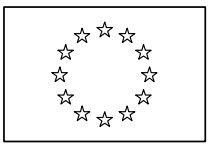

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COMMISSION SERVICES WORKING PAPER

Legal issues relating to the negotiations within the framework of the WTO's Doha Development Agenda
Opinion of the Council Legal Service of 17 March 2005 – Approval of "pre-legal commitments"

On 17 March 2005, the Legal Service of the Council issued a legal opinion examining a number of legal issues relating to the negotiations within the framework of the WTO's Doha Development Agenda.[2]

On numerous occasions, the Commission has made clear its views on all the issues discussed in the note from the Council Legal Service. At the present stage, the Commission questions the usefulness of engaging in a legal debate on such issues, as it fails to see the practical benefits for the effective conduct of the DDA negotiations.[3] Therefore, the present paper only addresses the issue which is most directly linked to the conduct of the negotiations, namely the introduction by the Council Legal Service of a new legal concept of "pre-legal commitments". As regards all other issues, the Commission stands by its previously expressed positions.

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In its legal opinion, the Council Legal Service examines the question under which conditions the approval of commitments made by the EC in the context of the Doha negotiations would require the intervention of the Council. Apart from the formal signing and conclusion of the agreements embodying the final outcome of the Doha round, for which the approval by the Council is required by the first paragraph of Article 300 (2) EC, the Council Legal Service identifies three scenarios in which an intervention of the Council would be required at an earlier stage:[4]

- If the provisional application of all or parts of the result of the Doha Round needs to be approved in accordance with the second subparagraph of Article 300 (2) EC.

- If the WTO Ministerial Conference or the WTO General Council takes a legally binding decision within the meaning of the second subparagraph of Article 300 (2) EC.

- If the "negotiations reach a stage in which parts of the overall agreement are fixed, by the WTO Ministerial Conference, the WTO General Council or otherwise, in a way constitutes a pre-legal commitment, but nevertheless a commitment".

The first two scenarios do not require further consideration at this stage.[5] In contrast, the third scenario, according to which the approval of "pre-legal commitments" reached in the context of the Doha Round would require prior approval by the Council, appears highly problematic.

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2 Document 7389/05, JUR 104, WTO 59

3 This applies also to the question of the division of competences between the Community and its Member States in respect of the Doha negotiations. At this stage it is not clear whether and to which extent the EC commitments resulting from the Doha Round will also contain issues for which a participation of the Member States is required under Article 133 EC as amended by the Nice Treaty. As the Council Legal Service correctly states (para. 10), the question of the division of competences must therefore be examined on the basis of the final outcome of the negotiations.

4 Council LS opinion, para. 29 et seq.

5 It is noted, however, that the Council LS still considers whether the decision of the WTO General Council on 1 August 2004 on the Doha Work Programme could be regarded as a decision having legal effects within the meaning of the second subparagraph of Article 300 (2) EC. The Commission would

The Council Legal Service justifies the third scenario with the argument that even if "pre-legal commitments" are not yet legally binding, they are "in practice irreversible". According to the Council Legal Service, the Commission cannot subscribe to such commitments on behalf of the Community without a prior explicit authorisation from the Council; the general negotiating directives would not be a sufficient basis. According to the Council Legal Service, the Council would otherwise be deprived "of any influence in the real decision-making process".

These interpretations of the Council Legal Service have no basis either in fact or in the Treaty. On the one hand, the notion of "pre-legal commitment" is found nowhere in the EC Treaty and it is completely alien to the EC system of international treaty-making; and, on the other hand, there is no such thing as irreversibility until a negotiation is concluded and its outcome is formally adopted.

The division of competences between the institutions of the Community as regards the negotiation, signature, and conclusion of international agreements is contained in Article 300 of the EC Treaty. As the Court of Justice has stated, this provision "constitutes, as regards the conclusion of treaties, an autonomous general provision, in that it confers specific powers on the Community institutions".[6] The Court proceeded to state that "with a view to establishing a balance between those institutions, [Article 300] provides that agreements between the Community and one or more States are to be negotiated by the Commission and then concluded by the Council [...]."[7]

Indeed, Article 300 EC strikes a carefully crafted balance between the Commission and the Council in respect of the negotiation, signature and conclusion of international agreements. According to Article 300 (1) EC, it is the Council, acting on the basis of a recommendation of the Commission, which authorises the Commission to negotiate international agreements. The Commission shall then conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it. According to Article 300 (2) EC, and subject to the powers vested in the Commission in this field, the signing and the conclusion of international agreements are decided by the Council, acting on a proposal from the Commission.

