new countries within the Kingdom of the Netherlands, Bonaire, Sint Eustatius and Saba became special municipalities of the Netherlands.

[4] European Council Decision 2010/718/EU of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy, OJ 2010 L 325/4.

[5] Council Directive 2013/61/EU of 17 December 2013 amending Directives 2006/112/EC and 2008/118/EC as regards the French outermost regions and Mayotte in particular, OJ 2013 L 353/5, Article 4.

[6] For a broader discussion of the status of outermost region under EU law, *see* F. Murray, *The European Union and Member State Territories: A New Legal Framework Under the EU Treaties* (2012) 71-90.

[7] *See* B. Eddington, "A Poorly Decided Divorce: Brexit's Effect on the European Union and United Kingdom" (2018) *Suffolk transnational law review*101 *et seq*.

Overseas countries and territories share similar characteristics which represent particular economic challenges, such as geographical isolation resulting in high transportation costs, small size of their economy, high dependency on imports (including of energy sources), low competitiveness of the local industries, and, in some cases limited national institutional capacity. Apart from these common features, overseas countries and territories still display a number of differences between them in terms of relative wealth, geographical characteristics and internal political organization. Even though the social situation in the majority of these territories is not one of absolute poverty as internationally defined,[8] there is a heavy dependence on financial assistance either from the related EU Member State or from the EU.

[2] Legal Status of Overseas Countries and Territories

The overseas countries and territories do not fulfil the requirements of statehood under public international law, accordingly they do not have the capacity to enter into international legal relations with States or international organisations. Their interests are therefore represented under international law by their respective home countries. From a EU law perspective, this situation is of particular importance when discussing the issue of their representation in international organisations. According to Article 355 of the TFEU, the overseas countries and territories do not fall within the scope of application of the Treaty. This fact can lead to a situation in which the EU member State—in representing its overseas countries and territories in an international organisation to which the EU is also a member—is acting independently of and in addition to the EU.

Nonetheless, in their relationships with the EU, they cannot be regarded as "third countries" *stricto sensu*, for at least two considerations. On the one hand, they cannot be disconnected from the EU in that they are subject to the sovereignty of an EU Member State. Secondly, in contrast to third country nationals, nationals of overseas countries and territories are in principle EU citizens, pursuant to Article 20 of the TFEU. This is the case of all nationals of Greenland, the French and Dutch overseas territories, while as of 2002 nationals of the British overseas are given the possibility to choose also the British nationality. As a consequence, nationals of the overseas countries and territories can enjoy EU citizens' rights, including free movement, right to vote in elections to the European Parliament (under the conditions established by Member States).[9] Another significant element to exclude that overseas countries and territories can be regarded as third countries is the fact that the ECJ has recognised the competence of courts these territories to request the ECJ to give a ruling under Article

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[8] The United Nations, *The Copenhagen Declaration and Programme of Action: World Summit for Social development 6-12 March 1995,* defined absolute poverty as:

> "a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to services."

[9] Case C-300/04, *Eman and Sevinger* [2006] ECR I8055.

267 of the TFEU,[10] or to submit actions for annulment, pursuant to Article 263 of the TFEU.[11] As to the issue of whether a Court must be seen as a Court or Tribunal "of a Member State" especially in view of a reference for preliminary ruling, it follows form the ECJ's case law that a national court in an overseas country or territory listed in Annex II of the TFEU constitutes a "a court or tribunal of a Member State."[12]

The *sui generis* nature of the association regime of the overseas countries and territories does not lead to a relationship between these entities and the EU being governed by public international law. This follows from the fact that, as has been said, the overseas countries and territories do not fulfil the criteria for statehood under international law. Consequently, the legal obligations laid down in Part Four of the TFEU (Articles 198 to 204) and the implementation decisions of the Council under Article 203 are only addressed to the Member States and the EU itself.[13] The ECJ and the Court of First Instance (now General Court) have frequently interpreted and applied the provisions of Part Four of the TFEU, as well as the implementation decisions under Article 203.[14] In this regard, it is significant to stress also that, as a settled case law has confirmed, if an overseas country or territory becomes independent, the association regimes ceases to apply, despite the fact that such an overseas territory or country continues to mentioned by Annex II to the TFEU.[15]

§ 198.04 Purposes Pursued by the Association Regime

The objectives of the association regime laid down in Article 198 of the TFEU are supplemented by the principles set out in the Preamble to the Treaty, to which Article 198 explicitly refers. In this connection, the promotion of "the economic and social development of the countries and territories" must be qualified as the primary purpose, not only with regard to the overseas countries and territories but also concerning the EU's policy on development cooperation as a whole, as shown by Article 208(1) of the TFEU. The additional goal of establishing "close economic relations between them and the Union as a whole" illustrates that the already existing close economic relations

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[10] Joined Cases C-100/89 and 101/89, *Peter Kaefer and Andréa Procacci v. French State*, [1990] ECR I4647, 4670; Case C-260/90, *Bernard Leplat v. Territory of French Polynesia*, [1992] ECR I643, 668.

[11] Case C-452/98, *Nederlandse Antillen v. Council* [2001] ECR I8973.

[12] Joined Cases C-100/89 and 101/89, *Peter Kaefer and Andréa Procacci v. French State*, [1990] ECR I-4647, Paragraph 8 *et seq*. *See also* Broberg, "Access to the European Court of Justice by Courts in Overseas Countries and Territories," in D. Kochenov, *EU Law of the Overseas* (2011), 138 *et seq*.

[13] Zimmermann, "Vorbemerkungen Articles 182 bis 188," in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Paragraph 17.

[14] Case C-430/92, *Kingdom of the Netherlands v. Commission*, [1994] ECR I5197; Case C-310/95, *Road Air BV v. Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I2229; Joined Cases T-480/93 and T-483/93, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Curaçao NV and Guyana Investments AVV v. Commission*, [1995] ECR II2305; Joined Cases T-332/00 and T-350/00, *Rica Foods (Free Zone) NV and Free Trade Foods NV v. Commission*, [2002] ECR II4755.

[15] Case C-147/73, *Carlheinz Lensing Kaffee-Tee-Import KG v Hauptzollamt Berlin-Packhof*, [1973] ECR 1543, 1546.

between the overseas countries and territories and their respective mother countries are intended to be extended to all Member States of the EU in line with the principle of nondiscrimination. From their contents, these economic purposes are very similar to the ones pursued by the association regime with the African, Caribbean and Pacific (ACP) group of States.

Article 198 furthermore refers to the Preamble to the TFEU, which expresses, *inter alia*, the desire of the EU "to ensure the development of their [the overseas countries and territories] prosperity in accordance with the principles of the Charter of the United Nations" in a spirit of solidarity. This reference to the Charter of the United Nations especially concerns its Articles 73 and 74,[1] which thereby become a binding and integral part of the regime established by Articles 198 to 204 of the TFEU. The adoption of a measure by the EU in violation of these Articles of the Charter of the United Nations would, therefore, also amount to a violation of the Treaty itself. Beyond the purposes stated in Article 198 of the TFEU, Article 73, Litera a of the Charter of the United Nations requires, among other things, "political, economic, social and educational advancement" while exercising "due respect for the culture of the peoples concerned."

Furthermore, Article 73 of the Charter of the United Nations demands that promotion and support for the overseas countries and territories must be undertaken "within the system of international peace and security established by the present Charter."[2] Therefore, far beyond mere economic aspects, recourse is taken to social and cultural elements that, due to the dynamic developments in the regime of the United Nations, increasingly display features of the rule of law.[3] First and foremost, this is true with regard to the human rights policy, which, ever since the "third generation" of the association regime of overseas countries and territories and the Lomé Conventions in 1985 and 1986, is also of increasing importance for the EU.[4] In addition, over the years the importance of a democratic form of government has been stressed in connection with the association regimes.[5] This is also clear in the Green Paper of 2008 which set the background of the most recent Overseas Association Decision. The latter states in Article 3(3): "the association shall respect the fundamental principles of liberty, democracy, human rights and fundamental freedoms, the

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[1] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

[2] Fastenrath, in B. Simma (ed), *The Charter of the United Nations—A Commentary* (2002) Article 73, paras. 1 *et seq.*

[3] As to the notion of "positive peace" under the Charter of the United Nations, *see* Wolfrum, in B. Simma (ed), *The Charter of the United Nations—A Commentary* (2002), Article 1, paras. 8 *et seq.*; C. Tietje, *Internationalisiertes Verwaltungshandeln* (2001) 231, with further references.

[4] M.E. Casanova Domènech, "Los Acuerdos de Asociación Econ/omica UE-ACP: un enforque pro-desarollo" in *Revista de Derecho Comunitario Europeo*, 2006, 945–970.

[5] F. Hoffmeister, *Menschenrechts und Demokratieklauseln in den vertraglichen Auβenbeziehungen der Europäischen Gemeinschaft* (1998) 7 *et seq.*, with further references.

rule of law, good governance and sustainable development, all of which are common to the OCTs and the Member States to which they are linked."[6]

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[6] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), OJ 2013 L 344/1.

CHAPTER 199

Article 199 TFEU on Objective of Associations

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SYNOPSIS

§ 199.01 Text of Article 199 TFEU

Article 199

(ex Article 183 TEC)

Association shall have the following objectives.

1. Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties.

2. Each country or territory shall apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which is has special relations.

3. The Member States shall contribute to the investments required for the progressive development of these countries and territories.

4. For investments financed by the Union, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories.

5. In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in

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accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a nondiscriminatory basis, subject to any special provisions laid down pursuant to Article 203.

