

EU Law of the Overseas

Outermost Regions, Associated Overseas Countries
and Territories, Territories Sui Generis

Edited by

Dimitry Kochenov



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List of Contributors

- Fabian Amtenbrink** Professor of European Union Law, Erasmus School of Law, Erasmus University Rotterdam, Visiting Professor, College of Europe (Bruges).
- Freya Baetens** Assistant Professor of Public International Law, Leiden University.
- Steven Blockmans** Head of the Department of Research, T.M.C. Asser Institute (The Hague) and Special Visiting Professor, University of Leuven.
- Morten Broberg** Professor of International Development Law, University of Copenhagen.
- Dominique Custos** Judge John Wessel Distinguished Professor of Law, Loyola University New Orleans.
- Mike Eman** Prime Minister of Aruba.
- Maria Fletcher** Senior Lecturer in European Law, University of Glasgow.
- Wessel W. Geursen** Ph.D. Fellow, VU University, Amsterdam.
- Iris Goldner Lang** Associate Professor of Law, Department of European Public Law, Faculty of Law, University of Zagreb.
- Antenor Hallo de Wolf** Lecturer in Human Rights, Faculty of Law, University of Groningen; Visiting Fellow, Centre for the Implementation of Human Rights, School of Law, University of Bristol.
- Dimitry Kochenov** Professor of EU Constitutional Law, University of Groningen.

List of Contributors

- Stéphanie Laulhé Shaelou** Assistant Professor of Law, Law Department, University of Nicosia.
- Gary Lawson** Professor of Law, Boston University School of Law.
- Karis Muller** Associate of the Centre of European Studies, Australian National University, Canberra.
- Ismaël Omarjee** Maître de conférences, Université de Paris-Ouest Nanterre La Défense.
- Tamara Perišin** Associate Professor of Law, Department of European Public Law, Faculty of Law, University of Zagreb.
- Teresa Pullano** Junior Lecturer (ATER) in Political Science, Institut d'Etudes Politiques, Paris.
- Guy Seidman** Professor of Law, the Interdisciplinary Center (IDC) Herzliya.
- Nikos Skoutaris** Assistant Professor of Law, University of Maastricht.
- Alina Tryfonidou** Lecturer in Law and Deputy Director of the Centre for European Law and Integration, University of Leicester.
- Jacques Ziller** Professor of EU Law, Università degli Studi di Pavia.

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Chapter 18

The Status of Northern Cyprus under EU Law: A Comparative Approach to the Territorial Suspension of the *Acquis*

Nikos Skoutaris

1. INTRODUCTION

Despite the partial normalization of relations between the two ethno-religious communities on the island, Cyprus' accession to the EU meant neither the reunification of the island nor the restoration of human rights nor a complete end to the political and economic isolation of the Turkish Cypriot community.¹ Ironically

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1. In view of the Turkish Cypriot approval of the Annan Plan in April 2004, the then UN Secretary-General, reporting on his mission of good offices in Cyprus (Report of the Secretary-General on his mission of good offices in Cyprus of 28 May 2004, UN Doc S/2004/437), expressed his hope that the Members of the UN Security Council 'can give a strong lead to all States to cooperate both bilaterally and in international bodies to eliminate unnecessary restrictions and barriers that have the effect of isolating the Turkish Cypriots and impeding their development' (para. 93). For the opposing views of the two communities on the isolation of the Turkish Cypriot community see *inter alia* Brus, M. et al., *A Promise to Keep: Time to End the International Isolation of the Turkish Cypriots*, Istanbul: Tesev Publications, 2008; Kozakou-Marcoullis, E., 'The So-Called Isolation of the Turkish Cypriot Community', 2 *Cyprus Ybk Int'l Rel.*, 2007, 9.