This basic division of powers between the Council and the Commission also applies with respect to the negotiation of trade agreements falling under Article 133 EC. It should be noted, however, that the last sentence of the second subparagraph of Article 133 (3), which was added by the Nice Treaty, provides also that the Commission shall report regularly to the special committee on the progress of the negotiations.

The notion of "pre-legal commitments" as utilised by the Council Legal Service is not contained in Articles 133 and 300 EC, or anywhere else in the EC Treaty. In fact, the interpretation of the Council Legal Service would result in the introduction of a new procedural step into the treaty-making procedure of the Community, namely the approval of "pre-legal commitments". However, such a step is not foreseen in the Treaties. Accordingly, the interpretation of the Council Legal Service would result in a shift in the powers of the

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recall its view expressed in the Council meetings in Geneva in late July 2004 that this was not the case, and notes that this view seems to have been shared by the overwhelming majority of the Council.

6 Case C-327/91, France vs. Commission, 1994 ECR I-3641, para. 28 (still with respect to ex-Article 228 EC).

7 Idem.

institutions to the detriment of the Commission's role as negotiator and, as a result, of the ability of the Community to take part fully and effectively in international negotiations.

The argument that otherwise, the Council would be deprived of any influence in the real decision-making process, is incorrect. The Council exercises its influence throughout the process in the ways foreseen by the EC Treaty. First of all, it is the Council which must authorise the Commission to open negotiations. Second, the Council may at any time issue negotiating directives to the Commission, which provide guidance to the Commission in the framework of the international negotiations. Third, the Commission must consult with the special committee appointed by the Council – in the occurrence the 133 Committee – and report regularly to the Committee on the progress of the negotiations.

Finally, and possibly most importantly, it is the Council which must approve the signing and conclusion of the international agreements on behalf of the Community. This competence of the Council lends additional weight to the negotiating directives issued by the Council. Moreover, the consultation of the special committee also provides important guidance as to whether the Council is likely to approve the final outcome of the negotiations on behalf of the Community or not.

As said before, the notion of "pre-legal commitments" finds no reflection in this system. Indeed, if the Council itself had to explicitly approve any significant "pre-legal commitment" –whatever this means- on behalf of the Community, the specific procedures of Articles 133 (3) and 300 (1) EC would become largely redundant.

It should also be noted that the criterion of "pre-legal commitments" would be impossible to apply in practice. International negotiations – and not just in the WTO - consist of a series of small steps which successively reduce the number of outstanding controversial issues. Each negotiating session therefore results necessarily in a number of "pre-legal commitments" or understandings, and it may not always be easy, in terms of negotiating strategy, to go back on such issues which have been informally agreed. However, no such commitment would be "irreversible", as it would by no means be legally binding. Indeed, it does occur in practice that aspects that were provisionally accepted early in a negotiation are subsequently modified. In other words, nothing is agreed until everything is agreed in a legally binding form. Accordingly, the borderline between "pre-legal commitments" which have to be approved by the Council and others which do not would be impossible to draw in practice.

The Council's interpretation is also incompatible with the long-standing treaty-making practice of the Community. This is illustrated by the practice of initialling, which is used to establish the final text resulting from an international negotiation. According to the Council's interpretation, the initialling would presumably have to be regarded as a "pre-legal commitment" which should be approved by the Council. However, in the practice of the EC, the decision to initial the text is the responsibility of the Commission, acting of course in consultation with the special committee.

In support of its interpretation, the Council Legal Service has finally relied on a passage of the Judgment of the Court of Justice of 23.3.2004 in Case C-233/02, France vs. Commission.[8] However, this judgment does not provide support for the Council's interpretation. The Court's statement did not concern the interpretation of Article 300, but the question of whether the

[8] Council LS Opinion, para. 34.

Commission, despite the fact that the guidelines in question did not constitute an international agreement falling within the scope of Article 300 EC, had the power to agree to these guidelines. Accordingly, the judgment of the Court does not in any way add to or subtract from the procedures of Article 300 EC regarding the negotiation of international agreements.

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In conclusion, the thesis of the Council Legal Service according to which the Council must approve any "pre-legal commitments" accepted by the Community in the context of the Doha Round negotiations must be rejected. The negotiations of the Doha Round negotiations will be conducted by the Commission on behalf of the Community in accordance with the procedures or Articles 133 (3) and 300 (1) EC.