§ 199.02 Text of TEC, Article 199[1]

Association shall have the following objectives:

1. *Member States shall apply to their trade with the countries and territories the same treatment as they accord each other pursuant to this Treaty.*
2. *Each country or territory shall apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the European State with which is has special relations.*
3. *The Member States shall contribute to the investments required for the progressive development of these countries and territories.*
4. *For investments financed by the Community, participation in tenders and supplies shall be open on equal terms to all natural and legal persons who are nationals of a Member State or of one of the countries and territories.*
5. *In relations between Member States and the countries and territories the right of establishment of nationals and companies or firms shall be regulated in accordance with the provisions and procedures laid down in the Chapter relating to the right of establishment and on a non-discriminatory basis, subject to any special provisions laid down pursuant to Article 187.*

§ 199.03 Normative Value of Article 199

From its wording, the introductory sentence of Article 199 of the TFEU seems imprecise. The provision, in fact, does not deal with the "objectives" of the association regime, as these objectives are already stated in Article 198, but rather with the basic conditions, such as free trade, financial aid and freedom of establishment, according to which the association of the overseas countries and territories is to be developed. This finding should not, however, lead to the conclusion that this provision is a mere programmatic statement and thus void of any normative value. Instead, Article 198 is a legally binding framework provision that determines the minimal contents to be regulated by the implementation decisions under Article 203.[1] As a consequence, Article 199 must always be read in conjunction with the implementation decisions adopted under Article 203.

§ 199.04 Principles of Trade

Article 199(1) and (2) determine the principles by which trade in the mutual relationship between all Member States and the overseas countries and territories should be exercised. In this context, the obligation of the most-favoured nation treatment deriving from the principle of non-discrimination under Article 12 and

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[1] Former Article 132.

[1] Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 183, Paragraph 1.

applying to EU law as a whole plays a crucial role.[1] These provisions, in fact, illustrate two situations. On the one hand, Article 199 (1) establishes an obligation for Member States to apply to their trade with the countries and territories the same treatment as they accord each other pursuant to the Treaties. This means that, in accordance with the obligation of the most-favoured nation treatment, under Article 199 (1), Member States apply the internal market regime to the overseas countries and territories with total exemption from customs duties for goods from overseas countries and territories entering the EU. However, a number of exceptions to this principle exist, especially concerning agricultural products. Thus, the aim of Article 203 and Part Four of the TFEU as a whole "is not to establish an internal market of the kind set up by the Treaty between the Member States."[2] This was recently confirmed by the ECJ which noted that the overseas countries and territories are not part of the internal market and consequently the internal market rules, which are contained in Part III of the TFEU are not applicable *ratione loci*.[3]

On the other hand, Article 199 (2) provides that overseas countries and territories apply to its trade with Member States and with the other countries and territories the same treatment as that which it applies to the Member State with which they have special relations. In other words, the preferential regime between overseas countries and territories with a Member State with which they have special relations is extended to all other Member States and other overseas countries and territories.

This obligation, however, is subject to the possibility of exceptions, as provided for in Article 200(3) of the TEC and Article 51 (2) of the Overseas Association Decision,[4] which may lead to one-sided trade liberalization to the advantage of the overseas countries and territories. Furthermore, this possibility of exceptions is also the reason why the association with overseas countries and territories under Part IV of the TFEU cannot be characterized as a free trade area *sui generis*, but only as a unique kind of association regime.[5]

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[1] Sørensen, "The Most-Favoured-Nation Principle in the EU" 34 Legal Issues of Economic Integration (2007) 315.

[2] Joined Cases T-480/93 and T-483/93, *Antillean Rice Mills NV, Trading & Shipping Co. TerBeek BV, European Rice Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission*, [1995] ECR II-2305, 2339; Case C-390/95 P, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission*, [1999] ECR I-769, Paragraph 36; Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I-675, Paragraph 29.

[3] Joined cases C-24/12 and C-27/12, *X BV and TBG Limited*, 5 June 2014.

[4] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ("Overseas Association Decision"), OJ 2013 L 344/1.

[5] For a diverging conclusion, see Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 183, Paragraph 2.

Ultimately, it must be stressed that, according to the recent Green Paper on the Future relations between the EU and the Overseas Countries and Territories,[6] the principles of trade between the EU and overseas countries and territories cannot be subject to revision without considering the changes in the wider world, which affect the EU and the overseas countries and territories themselves, as well as the laters' principal trading partners and in particular their ACP neighbours.

§ 199.05 Financial Aid

The principle of financial aid which informs the association regime which overseas countries and territories is articulated through a twofold perspective. On the one hand, Article 199 (3) refers to the obligation of the Member States to grant financial support to overseas countries and territories. On the other hand, Article 199 (4) establishes the freedom of participation in tenders and supplies for investments funded by the EU.

In particular, as regards the obligation to make financial contributions under Article 199(3), the provision does not indicate the specific regulations and details with regard to the total volume and allocation to individual Member States. These aspects are subject to additional regulation by EU Member States. Of specific relevance in this connection is the Development Fund (EDF), whose functioning was illustrated in Regulation No. 7 of 23 February 1959 of the Commission[1] and later in Decision 91/482, which established the first European Development Fund (EDF).[2] Originally and until 1998 the financial aid was allocated to all overseas countries and territories altogether, letting interested the Member States concerned (France, Netherlands and the UK) to distribute the resources among their own overseas countries and territories. Nonetheless, since the Association Decision of 2001 Eu financial resources have been allocated directly to the overseas countries and territories.[3]

The overall amount of EU financial support for overseas countries and territories is €364.5-million for the programming period 2014–2020 under the 11th EDF.[4]

As regards the freedom of participation in tenders and supplies for investments funded by the EU, Article 199(4) stipulates the prohibition of discrimination against

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[6] European Commission, Future relations between the EU and the Overseas Countries and Territories, Green Paper, COM (2008) 383 final, para. 3.2.

[1] Commission Regulation No 7 establishing the rules of operation of the Development Fund for the overseas countries and territories, OJ 1959 L 12/241.

[2] Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community, OJ 1991 L 263/1.

[3] Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ("Overseas Association Decision"), OJ 2001 L 314/1–77.

[4] Internal Agreement between the Representatives of the Governments of the Member States of the European Union, meeting within the Council, on the financing of European Union aid under the multiannual financial framework for the period 2014 to 2020, in accordance with the ACP-EU Partnership Agreement, and on the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the Treaty on the Functioning of the European Union applies, OJ 2013 L 210/1–14; see also Report from the Commission to the Council on the implementation of the financial assistance provided to the Overseas Countries and Territories under the 11th European Development Fund, 21 February 2017 COM (2017) 84 final.

individuals or companies of Member States or overseas countries and territories. While Implementation Decision 91/4821 included in its Articles 200 *et seq.* comprehensive regulations concerning the implementation of former Article 183(4), the current Overseas Association Decision of 2013 stresses, in Article 85(4), *Litera* a, the joint responsibility of the relevant authorities of the overseas countries and territories and the Commission for ensuring equality of conditions for participation in invitations to tender and contracts. Additional regulations with regard to tenders for projects financed by the EDF, which also include overseas countries and territories, can be found in the Financial Regulation adopted by the Council in 2015 and being applicable to the 11th EDF.[5]

§ 199.06 Freedom of Establishment

Among the classical freedoms enshrined in the Treaty, only the freedom of establishment is, in principle, regulated by Article 199(5) regarding relations between the Member States and the overseas countries and territories, while the details are referred to in specific regulations in the implementation decisions under Article 203. According to Article 51 of the current Overseas Association Decision, with regard to their regulations on establishment and services, the overseas countries and territories benefit from the principle of the most favourable treatment. From this perspective, the provision explicitly calls the EU to accord to natural and legal persons of the overseas countries and territories a treatment no less favourable than the most favourable treatment applicable to like natural and legal persons of any third country with whom the Union concludes or has concluded an economic integration agreement. On the other hand, based on the principle of non-discrimination, overseas countries and territories shall accord the same treatment to the natural and legal persons of the Union a treatment. Overall, all relevant Treaty provisions enshrined in Articles 49–55 of the TFEU on the progressive suppression of restrictions to the freedom of establishment find application in relation to overseas countries and territories. Nonetheless, specific derogations can be accorded by overseas countries and territories if justified within the general aim of supporting local occupation. Also, the conditions of entry and residence of nationals of EU Member States in the overseas countries and territories for other reasons than freedom of establishment or to provide services can be regulated autonomously by the authorities of overseas countries and territories.

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[5] Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund, OJ 2015 L 58/17–38.

CHAPTER 200

Article 200 TFEU on Customs Duties

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SYNOPSIS

§ 200.01 Text of Article 200 TFEU

Article 200

(ex Article 184 TEC)

1. Customs duties on imports into the Member States of goods originating in the countries and territories shall be prohibited in conformity with the prohibition of customs duties between Member States in accordance with the provisions of the Treaties.

2. Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be prohibited in accordance with the provisions of Article 30.

3. The countries and territories may, however, levy customs duties which meet the needs of their development and industrialisation or produce revenue for their budgets.

The duties referred to in the preceding subparagraph may not exceed the level of those imposed on imports of products from the Member State with which each country or territory has special relations.

4. Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which they are bound, already apply a non-discriminatory customs tariff.

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5. The introduction of or any change in customs duties imposed on goods imported into the countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.

§ 200.02 Text of TEC, Article 184[1]

1. *Customs duties on imports into the Member States of goods originating in the countries and territories shall be prohibited in conformity with the prohibition of customs duties between Member States in accordance with the provisions of this Treaty.*
2. *Customs duties on imports into each country or territory from Member States or from the other countries or territories shall be prohibited in accordance with the provisions of Article 25.*
3. *The countries and territories may, however, levy customs duties that meet the needs of their development and industrialization or produce revenue for their budgets.*

The duties referred to in the preceding subparagraph may not exceed the level of those imposed on imports of products from the Member State with which each country or territory has special relations.

4. *Paragraph 2 shall not apply to countries and territories which, by reason of the particular international obligations by which they are bound, already apply a non-discriminatory customs tariff.*
5. *The introduction of or any change in customs duties imposed on goods imported into the countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States.*

§ 200.03 Normative Structure of Article 200

Article 200 stipulates the principles of trade with overseas countries and territories as laid down in Article 199(1) and (2). The purpose of this provision to set the scope and limits of trade liberalization by the probation of customs duties, though this does not amount to a level comparable to the standard provided for in the concept of the Single Market. Taking into consideration that overseas countries and territories are not formally part of the Customs Union, the provision under Article 200 of the TFEU introduces a special regime vis-à-vis the overseas countries and territories.[1] A comparison with Article 200(1) and (2) shows that the trade liberalization is primarily intended to unilaterally benefit the overseas countries and territories, although this one-sidedness has been considerably softened in the new wording of this provision if compared to the former Article 133. From the purpose of Article 200, it follows that

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[1] Former Article 133.