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enough, the accession of Cyprus to the EU actually added a new dimension to the division of the island. According to Protocol No. 10 on Cyprus of the Act of Accession 2003,² the Republic of Cyprus joined the Union with its entire territory. However, due to the fact that its Government cannot exercise effective control over the whole island, pending a settlement, the application of the *acquis* is ‘suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not have effective control’.³

However, as in the case of the Overseas Countries and Territories (OCTs) associated with the EU, the scope of the suspension is territorial: Cypriots residing in the northern part are able to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such.⁴ Moreover, until the withdrawal of the suspension takes place, Article 2 has allowed the Council to define the terms under which the provisions of EU law shall apply to the ‘Green Line.’⁵ On the other hand, Article 3 allows measures with a view to promoting the economic development of those areas, such as the Financial Aid Regulation.⁶ In addition to the abovementioned legal matrix, which allows the partial application of the *acquis* in northern Cyprus, there is the case law of several national and international courts that discuss the suspension of the *acquis* directly or indirectly.

Having said that, it must be noted that despite the obvious historical and political connotations that the suspension of the *acquis* in northern Cyprus carries, it is not the only territorial/geographical exception to the application of EU law. In many Member States, there are special territories which for historical, geographical or political reasons have differing relationships with their national Governments – and consequently also the European Union – than the rest of the Member State’s territory.⁷

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2. Protocol No. 10 on Cyprus of the Act of Accession [2003] OJ L 236/955.
 3. Article 1(1) Protocol No. 10 [2003] OJ L 236/955. For a more detailed account of the terms of Cyprus’ Accession, see in general Hoffmeister, F., *Legal Aspects of the Cyprus Problem*, Leiden: Martinus Nijhoff Publishers, 2006; Laulhé Shaelou, S., *The EU and Cyprus: Principles and Strategies of Full Integration*, Leiden: Brill/Martinus Nijhoff, 2010; Skoutaris, N., *The Cyprus Issue: The Four Freedoms in a (Member) State of Siege. The Application of the Acquis Communautaire in the Areas not under the Effective Control of the Republic of Cyprus*, Oxford: Hart, 2011; Uebe, M., ‘Cyprus in the European Union’, 46 *German Ybk Int’l L.*, 2004, 375.
 4. Uebe, ‘Cyprus in the European Union’ (2004), 384. This is also in accordance with the case law of the ECJ according to which Union citizenship status is not dependent on territory. For example, in para. 27 of Case C-300/04 *M.G. Eman and O.B. Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055, the Court has provided that ‘[t]he second sentence of Article 17(1) EC provides that ‘[e]very person holding the nationality of a Member State shall be a citizen of the Union.’ It is irrelevant, in that regard, that the national of a Member State resides or lives in a territory which is one of the OCTs referred to in Article 299(3) EC.’
 5. Article 2(1) of Protocol No. 10 [2003] OJ L 236/955.
 6. Council Regulation 389/2006 of 27 Feb. 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation 2667/2000 on the European Agency for Reconstruction [2006] OJ L 65/5 (hereafter Financial Aid Regulation).
 7. For an analysis of the application of Union law to Overseas Countries and Territories (OCTs) and to Outermost Regions see in general Kochenov, D., ‘Substantive and Procedural Issues in the

Therefore, the very *telos* of the present paper is to discuss the territorial suspension of the *acquis* in northern Cyprus by briefly comparing it with analogous situations in Europe. It comments on Protocol No. 10, analyses the relevant Union legislation⁸ and case law⁹ that have further implemented and interpreted its provisions and compares the status of northern Cyprus under Union law with relevant paradigms, when appropriate. The relevance of such a comparative approach is not so much a matter of identifying similar factual/political/legal problems – that would have been controversial at least – but rather of considering other cases in which the integrity of the Union legal order has come up against national constitutional challenges. At the end of the day, setting the suspension of Union law in northern Cyprus in the wider context of territorial/geographical exceptions to the application of the *acquis* is not that remarkable. The Commission itself has compared the status of northern Cyprus to territories that are outside the EU customs territory, such as Gibraltar and Ceuta and Melilla, as we shall see later.¹⁰

Despite any analogies between those territories, which enjoy a special status under Union law, and northern Cyprus, it is critical to stress for the purposes of this chapter that while the relationship of the authorities of the former group of territories with their respective Member State governments is largely symbiotic, in Cyprus there are two competing claims of legitimate authority. It is hard to over-emphasize that the antagonistic relationship between the internationally recognized Government of the Republic and the entity in the north make the partial application of the *acquis* in the areas not under the effective control of the Republic even more problematic.