[1] See A. Tryfonidou, "The Overseas Application of the Customs Duties Provisions of the TFEU" in D. Kochenov (ed.), *EU Law of the Overseas* (2011), 226 *et seq*.

this provision does not only cover customs duties in a narrowsense, but "also applies to charges having an effect equivalent to customs duties."[2]

In its five paragraphs, Article 200 pursues a twofold goal. On the one hand, it aims to clarify the legal regime applicable to the import and export of goods and the relative customs duties, while, on the other hand, the provision regulates possible derogations from the non-discriminatory regime established under the provision under discussion.

In particular, by confirming the tenet of former Article 184(1) and (2) of the TEC, Article 200(1) and (2) provide for a comprehensive prohibition of customs duties, subject only to the regulations under Article 200(3).[3] It is worth recalling that, the original version of such provision under Article 133 of the TEEC provided for the progressive abolition of customs duties, in order to enable the Member States to gradually adapt to the EU regime.[4]

Article 200(1) contains an absolute prohibition against the Member States imposing customs duties on imports of goods originating in the overseas countries and territories. Likewise, the overseas countries and territories are subject to such a prohibition under Article 200(2). However, Article 200(3) and (5) provides for the possibility for overseas countries and territories to continue to levy customs duties under certain circumstances.

It is worth bearing in mind that Article 200 regulates the abolition of customs duties and charges having an equivalent effect exclusively in the relations between the Member States and the overseas countries and territories. If, and to what extent, the overseas countries and territories are allowed to impose external tariffs on goods originating from third countries is not covered by this provision.[5] Also, Article 200 does not serve as an indication of whether the association regime with the overseas countries and territories can be qualified as a customs union or a free trade area,[6] since the difference between these two concepts is the fact that customs unions are characterized by the existence of a common external tariff.[7]

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[2] Case C-260/90, *Bernard Leplat v. Territory of French Polynesia*, [1992] ECR I-643, 670 *et seq.*

[3] Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 184, Paragraph 1.

[4] F. Murray, *The European Union and Member State Territories: A New Legal Framework Under the EU Treaties* (2012) 109.

[5] Case C-130/93, *Lamaire NV v Nationale Dienst voor Afzet van Land-en Tuinbouwprodukten*, [1994] ECR I-3215, Paragraph 15; Case C-148/77, *H. Hansen jun. & O. C. Balle GmbH & Co. v Hauptzollamt de Flensburg*, [1978] ECR I-1787, Paragraph 22.

[6] For a different view, see Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 184, Paragraph 2.

[7] GATT, Article XXIV:8; J.G. Huber, *Die präferenziellen Abkommen der EG mit dritten Staaten und die Frage ihrer Vereinbarkeit vom dem GATT* (1981) 28 *et seq.*

§ 200.04 Prohibition of Customs Duties on Goods from Overseas Countries and Territories

Article 200 (1) of the Treaty refers to the prohibition of customs duties for products originating from the overseas countries and territories when entering the EU. Therefore, according to Article 200 (1) of the Treaty, products originating from the overseas countries and territories shall, in principle, be imported into the EU free of import duties. Following the abrogation of a number of related transitional provisions in 1997,[1] the decisive factor in determining whether a product can be imported free of import duties is consequently that the goods at issue must originate from one of the overseas countries and territories. This is due to the fact that the prohibition stipulated in Article 200(1) "does not extend to goods not originating in OCTs but in free circulation there."[2] It is worth mentioning that Annex VI to the Overseas Association Decision enshrines the criteria to identify products that shall be considered as originating in an overseas countries and territories.[3] In particular, the latter document refers to two categories of goods, namely: a) products wholly obtained in an overseas country or territory[4] and b) products obtained in an overseas country or territory incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing.[5] In the latter circumstance, the relevant rule is based on compliance with a maximum content of non-originating materials.

Pursuant to Article 200(2) the prohibition of customs duties must be coordinated with the general principles established in Article 30 of the TFEU on the prohibition of customs duties and charges having an equivalent effect. The prohibition regulated by Article 200(1) and (2) is implemented through the Overseas Association Decision, in particular through the general clause under Article 44, which confirms also the general justification for possible restrictions based on public morality or public policy, the protection of health and life of humans, animals and plants, the protection of national treasures possessing artistic, historic or archaeological value, the conservation of exhaustible natural resources or the protection of industrial and commercial property.

§ 200.05 Customs Duties and Charges Imposed by Overseas Countries and Territories

Contrary to the principles set forth in Paragraph 1, Article 200(2) and (3) impose upon the overseas countries and territories a considerably more limited obligation to

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[1] Council Decision 97/803/EC of 24 November 1997, amending at mid-term Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community, OJ 1997 L 329/50, 58.

[2] Case C-310/95, *Road Air BV v. Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I-2229, Paragraph 35.

[3] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), OJ 2013 L 344/1, Annex VI, Art. 2.

[4] *Ibid.*, Art. 3.

[5] *Ibid.*, Art. 4.

liberalise trade. Although Article 200(2) stipulates a comprehensive prohibition against customs duties on imports from Member States, Article 200(3) gives overseas countries and territories the possibility to continue to levy customs duties under certain circumstances. Upon a systematic interpretation of this provision, the wording of Article 200(5) ("introduction of or any change in customs duties") shows that Article 200(3) not only allows the continuing imposition of customs duties that already existed at the time of the entry into force of the Treaty, but also authorises the overseas countries and territories to introduce new customs duties.

According to Article 200(3), overseas countries and territories can levy customs duties.

> "provided, first, that the duties or charges levied meet the needs of their development and industrialization or produce revenue for their budgets and, secondly, that the introduction of or any change in such duties or charges does not give rise to any direct or indirect discrimination between imports from the various Member States, and is subject to the obligation to implement reductions laid down in the second subparagraph of Article 133(3) [of the TEEC]."[1]

Article 200(3) thereby only prohibits an overseas country or territory from discriminating against other Member States in comparison to the Member State with which it has special relations. By derogating from the principle of reciprocity of treatment, overseas countries and territories are authorized to levy customs duties if these are aimed at assuring their economic development or producing revenues for their budget. Nonetheless, these duties cannot exceed those levied on goods imported from the Member State with which the overseas country or territory has special relation.

Article 200(4) introduces a further exception to the general prohibition of customs duties and charges under paragraph (2) by establishing that it does not apply to countries and territories which, by reason of international obligations by which they are bound, already apply a non-discriminatory customs tariff. This provision under Article 200(4) formerly applied to certain states and territories in Africa that are now parties to the ACP Agreements, the most recent being the Cotonou Agreement.[2] Therefore, this provision is currently void of any relevance in practice.[3]

§ 200.06 Non-Discrimination

Non-discrimination constitutes an underpinning principle regulating the relations between the EU and overseas countries and territories. The reference to non-discrimination in Article 200(5) is therefore to be regarded as a reiteration in one specific area of a general EU law principle. In particular, Article 200(5) establishes that

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[1] Case C-260/90, *Bernard Leplat v. Territory of French Polynesia*, [1992] ECR I-643, 672.

[2] Partnership agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its Member States, signed in Cotonou on 23 June 2000, OJ 2000 L 317/3.

[3] Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 184, Paragraph 7.

the introduction of or any change in customs duties imposed on goods imported into the overseas countries and territories shall not, either in law or in fact, give rise to any direct or indirect discrimination between imports from the various Member States. In this regard, the principle of non-discrimination constitutes a form of complementary protection against discrimination among Member States. Nonetheless, it is worth mentioning that the provision does not foresee any scrutiny mechanisms as regards the existence of a possible violation of the general principle of non-discrimination, nor the does the provision or the Overseas Association Decision regulate any procedures to avoid such a risk of violation[1] The latter Decision enshrines in Article 46 only a general non-discrimination clause based on the principle of reciprocity, according to which the EU shall not discriminate between overseas countries and territories and these shall not discriminate between Member States.

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[1] *See* Buonomenna, in C. Curti Gialdino (dir.), *Codice dell'Unione europea operative, TUE e TFUE commentate articolo per articolo* (2012) Article 200.

CHAPTER 201

Article 201 TFEU on Measures to Remedy Deflections of Trade

Salvatore. F. Nicolosi[*]

SYNOPSIS

§ 201.01 Text of Article 201 TFEU

Article 201

(ex Article 185 TEC)

If the level of the duties applicable to goods from a third country on entry into a country or territory is liable, when the provisions of Article 200(1) have been applied, to cause deflections of trade to the detriment of any Member State, the latter may request the Commission to propose to the other Member States the measures needed to remedy the situation.

§ 201.02 Text of TEC, Article 185[1]

If the level of the duties applicable to goods from a third country on entry into a country or territory is liable, when the provisions of Article 184(1) have been applied, to cause deflections of trade to the detriment of any Member State, the latter may request the Commission to propose to the other Member States the measures needed to remedy the situation.

§ 201.03 Commentary on Article 201

Article 201 of the TFEU reiterates the safeguard clause corresponding to former Article 185 and before to Article 134. This horizontal clause applying to all Part IV of the TFEU would serve as a counterbalance whenever deflections of trade to the detriment of any Member State occur. This circumstance will be the consequence of

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[1] Former Article 134.

the application of a level of duties applicable to goods from a third country on entry into a country or territory which is lower than the one established by the common external tariff for the same goods which is re-exported to the EU.

In case of such a deflection in trade, a specific procedure set forth by Article 201 can be triggered by the Member State concerned which can ask the Commission to propose to the other Member States the measures needed to remedy the situation. It is worth stressing that the Commission's intervention can be required even in case of a mere risk of deflection in trade to the detriment of any Member State.[1]

As to the nature of the Commission's intervention, Article 201 of the TFEU refers to a proposal containing the measures needed to remedy the situation thereby authorizing other Member States to hold a specific conduct. Nonetheless, in the mechanism under Article 201 is no longer of any practical importance. The possible deflections of trade caused by the import of goods from a third country into the EU via one of the overseas countries and territories covered by this provision are today dealt with according to the rules of origin. Accordingly, possible economic problems as envisioned by Article 201 are today dealt with on the basis of specific rules of origin in Annex VI to the Overseas Association Decision.[2] This approach corresponds to the situation in the WTO legal order, where rules of origin have an important position from an economic policy point of view.[3]

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[1] Case C-390/95 P, Antillean Rice Mills and Others v. Commission, [1999] ECR I769.