2. THE SUSPENSION OF THE *ACQUIS*

Cyprus became an EU Member State on 1 May 2004, a week after the Greek Cypriots massively rejected the UN Plan for The Comprehensive Settlement of

Application of European Law in the Overseas Possessions of European Union Member States’, 17 *Mich. St. Int’l. L.*, 2008, 195; Kochenov, D., ‘The Impact of European Citizenship on the Association of the Overseas Countries and Territories within the European Community’, 36 *LIEI*, 2009, 239; Murray, F., *EU & Member State Territories, The Special Relationship under Community Law*, London: Thomson, Sweet & Maxwell, 2004; Ziller, J., ‘Les collectivités des outre-mer de l’Union européenne’, in Faberon, J.-Y (ed.), *L’ Outre-mer Français: La nouvelle donne institutionnelle*, Paris: Documentation française, 2004; Ziller, J., ‘L’Union Européenne et l’outre-mer’, 113 *Pouvoirs*, 2005, 145; Ziller, J., ‘The European Union and the Territorial Scope of European Territories’, 38 *Victoria U. Wellington L.Rev.*, 2007, 51.

8. Financial Aid Regulation; Council Regulation 866/2004 on a regime under Art. 2 of Protocol No. 10 of the Act of Accession [2004] OJ L 206/51 (hereafter the Green Line Regulation).

9. Case C-420/07 *Meletis Apostolides v. David Charles Orams and Linda Elizabeth Orams* [2009] ECR I-03571.

10. Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control; Brussels, 7 Jul. 2004 COM(2004) 466 final; Hoffmeister, *Legal Aspects of the Cyprus Problem* (2006), 217–218.

the Cyprus problem, on terms provided *inter alia* in Protocol No. 10 on Cyprus of the Act of Accession 2003. The unprecedented (for an EU Member State) situation of not controlling part of its territory is acknowledged in Protocol No. 10. Given that it was signed at a period when there was huge optimism about the reunification of the island, the EU Member States and the acceding States reaffirmed their commitment to a comprehensive settlement of the Cyprus problem, consistent with the relevant UN Security Council Resolutions¹¹ and their strong support for the efforts of the UN Secretary General in the preamble of Protocol No. 10. However, since such a comprehensive settlement had not yet been reached, they considered that it was necessary to provide for the suspension of the application of the *acquis*¹² in the ‘Areas’, a suspension which shall be lifted in the event of a solution.

Therefore, Article 1(1) of the Protocol provides that the application of the *acquis* is suspended in those ‘Areas’. The suspension should be understood as limiting ‘any unrealisable obligations for the Republic of Cyprus in relation to Northern Cyprus which bring it into conflict with Community law’.¹³ Although Cyprus joined the Union with its entire territory, its Government cannot guarantee effective implementation of the EU law in the North.¹⁴ In fact, according to international courts, Turkey exercises effective control in those areas.¹⁵

More importantly, it should be noted that the scope of the suspension is territorial. According to Advocate General Kokott, the *acquis* ‘is to be suspended *in* that area and not *in relation* to that area’.¹⁶ This means that the citizens of the Cyprus Republic residing in the northern part of the island should be able to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such.¹⁷ Therefore, although Union law is in principle suspended in northern Cyprus, the territorial character of the suspension allows for some partial application of the *acquis*.

11. For a detailed list of the UN Security Council Resolutions about the Cyprus question, see in general <www.mfa.gov.cy/mfa/mfa.nsf/UNSecurityCouncilList>.

12. With regard to the term *acquis* to which the Protocol refers, it must be noted that it is neither a *terminus technicus* nor is it defined by Union legislation. It has been defined, however, by the Commission in texts adopted during the course of, or at the end of, each enlargement process. In its Opinion on the accession of Cyprus and the other nine then candidate States to the EU, for example, the Union stressed that the then applicant States accepted, without reservation, ‘the Treaty on European Union and all its objectives, all decisions taken since the entry into force of the Treaties establishing the European Communities and the Treaty on European Union and the options taken in respect of the development and strengthening of those Communities and of the Union.’: 19 Feb. 2003, COM(2003) 79 final, point (9). See also Delcourt, C., ‘The *Acquis Communautaire*: Has the Concept Had Its Day?’, 38 *CMLRev.*, 2001, 829.

13. Case C-420/07 *Apostolides* [2009] ECR I-03571, para. 42.

14. See Opinion of AG Kokott in Case C-420/07 *Apostolides* [2009] ECR I-03571, paras 40–41.

15. See *inter alia* ECt.HR *Cyprus v. Turkey* [2001] Appl. No. 25781/94, para. 77.

16. Opinion of AG Kokott in Case C-420/07 *Apostolides* [2009] ECR I-03571, para. 34.

17. Uebe, ‘Cyprus in the European Union’ (2004), 384.

In contrast with the situation in northern Cyprus, the *acquis*, generally speaking, applies in the Outermost regions¹⁸ by virtue of Article 355(1) TFEU, as extensively analysed in other chapters of this book.¹⁹ For the purposes of the present chapter, it suffices to stress the difference between the situation in the Outermost regions, where there are derogations to the application of the *acquis*,²⁰ and that in northern Cyprus, where there are ‘derogations’ from the suspension of the application of the *acquis*. The main reason for this partial application of Union law in northern Cyprus is the territorial character of the suspension, as noted above. This allows the citizens of the Republic of Cyprus residing in the north of the island to enjoy, as far as possible, the rights attached to Union citizenship that are not linked to the territory as such, a situation similar to the status of the Union citizens residing in the Overseas Territories,²¹ as we shall see. In an area, however, where there are two competing claims of authority, it is not straightforward to determine who, among the inhabitants of the ‘Areas’, are entitled to nationality of this Member State, and how the rights attached to Union citizenship can be exercised in northern Cyprus, where the application of the *acquis* is suspended.

Concerning the first question, the Republic of Cyprus continues to recognize the citizenship and the right to citizenship of all resident Cypriots of Turkish origin residing in the North, who can prove that they come under the scope *ratione personae* of Annex D of the Treaty of Establishment and The Republic of Cyprus Citizenship Law of 1967. Hence, it can be argued that the Turkish Cypriots possess EU citizenship in ‘hibernation’ that can be activated if they provide proper documentation to the relevant authority of the only recognized Government in the island. In practice, the Republic of Cyprus regularly issues passports to Turkish Cypriots upon application.²² This situation is analogous to the one faced by the

18. *I.e.* French Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Spanish Canary Islands, the Portuguese Azores and Madeira.

19. See, for instance, the introduction to this collection by Dimitry Kochenov (esp. s. 3) and the chapter by Ismaël Omarjee.

20. For a comprehensive analysis of the application of the *acquis* in the Outermost Regions see in general Kochenov, ‘Substantive and Procedural Issues’ (2008), 227–244 and 268–286; See also the relevant ECJ case law: Case 48/77 *H. Hansen Jun. & O.C. Balle GmbH & Co. v. Hauptzollamt de Flensburg* [1978] ECR 1787; Joined cases C-363 & 407–411/93 *René Lancry SA v. Direction Générale des Douanes and Société Dindar Confort; Christian Ah-Son, Paul Chevassus-Marche, Société Conforéunion and Société Dindar Autos v. Conseil Régional de la Réunion and Direction Régionale des Douanes de la Réunion*, [1994] ECR I-3978; Case C-212/96 *Paul Chevassus-Marche v. Conseil régional de la Réunion*, [1998] ECR I-743.

21. Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055. See also the chapter on EU citizenship by Dimitry Kochenov in this collection.