[2] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), OJ 2013 L 344/1.

[3] WTO Agreement on Rules of Origin, reprinted in: WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations-The Legal Texts* (1999) 211 *et seq.*; Prien, "Das ?bereinkommen über Ursprungsregeln," in H.-J. Prien and G.M. Berrisch (eds), *WTO Handbuch* (2003) B.I.10., Paragraphs 1 *et seq.*; D.B. Kaufmann, *Ursprungsregeln: Die internationale und europäische Gestaltung der Ursprungsregeln* (1996) 180 *et seq.*

CHAPTER 202

Article 202 TFEU on Freedom of Movement of Workers

Salvatore F. Nicolosi[*]

SYNOPSIS

§ 202.01 Text of Article 202 TFEU

Article 202

(ex Article 186 TEC)

Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be regulated by acts adopted in accordance with Article 203.

§ 202.02 Text of TEC, Article 186[1]

Subject to the provisions relating to public health, public security or public policy, freedom of movement within Member States for workers from the countries and territories, and within the countries and territories for workers from Member States, shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States.

§ 202.03 Commentary on Article 186

Article 202 covers the freedom of movement for workers from overseas countries and territories in coordination with Articles 45 *et seq.,* as to the notion of "worker" as well as any possible limitations.

This provision under Article 202 therefore confirms a well-consolidated principle based on reciprocity rules ensuring freedom of movement within Member States for

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[*] Utrecht University, The Netherlands.

[1] Former Article 135.

workers from overseas countries and territories, and within these countries and territories for workers from Member States.

Former Article 186 established that such a regime of free movement for workers shall be governed by agreements to be concluded subsequently with the unanimous approval of Member States. This means that possible agreements had to be concluded between all Member States and all overseas countries and territories.

It was argued by Advocate General Mischo that, due to the lack of agreements under former Article 186, citizens of the Union with residence in the Member States "may not rely on Community law to claim the right to enter into and stay in an overseas country or territory in order to take up and carry on salaried employment there."[1] Instead, they could only rely on the principle of non-discrimination.[2] However, taking into account the dynamic interpretation of Article 45 as a right that also prohibits restrictions (not only discrimination) upon the freedom of movement for workers,[3] it seemed impossible to reconcile the mentioned Advocate General's Opinion with a vast part of settled case law.

Since then, the introduction of a EU citizenship in the letter of Article 20 of the TFEU (former Article 17 of the TEC), and of Article 21 on the EU citizens' right to move and reside freely coupled with the dynamic interpretation of this provision by the ECJ[4] have obviously reduced the importance of Article 202.[5] In this context, it is worth stressing that nationals of overseas countries and territories, who are not at the same time nationals of one of the Member States, could not rely on the freedoms as long as the agreements under former Article 186 had not been concluded.[6] However, this restriction does not apply to nationals of overseas countries and territories who are nationals of a Member State and, thus, citizens of the Union in accordance with Article 20(1) of the TFEU. As citizens of the Union, these persons can rely on the general freedom of movement and residence provided for by Article 21 even if they have not yet entered the territory of the EU.[7] This finding stems directly from the wording of

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[1] Advocate General Mischo in Joined Cases C-100/89 and 101/89, *Peter Kaefer and Andréa Procacci v. French State*, [1990] ECR I-4647, Paragraph 25.

[2] Joined Cases C-100/89 and 101/89, *Peter Kaefer and Andréa Procacci v. French State*, [1990] ECR I-4647, 4672.

[3] Hobe and Tietje, "Europäische Grundrechte auch für Profisportler," 36 *Juristische Schulung* (1996) 486, 489 *et seq.*

[4] For an overview of the relevant judgments, see Lenaerts, "EU citizenship and the European Court of Justice's 'stone-by-stone' approach," in K. *International Comparative Jurisprudence* 1 (2015) 1 *et seq*.

[5] *See* Kochenov, "EU Citizenship in the Overseas," in D. Kochenov, *EU Law of the Outerseas* (2011) 199 *et seq*.

[6] Randelzhofer and Forsthoff, "Vorbemerkungen zu den Artikeln 39 bis 55," in E. Grabitz and M. Hilf (eds), *Das Recht der Europäischen Union* (2004) Paragraph 18; Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 186, Paragraph 1.

[7] European Commission, *Future relations between the EU and the Overseas Countries and Territories*, Green Paper, COM (2008) 383, 6–7.

Article 21, which does not refer to the territorial scope of application of the Treaty, as it exclusively refers to the "territory of the Member States" of which the overseas countries and territories are part.[8]

In addition, the applicability of Article 21 under these circumstances also follows from the character of this provision as determining "the fundamental status of nationals of the Member States."[9] In line with this finding, the previous Overseas Association Decision stated that the definition of nationals of an overseas country or territory "is without prejudice to the rights conferred by citizenship of the Union within the meaning of the Treaty."[10]

Ultimately, the right of entry of nationals of overseas countries and territories into the Member States based on Article 21 also results in the fact that, as far as they are nationals of one of the Member States, individuals can also rely upon the rights guaranteed by Articles 45 *et seq.* following their entry. Thus, with regard to this category of persons, Article 202 is no longer of any relevance.[11]

As to the implementation of the provision under Article 202, a specific reference is made to the possibility to adopt regulatory acts in accordance with Article 203 of the TFEU. Nonetheless, it is worth mentioning that no specific provision is included in this regard within the current Overseas Association Decision.[12]

Because no arrangement has been adopted, one may conclude that citizenship determines the right to move and reside freely.

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[8] Hilf, in E. Grabitz and M. Hilf (eds), *Das Recht der Europäischen Union* (2004) Article 18, Paragraph 8. A different interpretation is provided by Magiera, in R. Streinz (ed), *EUV/EGV* (2003) Article 18, Paragraph 17.

[9] Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193, Paragraph 31.

[10] Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (Overseas Association Decision), OJ 2001 L 314/1 Article 45(1), Litera b.

[11] Council Regulation 1612/68/EEC of 15 October 1968 on freedom of movement for workers within the Community, OJ 1968 L 257/2, Article 1(1), by which "[a]ny national of a Member State" has the right to rely on freedom of movement "irrespective of his place of residence." For a different argument, *see* Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 186, Paragraph 1; Wölker and Grill, "Vorbemerkungen zu den Artikeln 39 bis 41," in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2003) Paragraph 55;*see also* Kochenov, "EU Citizenship in the Overseas," in D. Kochenov, *EU Law of the Outerseas* (2011) 215.

[12] Council Directive 2013/61/EU of 17 December 2013 amending Directives 2006/112/EC and 2008/118/EC as regards the French outermost regions and Mayotte in particular, OJ 2013 L 353/5.

CHAPTER 203

Article 203 TFEU on Implementing Measures

Salvatore F. Nicolosi[*]

SYNOPSIS

§ 203.01 Text of Article 203 TFEU

Article 203

(ex Article 187 TEC)

The Council, acting unanimously on a proposal from the Commission, shall, on the basis of the experience acquired under the association of the countries and territories with the Union and of the principles set out in the Treaties, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Union. Where the provisions in question are

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adopted by the Council in accordance with a special legislative procedure, it shall act unanimously on a proposal from the Commission and after consulting the European Parliament.

§ 203.02 Text of TEC, Article 187

The Council, acting unanimously, shall, on the basis of the experience acquired under the association of the countries and territories with the Community and of the principles set out in this Treaty, lay down provisions as regards the detailed rules and the procedure for the association of the countries and territories with the Community.

§ 203.03 Implementation Decisions Under Article 203

[1] Current Wording and General Importance of Article 203

The provision under Article 203 of the TFEU is crucial for the whole Part IV as it lays down the procedure by which the association regime with overseas countries and territories is to be regulated. Over the years and the different treaty revisions, this procedure has been subject to a number of amendments. According to the original wording of former Article 136(1) of the Treaty of Rome, the principles laid down in former Articles 182 to 186 of the TEC were to be in the form of an implementation convention "[f]or an initial period of five years." For a subsequent period, the determination of the regulations was intended to be by a unanimously adopted Council decision in accordance with former Article 136(2). Such an outdated wording was amended by the Treaty of Amsterdam in 1997. However, this revision did not lead to substantial changes with regard to the procedure adopted by the Council. In line with former practice, the specific rules concerning the association regime with overseas countries and territories are still being adopted in the form of implementation decisions for a limited period. Nonetheless, the text of Article 203 of the TFEU as it results following the Lisbon treaty, presents two novelties at least on the formal level. Firstly, the provision makes clear the involvement of the European Commission and the European Parliament in the procedure of adoption of the association regime. The reference to the involvement of the Commission reflects in fact the normal institutional practice, as the Commission has always retained the right of initiative. On the contrary, the involvement of the Parliament with a preventive consultative role is new, even though this constitutes a formalization of a role that the European Parliament has been playing by adopting ad hoc resolutions in view of any Association Decisions.[1] This was the case of the former Association Decision adopted in 2001.[2] Secondly, as to the procedure to adopt the Association Decision, Article 203 of the TFEU specifically refers to the special legislative procedure. In line with the changes introduced by the Lisbon treaty, legislative acts (Regulations, Directives and Decisions) can be adopted by the ordinary legislative procedure regulated by Article 294 of the TFEU or by a

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[1] *See* Buonomenna, in C. Curti Gialdino (dir.), *Codice dell'Unione europea operative, TUE e TFUE commentati articolo per articolo* (2012) Article 203.

[2] European Parliament resolution on the proposal for a Council decision on the association of the overseas countries and territories with the European Community ("Overseas") (COM(2000) 732-C5-0070/2001-2001/2033(COS)).

special legislative procedure provided for by a case by case basis. As regards Article 203 of the TFEU, the special nature of the procedure is due to a twofold element: a) the Council's voting system by unanimity instead of the qualified majority and b) the participation of the European Parliament with a consultative role instead of as a co-legislator.

Moreover, it is noteworthy mentioning that, as already inferred from the wording of former Article 136 that "[a]ssociation of the OCT with the Community is to be achieved by a dynamic and progressive process."[3] It is because of the firmly established practice of adopting implementation decisions only for a limited period of time that the ECJ has consistently held that "[a]ssociation of the OCT with the Community is to be achieved by a dynamic and progressive process which may necessitate the adoption of a number of measures in order to attain all the objectives mentioned in Article 132 [former version] of the Treaty, having regard to the experience acquired through the Council's previous decisions."[4] This characterization of the association with overseas countries and territories as a dynamic and progressive process has far-reaching normative implications, which will be outlined below.

[2] Previous Practice of Implementation Agreements and Decisions

Initially, the Member States concluded, on 25 March 1957, an implementation agreement according to former Article 136(1) on the association regime of overseas countries and territories as an integral part of the Treaties of Rome. Due to the process of decolonisation, the number of dependent overseas countries and territories decreased considerably during the period of validity of this implementation agreement. The association with the now independent overseas countries and territories was continued on the basis of the Yaoundé, Lomé and finally the Cotonou Agreements.[5] Following the expiry of the implementation agreement on 31 December 1962, the specifics with regard to relations with the remaining dependent overseas countries and territories were regulated in the form of decisions unanimously adopted by the Council for a period of five years, each based on a proposal by the Commission.[6] Upon the new

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[3] Case C-310/95, *Road Air BV v. Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I2229, Paragraph 40.

[4] Case C-310/95, *Road Air BV v. Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I2229, Paragraph 40; Case C-390/95 P, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission*, [1999] ECR I769, Paragraph 36; Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I675, Paragraph 28.

[5] 2000/483/EC, Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317/3–353.

[6] Council Decision 64/349/ECC of 25 February 1964, OJ 1964, 1472; Council Decision 70/549/ECC of 25 September 1970, OJ 1970 L 282/83; Council Decision 76/568/ECC of 29 June 1976, OJ 1976 L 176/8; Council Decision 80/1186/ECC of 16 December 1980, OJ 1980 L 361/1; Council Decision 86/283/ECC of 30 June 1986, OJ 1986 L 175/1; Council Decision 91/482/ECC of 25 July 1991, OJ 1991 L 263/1, as amended by Council Decision 97/803/EC of 24 November 1997, OJ 1997 L 329/50; Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (Overseas Association Decision), OJ 2001 L 314/1.

legal basis under Article 203 of the TFEU, the current implementation decision was adopted on 25 November 2013 and entered into force on 1 January 2014 and following the regime which was a distinct featured of the previous Association Decision, the current Overseas Association Decision will enjoy an extended period of validity.

The implementation decisions under current Article 203 of the TFEU are to a large extent similar to the Lomé Conventions and the current Cotonou Agreement, especially owing to the historical background and the similar development policy goals still existing today. Furthermore, from a historical perspective, it should be also mentioned that the implementation decisions adopted by the Council were always followed by a corresponding decision of the representatives of the governments of the Member States of the European Coal and Steel Community (ECSC) meeting within the Council in order to avoid problems with regard to foreign trade competence under the ECSC Treaty.[7]

These decisions were, however, limited to the trade policy related provisions of the implementation decisions. Such an approach was similar to the one adopted with regard to the Lomé Conventions, and became unnecessary in 1994 following an opinion by the ECJ stating that Article 133 (now Article 207 of the TFEU) also included competence for foreign trade relations with regard to goods covered by the ECSC Treaty.[8] It is because of the integration of the areas covered by the ECSC Treaty into the TEC by 24 July 2002 that these aspects are now only of interest from a historical point of view.

§ 203.04 Normative Framework for the Adoption of Implementation Decisions

[1] Time Limits for Implementation Decisions

Former Article 136(2) of the Treaty of Rome established that the Council "for a further period" shall lay down the new regulations before the original implementation convention expires. This wording has sometimes been interpreted as allowing the adoption of a single implementation decision, with the consequence that the above-mentioned practice of the Council adopting various implementation decisions over the years, could be seen as being in violation of the TEC prior to the conclusion of the Treaty of Amsterdam. However, the ECJ, referring to the purpose of the association regime with the overseas countries and territories, did not follow this argument, but held that Article 187 "must be interpreted as providing not for a single 'further period' for which the Council is empowered to adopt provisions needed in order to attain the

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[7] The last of these decisions had been Decision 91/483/ECSC of the representatives of the Governments of the Member States, meeting within the Council of 25 July 1991 on the arrangements for trade between the Community and the associated overseas countries and territories in products within the province of the European Coal and Steel Community, OJ 1991 L 263/154.

[8] Opinion 1/94 on the competence of the Community to conclude international agreements concerning services and the protection of intellectual property—Article 228(6) of the EC Treaty, [1994] ECR I5267, 5396 *et seq.*; T.C. Hartley, *The Foundations of European Community Law* (2003) 170 *et seq*.

objectives of association, but for the introduction of a regime under which the Council may adopt a number of successive decisions each containing provisions 'for a further period.' "[1]

This statement and the wording of Article 187, before, and Article 207 of the TFEU, now, have also led to the conclusion that this provision confers on the Council "a considerable degree of discretion" with regard to the duration of the further period for which it may adopt implementation provisions.[2] Furthermore, the Council has the competence to amend an implementation decision while it is still valid. Due to the Council's authority to amend a valid implementation decision at any time, the ECJ held, with regard to the protection of legitimate interests, that "traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretion will be maintained; this is particularly true in an area such as the common organisation of the markets whose purpose involves constant adjustments to meet changes in the economic situation."[3]

Under former Article 187, the Council's broad discretion with regard to its competence *ratione temporis* frequently led to the fact that it did not consider itself to be bound by its own time limits, as stated in the former implementation decision, with regard to the required "midterm" review.[4] The Council's practice in this regard became of specific importance concerning the legality of Council Decision 97/803/EC of 24 November 1997[5] on the midterm amendment of Council Decision 91/482/EEC because, according to Article 240(3) of Council Decision 91/482/ECC,[6] the Council was originally required to adopt the necessary amendments before the end of the first five years of its validity. However, contrary to Article 240(3), Council Decision 97/803/EC was only adopted two and one half years after the end of that period. Based on the above-mentioned argument, the ECJ nevertheless considered this practice to be in conformity with Community law.[7] The current Overseas Association Decision does not contain any provision on a possible mid-term review. The fact that Article 97 of the latter Decision authorizes the Council, acting according to Article 203 of the TFEU, to "decide on any necessary adjustments" to this Decision in situations affecting the legal status of an overseas country or territory, such one of these countries and territories

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[1] Case C-310/95, *Road Air BV v. Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I2229, Paragraph 41.

[2] Case C-310/95, *Road Air BV v. Inspecteur der Invoerrechten en Accijnzen*, [1997] ECR I2229, Paragraph 39.

[3] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I675, Paragraph 34.

[4] For the most recent time limit in this regard, *see* Article 62 of Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (Overseas Association Decision), OJ 2001 L 314/1.

[5] Council Decision 97/803/EC of 24 November 1997, amending at midterm Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community, OJ 1997 L 329/50.

[6] Council Decision 91/482/ECC of 25 July 1991, OJ 1991 L 263/1.

[7] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I675, Paragraphs 31 *et seq.*

becomes independent, becomes an outermost region or vice versa, or an overseas country or territory leaves the association, seems to confirm that no review is foreseen.[8]

[2] Definitions in Article 203

The reference made in Article 203 to the "principles set out in this Treaty" means that, *inter alia*, all the EU goals listed in Article 3 are of relevance when adopting an implementation decision under this provision. A conflict might arise, however, between the purposes to be pursued by the association regime and the other EU goals listed in Article 3. Since the entry into force of Council Decision 91/482/ECC, this consequence is especially obvious with regard to trade in agricultural goods originating in overseas countries and territories for which, for the first time in the history of the association regime, free market access had been granted.[9] Such an opening of a market can result in disturbances in the Common Market for agricultural products. This reflects a circumstance that occurred in practice due to the possible "cumulation of origin," especially with regard to imports of rice originating from the Netherlands Antilles.

In response to these problems, comprehensive and detailed regulations with regard to the cumulation of origin have been included since the former Overseas Association Decision.[10] However, the underlying dogmatic issue with which the ECJ and the General Court had to deal in several judgements obviously remains: in the case of a conflict between two or more goals listed in Article 3, a balancing of interests must take place. This is an obligation which is now required by Article 7 of the TFEU, which calls the EU to ensure consistency between its policies and activities. From this perspective, it is the Council that has the competence to bring the different principles of the EU in conformity with each other as regards the association regime with overseas countries and territories.[11] With regard to this balancing approach, the Council, in particular with regard to Article 203, "enjoys for that purpose a considerable margin of discretion reflecting the political responsibilities entrusted to it."[12]

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[8] Council Decision 2013/755/EU of 25 November 2013, Official Journal of the European Union L 344/1.

[9] Council Decision 91/482/ECC of 25 July 1991, OJ 1991 L 263/1, Article 102; Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (Overseas Association Decision), OJ 2001 L 314/1, Article 35.

[10] Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community (Overseas Association Decision), OJ 2001 L 314/1, Annex III, Article 6; Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ("Overseas Association Decision"), OJ 2013 L 344/1, Annex VI, Article 7.

[11] Case 5/73, *BalkanImportExport GmbH v. Hauptzollamt BerlinPackhof*, [1973] ECR 1091, Paragraph 29; Case 195/87, *Cehave NV v. Hoofdproduktschap voor Akkerbouwprodukten*, [1989] ECR 2199, Paragraph 21.

[12] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I675, Paragraph 39.

The Council's discretion opens up the possibility for the adoption of a variety of measures to be specified in an implementation decision under Article 203. One of these possible measures is the introduction of a general safeguard clause, according to which the Commission may adopt safeguard measures in the case of a serious disturbance of the Common Market. With regard to the overseas countries and territories, such a safeguard clause had been included in Article 109 of Council Decision 91/482/ECC, as well as in Article 42 of the former 2001 Overseas Association Decision. While the ECJ and the Court of First Instance confirmed the legality of this measure,[13] no clause of this kind was included in the current Overseas Association Decision of 2013.