22. The Republic of Cyprus has so far had to supply 50,974 of the quarter million inhabitants of the North with EU passports. Some 81,805 have applied for and received ID cards. Figures as of 18 Apr. 2008 from Republic of Cyprus Press and Information Office, Nicosia. For a more detailed analysis see Skoutaris, N., ‘Differentiation in European Union Citizenship Law: The Cyprus Problem’, in Ott, A. and Inglis, K. (eds), *The Constitution for Europe and Enlarging Union: Unity in Diversity?*, Groningen: Europa Law Publishing, 2005, 160.

citizens of the Democratic Republic of Germany, who, before the fall of the Berlin wall, were considered to fall under the *ratione personae* of the EEC Treaty.²³

Apart from the Turkish Cypriot citizens of the bi-communal Republic of Cyprus, there are many residents in the 'Areas' who fall within the definition of national established by Article 67 of the Constitution of the Turkish Republic of Northern Cyprus ('TRNC') and the 'Turkish Republic of Northern Cyprus Citizenship Law' but are excluded from the nationality of the Republic because they come under the category of 'settlers'. The Republic of Cyprus does not consider those alien persons who settled illegally and without permission in the areas under the control of the Turkish forces as legitimate claimants to Cypriot citizenship²⁴ and they thus do not have access to EU citizenship via the citizenship laws of the Republic of Cyprus. According to the legislation of the Republic, they are considered to be illegal immigrants.²⁵ Prima facie, the policy of the Republic towards the 'settlers' bears similarities with the decision of certain Baltic States not to grant citizenship rights to huge portions of their Russian-speaking population, which remained stateless after the dissolution of the USSR.²⁶ However, it should be noted that by not recognizing those persons as lawful claimants of the citizenship of the bi-communal Republic, the Cypriot Government conforms with its obligations under Annex D of the Treaty of Establishment and under its own Constitution, which was part of an international agreement. In any case, according to the ECJ's 'established case law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'.²⁷

Comparing the aforementioned regime with the state of Union citizenship status of inhabitants of OCTs, we could argue that although the OCTs fall de jure outside the territorial scope of the Treaties – as northern Cyprus does as

23. In 1957, Germany declared that Germans within the meaning of the German Nationality Act (*Reichs- und Staatsangehörigkeitsgesetz* 1913, with amendments), which included all nationals of the Democratic Republic of Germany, must be regarded as Germans for European Community purposes. This does not mean, by any means, that the DDR citizens could exercise their rights deriving from the Treaties without fleeing from the DDR or that they could invoke any of those rights against DDR. In fact, they were deprived from the possibility of using any EEC rights as long as they were DDR citizens. That is why the 'GDR citizens [...] only acquired the practical possibility to use their Community law rights as "Germans" upon the accession of the GDR to the Federal Republic of Germany', Kochenov, D., 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between the Status and Rights', 15 *Colum. J. Eur. L.*, 2009, 169, 188.

24. See in general U.S. Office of Personnel Management Investigation Service, *Citizenship of the world*, March 2001, 62; available in <<http://labs.ucop.edu/internet/security/forms/citizenship.pdf>>.

25. See in general *Ο Περί Αλλοδαπών και Μεταναστεύσεως (Τροποποιητικός) Νόμος του 2004 [Aliens and Immigration (Amending) Act 2004]*; De Zayas, A., 'The Annan Plan and the Implantation of Turkish Settlers in the Occupied Territory of Cyprus', 1 *Cyprus Ybk Int'l Rel.*, 2006, 163; Lahlé Shaelou, *The EU and Cyprus* (2010), 227.

26. Guliyeva, G., 'Lost in Translation: Russian Speaking Non-Citizens in Latvia and the Protection of Minority Rights in the European Union', 33 *ELJ*, 2008, 843; Kochenov, D., 'A Summary of Contradictions: An Outline of the EU's main Internal and External Approaches to Ethnic Minority Protection', 31 *B.C. Int'l & Comp. L.Rev.*, 2009, 32.