The above-mentioned discretion enjoyed by the Council is limited by Article 203 insofar as this provision requires the Council to adopt its implementation decisions "on the basis of the experience acquired under the association of the countries and territories with the Union." In balancing the competing interests, this "experience" must be taken into account by the Council.[14] However, according to the ECJ, the Community organs, especially the Council, again enjoy a considerable discretion in this ambit.[15] As a result, only a certain level of protection of legitimate expectations exists, if at all, with regard to the association regime of the overseas countries and territories, and a deviation from this level of association is legally possible through the adoption of a new implementation decision based on a balancing of all the relevant interests involved.

This issue first gained importance in practice concerning a number of provisions included in Council Decision 97/803/EC of 24 November 1997.[16] Based on a political compromise, this Council Decision included, in its Article 108a and 108b, limits on the quantity of rice and sugar originating in the overseas countries and territories that may qualify for cumulation of origin and that were allowed to be imported into the Community without restrictions. From the point of view of the economic actors affected, this regulation amounted to a "step backwards" as compared to the unlimited possibility of imports provided for in Article 102 of former Council Decision 91/482/ECC.[17] Nevertheless, the ECJ held these provisions not to be in violation of

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[13] Case C-390/95 P, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission*, [1999] ECR I769, Paragraphs 36 *et seq.*; Joined Cases T-480/93 and T-483/93, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission*, [1995] ECR II2305, 2340 *et seq.*

[14] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I675, Paragraph 38; Joined Cases T-480/93 and T-483/93, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission*, [1995] ECR II2305, 2340 *et seq.*

[15] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I675, Paragraph 39.

[16] Council Decision 97/803/EC of 24 November 1997, amending at midterm Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community, OJ 1997 L 329/50.

[17] Council Decision 91/482/ECC of 25 July 1991, OJ 1991 L 263/1.

EU law.[18] Consequently, the detailed rules on cumulation of origin of goods included in the former and current Overseas Association Decisions must also be considered as being in conformity with EU law, despite the fact that these rules might, under certain circumstances, result in restrictions on trade with the overseas countries and territories.

It is thus not possible to determine, simply on the basis of an isolated comparison between the rules of the former implementation decision and the current one, whether an unacceptable disregard of the "experience acquired" in the sense of Article 203 is given. Such a static approach would be contrary to the dynamic character of the association regime with the overseas countries and territories. Rather, a balancing act, taking into account the competing interests, is required, an approach that could in some cases result in a deviation from already existing levels of trade liberalization. Particularly in relation to the Common Market for agricultural goods, it is thereby of the utmost importance to take into account that a profitable association regime, which follows the purposes laid down in Article 203, necessarily requires the possibility of participation of the overseas countries and territories in a Common Market that is free from disturbances.

§ 203.05 Legal Effects of Implementation Decisions Under Article 203

[1] General Considerations

It is worth stressing that, as regards the association regime with overseas countries and territories, it might be difficult to classify the implementation decisions adopted under Article 203 of the TFEU by using the conventional legal terminology of EU law. In particular, the question arises whether these Decisions can be included within the traditional sources of EU secondary law listed in Article 288 of the TFEU. A former commentator submitted that it is not possible to assign these Council's decisions to the list of legal sources provided for in former Article 249 (now Article 288 TFEU),[1] while another authoritative opinion suggested that these decisions are to be best considered as Regulations.[2] As to the first argument, while it is clear that the Association Decisions under Article 203 TFEU fall below the constitutive Treaties, and are thus not able to derogate from these Treaties outside the amendment procedure provided in Article 48 of the TEU,[3] the fact that these Association decisions pursue the goal of specifying and supplementing the content of the provisions of Part IV of the TFEU, does not exclude that they can be regarded as sources of EU secondary law. The aim of the latter body of law is, in fact, to provide a more specific regulation for an area covered by the Treaty. As to the argument whether the Association Decision are to be regarded as Regulations instead, there is not that much clarity, apart from the settled

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[18] Case C-17/98, *Emesa Sugar (Free Zone) NV v. Aruba*, [2000] ECR I675, Paragraphs 38 *et seq.*

[1] Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag ¨uber die Europ¨aische Union und zur Gr¨undung der Europ¨aischen Gemeinschaft* (2004) Article 187, Paragraph 6.

[2] R. Geiger, *EUV/EGV* (2000) Article 187, Paragraph 2.

[3] Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, [1994] ECR I4973, Paragraph 117.

principle established by the ECJ that the *nomen juris* of an act is irrelevant. Nonetheless, the issue of direct applicability, which will be dealt with in the next sub-section, is another relevant element that help qualify the Association Decision as an act of EU secondary law under Article 288 TFEU.

[2] Direct Applicability

A relevant issue concerning the legal effect of the Overseas Decision is the direct applicability of certain provisions, with the consequence that these provisions confer rights on individuals that they can rely on before national courts (direct effect). Referring to its jurisprudence with regard to other association regimes under Article 217 TFEU, this direct effect has been explicitly recognised by the ECJ.[4] As to individual provisions included in implementation decisions under Article 203, these are directly applicable "if they impose an unconditional and sufficiently clear and precise obligation on Member States."[5]

The question of which provisions of an implementation decision under Article 203 fulfil these requirements of direct applicability is subject to determination in each case. The ECJ has already recognised the direct applicability of the provision prohibiting discrimination with regard to establishment and services.[6] Based on the Court's findings, with regard to the current Overseas Association Decision, one must consider, *inter alia*, the provisions on the free access of products originating from the overseas countries and territories under Article 43 and on the elimination of quantitative restrictions and measures having equivalent effect under Article 44 of this implementation decision to be directly applicable. In addition, with regard to the implementation of Council's decisions under Article 203, affected individuals and companies can always rely on the principle of proportionality. This principle was particularly important in the adoption of safeguard measures under Article 42 of the former Overseas Association Decision.[7] However, the ECJ also stated that the Commission has been given wide discretion in this regard, with the consequence that the Court "must restrict itself to considering whether the exercise of that discretion contains a manifest error or constitutes a misuse of power or whether the Commission clearly exceeded the bounds of its discretion."[8]

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[4] Joined Cases C-100/89 and C-101/89, *Peter Kaefer and Andréa Procacci v. French State*, [1990] ECR I4647, Paragraphs 21 *et seq.*; Case 12/86, *Meryem Demirel v. Stadt Schw¨abisch Gm¨und*, [1987] ECR 3719, 3752; Case C-192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, [1990] ECR I3461, 3501 *et seq.*

[5] Joined Cases C-100/89 and C-101/89, *Peter Kaefer and Andréa Procacci v. French State*, [1990] ECR I4647, Paragraph 24, with further references.

[6] Joined Cases C-100/89 and C-101/89, *Peter Kaefer and Andréa Procacci v. French State*, [1990] ECR I4647, Paragraph 28.

[7] Joined Cases T-480/93 and T-483/93, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission*, [1995] ECR II2305, 2370.

[8] Case C-390/95 P, *Antillean Rice Mills NV, Trading & Shipping Co. Ter Beek BV, European Rice*

§ 203.06 Contents of Current Overseas Association Decision

The current implementation decision under Article 203 is Council Decision 2013/755/EU (Overseas Association Decision) adopted on 25 November 2013. In contrast with its predecessor, Decision 2001/822/EC, the applicability of the current Overseas Association Decision, which has entered into force on 1 January 2014, is not limited to a specific period of time. Nonetheless, it is worth mentioning that these Association Decisions have become inherently linked to the Multiannual Financial Framework which is usually set up for a period of seven years. This means that in connection with any Multiannual Financial Framework a new Association Decision would be adopted, as confirmed by the recent proposal for an Association Decision tabled by the European Commission last 14 June 2018, in preparation for the upcoming Multiannual Financial Framework 2021–2027 and applicable as of 1 January 2021.[1]

In a very detailed way, the current Overseas Association Decision regulates the specifics of the association regime with the overseas countries and territories in 99 articles and further provisions included in eight annexes. In line with the approach adopted with regard to the Cotonou Agreement, the last two Overseas Association Decisions have a text which is much shorter if compared to the 242 articles included in former Overseas Association Decisions. This was especially possible by moving a considerable number of provisions to the annexes.[2] In the following, an overview will be given of the most important provisions included in the current implementation decision under Article 203.

The current Overseas Association Decision reflects the new approach aimed at modernising and updating the legal framework governing the partnership between the EU and the overseas countries and territories, expressed in the Green Paper of 2008. From this perspective, the new Association Decision seeks to promote the overseas countries and territories' competitiveness, develop sustainable and resilient economies and foster strong partnerships in the respective regions of these territories and countries where possible. In order to pursue these goals, the Association Decision enhances the dialogue with multiple actors, as already foreseen by the former 2001 Association Decision. In this regard, it is worth noticing that, according to Article 11(2), in addition to the relevant governmental authorities, "civil society" as well as "local, national or international nongovernmental organisations" are assigned a prominent function. This should be regarded as a further indication of the increasingly important role played by this type of non-State actor in the international system.[3]

Brokers AVV, Alesie Cura¸cao NV and Guyana Investments AVV v. Commission, [1999] ECR I769, Paragraph 48.

[1] COM (2018) 461 final.

[2] "Proposal for a Council Decision on the association of the overseas countries and territories with the European Community prepared by the Commission," COM 2000/732 final, 8.

[3] Nowrot, "Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law," 6 *Indiana Journal of Global Legal Studies* (1999) 579 *et seq.*, with further references.

As to the instances of the association regime, a key role is played by the Overseas Countries and Territories-EU forum for dialogue (the "OCTs-EU Forum") is established as an institutional framework of dialogue that meets annually to bring together OCTs authorities, representatives of the Member States and the Commission. Pursuant to Article 14 of the current Association Decision, members of the European Parliament, representatives of the European Investments Bank, and representatives of the outermost regions shall, where appropriate, be associated with the OCTs-EU Forum.[4] Annual Forums take place in Brussels and in an oversea country and territory alternatively: the next 17th Forum will take place in French Polynesia in 2019, while the last one took place in Brussels in February 2018.

In addition, "partnership working parties" for each of the overseas countries and territories individually can be established under Article 14, consisting of the Commission, the Member State to which the respective overseas country or territory is linked, and the authorities of that country or territory. The partnership working parties act in an advisory capacity and provide a framework for technical discussions on matters which are of specific concern to the OCTs and the Member States to which they are linked, complementing the work that is being done in the annual forum and/or in the Tripartite meetings.

According to Article 14(2) the Commission shall chair the partnership working parties, as well as the "OCTEU forum for dialogue," and shall provide their secretariat.

The substantive areas of cooperation between the EU and the overseas countries and territories are described in Part 2 (Articles 15 to 25) of the Overseas Association Decision. In line with the new approach expressed by the 2008 Green paper, Part Two is divided in different chapters which cover a wide range of areas of cooperation for sustainable development: from environmental issues and climate change (Chapter 1) to Accessibility (Chapter 2), Research and Innovation (Chapter 3) Youth, education, training, health, employment and social policy (Chapter 4), Culture (Chapter 5), Fight against organised crime (Chapter 6) and Tourism (Chapter 7). This Part is coupled with Part 4 which focuses on the instruments for sustainable development. The latter will include both financial and technical assistance. A specific role is assigned to Territorial and Regional Authorising Officers to represent it in all operations financed from the resources of the 11th European Development Fund (EDF) (Article 86). In this regard the Association Decision also regulates the possibility to establish EDF-OCTs Committee that shall focus its work on the substantive issues of cooperation at OCTs and regional level (Article 87(3)).

Part Three of the Overseas Association Decision deals with Trade related Cooperation. This Part includes the core of the operative and substantive regulations on the association regime as regard especially the OCTs' effective integration in the regional and world economies and the development of trade in goods and services. With reference to trade in goods, the core regulation is enshrined in Chapter 1 (Articles 43

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[4] *See* Baetens, The Overseas Countries and Territories Association: The Added Value of a Concerted Approach" in D. Kochenov, *EU Law of the Overseas* (2011), 383 *et seq*.

to 49), with Article 43 providing for free market access for products originating in the overseas countries and territories. In connection with this provision, Annex VI to the Overseas Association Decision includes detailed procedural and substantive provisions on rules of origin. With regard to trade in goods, the Association Decision furthermore establishes comprehensive regulations on: the prohibition of quantitative restrictions and measures having equal effect (Article 44); the control mechanisms for the movement of waste in accordance with public international and EU law (Article 47) possible customs duties and quantitative restrictions retained or introduced by overseas countries and territories (Article 45); and possible safeguard measures adopted by the EU (Article 49 in connection with Annex VIII).

Aside from trade in goods, Part Three of the Overseas Association Decision furthermore contains regulations on: trade in services and the freedom of establishment in Chapter Two and trade related areas in Chapter Three, such as labour standards; sustainable development in trade; competition policies; protection of intellectual property rights; and consumer health protection. From their contents, these last mentioned regulations are closely related to the corresponding standards of public international law in general and of the WTO legal order in particular. Special attention is, therefore, given in this Association decision to the new "trade and" issues, such as the relationship between trade and environment and trade and labour standards. Finally, this Part of the Overseas Association Decision contains a number of provisions on: monetary and tax matters.

§ 203.07 The Proposal for a New Overseas Association Decision

In the context of the 2021–2027 Multiannual Financial Framework, outlined by the European Commission,[1] a new Overseas Association Decision has been seen as a Priority for the EU external action Programmes. Accordingly, the European Commission submitted a Proposal for a New Overseas Association Decision for the period 2012–2017,[2] which also reflects the post Brexit scenario and its impact on overseas countries and territories. This proposal, in fact, is presented for a Union of 27 Member States, in line with the notification by the United Kingdom of its intention to withdraw from the European Union and Euratom based on Article 50 of the Treaty on European Union received by the European Council on 29 March 2017. It therefore does not apply to the 12 overseas countries and territories linked to the United Kingdom. The association of the 13 remaining overseas countries and territories with the EU flows from the constitutional relations that these countries and territories have with Denmark, France, and the Netherlands.

This new Proposal that covers the political and legal framework for the association regime aims to accomplish several objectives, such as: "unity of management" by including all overseas countries and territories under the same source of funding, namely the EU budget; consolidation of shared objectives; simplification and coherence in the legal framework; higher profile for the overseas countries and

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[1] *See* COM (2018) 98 final; COM (2018) 321 final.

[2] COM(2018) 461 final.

territories as a group. While pursuing these objectives, the Proposal confirms the Member States' commitment to retain the structure and acquis of the current Overseas Association Decision. Accordingly, the new Overseas Association Decision should consist of the same structure with the same political, trade and cooperation pillars as the current Decision. Pursuant to Recital 10 of the Proposal, the association between the Union and the OCTs "should continue to be based on the three key pillars of enhancing competitiveness, strengthening resilience and reducing vulnerability, and promoting cooperation and integration between the OCTs and other partners and neighbouring regions." Moreover, the new Association Decision will also confirm the existing shift in the paradigm of cooperation from a development cooperation approach to a reciprocal partnership to support the overseas countries and territories' sustainable development.

Nonetheless, the Proposal highlights a few main changes. In particular, in order to streamline the number of External Financing Instruments and their performance, the proposed Decision will merge into a single instrument the association regime with overseas countries and territories, on the one hand, and the special Greenland Decision. Therefore, it will replace the current Overseas Association Decision 2013/755/EU and Council Decision 2014/137/EU on the relations with Greenland. The specific features concerning the relations with Greenland, such as the objective to preserve the close and lasting links between the Union, Greenland and Denmark, the acknowledgement of the geostrategic position of Greenland, the importance of policy dialogue between Greenland and the Union, the existence of a Fisheries Partnership Agreement between the Union and Greenland and the potential cooperation on Arctic issues, are to be specifically highlighted.

From a formal point of view, a general updating of the text and its annexes is required to take into account the latest changes in taxation and trade legislation and the fact that the EDF being integrated into the EU budget. Therefore, Annexes IV and V of the current Decision concerning the EU financial assistance will be repealed as well as Annex III on EIB own resources management.

As to the financial support, the new Decision provides for a total amount of EUR 500,000,000 to be allocated to the association with the overseas countries and territories. Of this amount, EUR 225,000,000 is to be allocated to Greenland, EUR 225,000,000 for other overseas countries and territories.[3] The overseas countries and territories will remain eligible under the next Multiannual Financial Framework to participate in EU programmes as a matter of principle. They will be eligible for the thematic programmes and rapid response actions of the Neighbourhood, Development and International Cooperation Instrument for implementing the financial cooperation of the proposed Decision.

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[3] This amount will comprise EUR 159,000,000 for territorial programmes and for EUR 66,000,000 to regional programmes. In addition, an intra-regional financial envelope of EUR 15,000,000 is open to all the overseas countries and territories, including Greenland. Moreover, an amount of EUR 22,000,000 for technical assistance is foreseen in accordance with the new Decision as well as a non-allocated amount of EUR 13,000,000.

CHAPTER 204

Article 204 TFEU on Greenland

Salvatore Nicolosi[*]

SYNOPSIS

§ 204.01 Text of Article 204 TFEU

Article 204

(ex Article 188 TEC)

The provisions of Articles 198 to 203 shall apply to Greenland, subject to the specific provisions for Greenland set out in the Protocol on special arrangements for Greenland, annexed to the Treaties.

§ 204.02 Text of TEC, Article 188

The provisions of Articles 182 to 187 shall apply to Greenland, subject to the specific provisions for Greenland set out in the Protocol on special arrangements for Greenland, annexed to this Treaty.

§ 204.03 Greenland's "Withdrawal" from the European Community

The provision under Article 204 of the TFEU takes into consideration the constitutional legal developments taking place in Denmark as regards the process through which Greenland obtained an autonomous status. Such a process came to an

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end in 1979 by granting to Greenland the right of "self-administration."[1] Furthermore, these developments, as well as the specific cultural, social and economic situation of Greenland, were the reasons why a growing part of its population that expressed the wish to segregate from the then European Community.

Originally, it is because of being an integral part of Denmark at that time that the territory of Greenland joined the then European Community together with the accession of Denmark in 1973, although some specific conditions on the status of Greenland were included in the 1972 Accession Protocol No. 4.[2] In particular, such Protocol provided for some restrictions on the right of establishment, while the European Community's institutions were called to find solutions to the specific problem of Greenland in the ambit of the common market for fisheries.[3]

During a referendum held on 23 February 1982, the majority of the people of Greenland voted in favour of segregation from the European Community, thus becoming an overseas country and territory.[4]

Such a segregation from the European Community required an amendment to the TEC in accordance with former Article 236. Since Greenland remained part of Denmark's territory, with the consequence that current Article 355(1) made any solution apart from such an amendment impossible.[5] Accordingly, the case of Greenland does not amount, under EU law, to the problematic situation of a "withdrawal," which is regulated by Article 50 of the TEU, instead, it can be qualified as a segregation of a territorial part of one of the Member States with a territorial reduction of the EU, while this segregating part still belongs to the territory of the respective Member State.[6]

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[1] Alfredsson, "Greenland and the Law of Political Decolonization," 25 *German Yearbook of International Law* (1982) 290; Harders, "Grönland: Selbstverwaltung und Umweltschutz in der Arktis," 12 *Natur und Recht* (1990) 302.

[2] Documents Concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, Protocol Number 4 on Greenland, OJ 1972 L 73/165.

[3] *See* F. Murray, *The European Union and Member State Territories: A New Legal Framework Under the EU Treaties* (2012) 63.

[4] Alfredsson, "Greenland and the Law of Political Decolonization," 25 *German Yearbook of International Law* (1982) 290; Krämer, "Greenland's European Community Referendum: Background and Consequences," 25 *German Yearbook of International Law* (1982) 273; Weiss, "Greenland's Withdrawal from the European Communities," 10 *European Law Review* (1985) 173; Harhoff, "Greenland's Withdrawal from the European Communities," 20 *Common Market Law Review* (1983) 13, 17 *et seq.*; Johansen and Sorensen, "Grönlands Austritt aus der Europäischen Gemeinschaft," 38 *EuropaArchiv* (1983) 399; Ungerer, "Der 'Austritt' Grönlands aus der Europäischen Gemeinschaft," 39 *EuropaArchiv* (1984) 345.

[5] Harhoff, "Greenland's Withdrawal from the European Communities," 20 *Common Market Law Review* (1983) 13, 27 *et seq.*; Ehlermann, "Mitgliedschaft in der Europäischen Gemeinschaft: Rechtsprobleme der Erweiterung der Mitgliedschaft und Verkleinerung," 19 *Europarecht* (1984) 113, 129.

[6] Ehlermann, "Mitgliedschaft in der Europäischen Gemeinschaft: Rechtsprobleme der Erweiterung der Mitgliedschaft und Verkleinerung," 19 *Europarecht* (1984) 113, 122 *et seq.*

This reduction of the territorial scope of application of the Treaty was exercised by granting Greenland the status of an overseas country or territory in the sense of Articles 198 *et seq.* In addition to the insertion of Article 188 of the TEC, now Article 204 of the TFEU, an amendment to Article 182, now Article 198 of the TFEU, which did not previously mentioned Denmark was necessary. Moreover another amendment involved former Annex IV to the Treaty, now Annex II of the TFEU. These changes were introduced through the Treaty Amending, with Regard to Greenland, the Treaties Establishing the European Communities of 13 March 1984.[7] In the light of EU law, the admission of Greenland to the overseas countries and territories can be justified on the basis of Greenland being a former colony, an overseas territory with autonomous self-government, and a territory lacking a strong economic base.[8]

§ 204.04 Legal Status of Greenland Under EU Law

[1] Treaty Amendments Regarding Greenland

Articles 2 to 4 of the Treaty Amending, with Regard to Greenland, the Treaties Establishing the European Communities of 13 March 1984 grant Greenland the status of an overseas country and territory. The segregation of Greenland from the territorial scope of application of the Treaty and its admission to the overseas countries and territories entered into force on 1 February 1985.[1] Based on a systematic interpretation of Article 355(1) and (3), one must conclude that from 1985, the whole body of EU law, in the absence of specific regulations, is no longer applicable in Greenland.[2] At the same time as the regulations on the segregation of Greenland entered into force, the provisions concerning the EU customs union were modified in order to adapt them to the changing circumstances.[3] In this case, an amendment to Article 299(1) (now Article 355(1) of the TFEU) was not necessary because the relevant normative situation derived from the then Article 299(1) and (3) in connection with former Annex IV, now Annex II to the TFEU.[4] The adoption of a new Article 188 (now 204 of the

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[7] OJ 1985 L 29/1.

[8] Harhoff, "Greenland's Withdrawal from the European Communities," 20 *Common Market Law Review* (1983) 13, 24 *et seq.*; Lefaucheux, "Le nouveau regime de relations entre le Groenland et la Communauté économique européenne," 28 *Revue du Marché Commun* (1985) 81, 82. For a critical view on the admission of Greenland to the overseas countries and territories, *see* Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 188, Paragraph 3; Pitschas, in R. Streinz (ed), *EUV/EGV* (2003) Article 188, Paragraph 6.

[1] OJ 1985 L 29/3.

[2] Lefaucheux, "Le nouveau regime de relations entre le Groenland et la Communauté économique européenne," 28 *Revue du Marché Commun* (1985) 81, 85; Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft* (2004) Article 188, Paragraph 2; Case C-260/90, *Bernard Leplat v Territory of French Polynesia*, [1992] ECR I643, 668.

[3] Council Regulation 319/85/EEC of 6 February 1985, amending Regulation 2151/84/EEC on the customs territory of the Community, OJ 1985 L 34/32.

[4] Zimmermann, in H. von der Groeben and J. Schwarze (eds), *Kommentar zum Vertrag über die*

TFEU) in addition to an amendment to Annex II became necessary in order to regulate the controversial issue of fisheries separately from the other overseas countries and territories.[5]

[2] The Protocol on Special Arrangements for Greenland

Accession Protocol No. 4 of 1972, which was originally applicable to Greenland, was replaced by Protocol (No 34) on special arrangements for Greenland.[6] Contrary to the dynamic character of the association regime with the overseas countries and territories in general, this Protocol on Greenland must be qualified as a static and permanent set of provisions[7] subject to amendment only by way of the procedure set out in Article 48 of the TEU.

In its sole Article, Protocol No. 34, sets out the general principle underpinning the treatment on import into the Union of products subject to the common organisation of the market in fishery products, originating in Greenland. According to the Protocol, such a treatment involves "exemption from customs duties and charges having equivalent effect and the absence of quantitative restrictions or measures having equivalent effect if the possibilities for access to Greenland fishing zones granted to the Union pursuant to an agreement between the Union and the authority responsible for Greenland are satisfactory to the Union." This treatment thus constitutes an exception to or a conditional application of the principle of free market access as provided for overseas countries and territories in Article 43 of the Overseas Association Decision, establishing that products originating in the overseas countries and territories shall be imported into the Community free of import duty.[8]

Pursuant to Article 2 of the former the Protocol on Special Arrangements for Greenland, the Council adopted the transitional measures concerning the rules on social security for migrant workers with regard to Greenland.[9] In addition, Article 153(1), Litera a of former Overseas Association Decision 91/482/ECC[10] provided that, contrary to the other overseas countries and territories, Greenland was not entitled to financial assistance from the Community under the financial aid regime of the implementation decision. This situation remains unchanged for the time being, thus Greenland is not eligible for financial and technical assistance. This exception can be

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Europäische Union und zur Gründung der Europäischen Gemeinschaft (2004) Article 188, Paragraph 2.

[5] Lefaucheux, "Le nouveau regime de relations entre le Groenland et la Communauté économique européenne," 28 *Revue du Marché Commun* (1985) 81, 90.

[6] OJ 1985 L 29/7.

[7] Lefaucheux, "Le nouveau regime de relations entre le Groenland et la Communauté économique européenne," 28 *Revue du Marché Commun* (1985) 81, 86.

[8] Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), OJ 2013 L 344/1.

[9] Council Regulation 1661/85/EEC of 13 June 1985, laying down the technical adaptations to the Community rules on social security for migrant workers with regard to Greenland, OJ 1985 L 160/7.

[10] OJ 1991 L 263/1.

explained on the basis of the higher development standard of Greenland compared to the other overseas countries and territories and the special agreement on fisheries.[11]

[3] Agreement on Fisheries

Greenland entered into a fisheries agreement with the then European Economic Community on 13 March 1984.[12] This Agreement has been implemented over the years by subsequent protocols concluded between the Community, on the one hand, and Denmark and Greenland, on the other hand, and dealing with specific issues of fisheries. In 2007, this agreement was replaced by a Fisheries Partnership Agreement (FPA),[13] providing a financial contribution in order to access to fishing opportunities and sectoral fisheries support. The EU-Greenland FPA also differs from the "Northern Agreements" that the EU has concluded with Norway, Iceland and the Faroe Islands, since these are based on an exchange of fishing quotas and do not provide for financial compensation.

The financial contribution to be paid by the EU as well as the fishing conditions for EU vessels in the waters of Greenland are regulated in the FPA Associated Protocols. The latest Protocol covers the period 2016–2020.[14] The total financial contribution of the EU is of €17.8 million per year (roughly the same as in the previous 2012–2016 Protocol), which makes it the third most expensive EU fisheries agreement. Moreover, the sectoral support to Greenland's fisheries has increased to €2.93 million, as well as the fishing authorisation fees to be paid by EU vessels are higher.

A relevant difference from the regime applicable to other overseas countries and territories is that the financial contribution of the EU does not come from the European Development Fund but directly from the EU budget.

[4] Recent Developments

Fisheries remains a cornerstone of the EU-Greenland relations. However, since at least the Fourth Protocol laying down the conditions relating to fishing provided for in the 1984 Agreement on Fisheries,[15] the European Commission has been expressing its determination to considerably modify the relations with Greenland by providing for a new and broader basis going beyond mere issues of fisheries.

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[11] On the reasons for the different treatment of Greenland in connection with financial assistance, *see* F. Murray, *The European Union and Member State Territories: A New Legal Framework Under the EU Treaties* (2012) 98.

[12] OJ 1985 L 29/9

[13] Council Regulation (EC) No 753/2007 of 28 June 2007 on the conclusion of the Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand, OJ 2007 L 172/1.

[14] Council Decision (EU) 2015/2103 of 16 November 2015 on the signing, on behalf of the European Union, and provisional application of the Protocol setting out the fishing opportunities and the financial contribution provided for by the Fisheries Partnership Agreement between the European Community on the one hand, and the Government of Denmark and the Home Rule Government of Greenland, on the other hand, OJ 2015 L 305/1 *et seq*.

[15] OJ 2001 L 209/2.

The ultimate goal in this connection is to create a "new partnership on sustainable development between the EU and Greenland."[16] According to the Commission, this new partnership should be based on an *ad hoc* agreement between the EU, Denmark and Greenland, which would include the existing regulations on Greenland as being part of the overseas countries and territories, as well as the current Agreement on Fisheries, but would also provide for additional provisions on the new partnership on sustainable development.[17] This was confirmed in the Council Decision 2006/526/EC on relations between the European Community on the one hand, and Greenland and the Kingdom of Denmark on the other, which included other areas of cooperation.[18] This objective has been also included in the most recent proposal of 2011 for a new Council Decision, aiming in particular at broadening and strengthening relations and contributing to the sustainable development of Greenland.[19]

Nevertheless, pursuant to a recent Proposal of June 2018 on the future Overseas Association Decision for the period 2021–2027, the relationship with Greenland will be subject to this overarching Decision,[20] that will replace replaces Council Decision 2013/755/EU27 ("Overseas Association Decision") and Council Decision 2014/137/EU28 ("Greenland Decision"). As regard Greenland the specific features of the relations with Greenland will be highlighted.

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[16] Communication from the Commission to the Council and the European Parliament—Midterm review of the Fourth Fisheries Protocol between the EU and Greenland of 3 December 2002, COM (2002) 697 final 7.

[17] Communication from the Commission to the Council and the European Parliament—Midterm review of the fourth fisheries protocol between the EU and Greenland of 3 December 2002, COM (2002) 697 final 7 *et seq.*

[18] OJ 2006 L 208/28–31.

[19] COM 2011 (846) final.

[20] COM (2018) 461 final.