27. Case C-135/08 *Janko Rottman v. Freistaat Bayern*, ECR-0000, para. 39 referring to Case C-369/90 *Mario Vincente Micheletti and others v. Delegacion del Gobierno en Cantabria*, ECR [1992] I-4258, para. 10; Case C-179/98 *Belgian State v. Fatna Mesbah* [1999] ECR

well – their inhabitants are also considered Union citizens. Therefore, for example, by virtue of the British Overseas Territories Act 2002, all the British Overseas Territories citizens became British citizens and thus Union citizens.²⁸ The same is true for the natives of the French OCTs. Interestingly enough, Greenlanders are also Union citizens, although they voted for Greenland to leave the then EEC in their 1982 referendum.²⁹ With regard to the citizens of the Dutch OCTs, until a recent ECJ decision,³⁰ they were considered EU citizens but they could not exercise the relevant voting rights attached to the ‘fundamental status of nationals of Member States’.³¹

At the same time, if we compare the Court findings in *Kaefer and Procacci*³² with the Opinion of Advocate General Kokott in *Orams*, we realize that the status of northern Cyprus under Union law differs significantly from the relevant status of the OCTs. In *Kaefer and Procacci* the Court of Justice held that despite the fact that French Polynesia does not fall under the territorial scope of Community law, ‘the *Tribunal administratif*, Papeete, is a French court’.³³ On the other hand, Advocate General Kokott clarified that the courts in northern Cyprus are not EU Courts by holding that neither ‘the recognition and enforcement of a judgment of a court of a Member State in the northern area of Cyprus’ is possible ‘[n]or does it appear possible [...] for a judgment of a court situated in that area of Cyprus to be recognized and enforced in another Member State’³⁴ under Regulation 44/2001.³⁵

Moreover, it is also critical to examine how the rights attached to Union citizenship³⁶ could be exercised in an area where the application of the *acquis* is suspended. Obviously, the suspension of the *acquis* means that Union citizens, whether residing in northern Cyprus or not, cannot invoke any rights derived from primary or secondary Union law against the ‘TRNC’ administration. Despite this, as already mentioned, such a suspension is territorial and thus the Union citizens

I-7955, para. 29; and Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925, para. 37.

28. With the exception of those that enjoyed this status by virtue of a connection with the UK Sovereign Base Areas in Cyprus. In addition, such a provision is rather moot with regard to the British Antarctic Territory and the British Indian Ocean territory as neither has a permanent population.

29. Treaty Amending, With Regard to Greenland, the Treaties Establishing the European Communities, [1985] OJ L 29/1; Weiss, F., ‘Greenland’s Withdrawal from the European Communities’, 10 *ELRev.*, 1985, 173.

30. Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

31. Case C-184/99 *Rudy Grzelczyk v. Centre Public d’Aide Sociale d’Ottignes-Louvain-la-Neuve (CPAS)* [2001] ECR I-6193, para. 31.

32. Joined cases C-100 & 101/89 *Peter Kaefer and Andréa Procacci v. French State* [1990] ECR I-4647.

33. Joined cases C-100 & 101/89 *Kaefer and Procacci* [1990] ECR I-4647, para. 8.

34. Opinion of AG Kokott in Case C-420/07 *Apostolides* [2009] ECR I-03571, para. 31.

35. Council Regulation 44/2001 of 22 Dec. 2000 on jurisdiction and enforcements of judgments in civil and commercial matters [2001] OJ L 12/1.

36. Article 21 TFEU: right to free movement and residence (subject to limitations) (the paper discusses the crossing of the Green Line in the next section); Art. 22: electoral rights as far as it concerns the European Parliament and municipal elections; Art. 23 TFEU: diplomatic and consular protection; Art. 24 TFEU: access to Ombudsman; Art. 25: right to petition the European Parliament.

residing in the 'Areas' should be able to enjoy, as far as possible, the relevant rights that are not linked to the territory as such.³⁷ In particular, they are entitled to exercise the rights attached to Union citizenship – for example the right to free movement and residence in other EU Member States, diplomatic and consular protection, access to the Ombudsman, the right to petition the European Parliament – and their fundamental freedoms in other EU Member States, a situation similar to the status of the Union citizens residing in the OCTs.³⁸

Firstly, pursuant to Article 14(2) TEU, the Union's citizens should elect their own representatives in the European Parliament. Given that the vast majority of Turkish Cypriots have not participated in the constitutional life of the Republic of Cyprus since 1963 and that the relevant Cypriot Law 72/79 does not provide for any separate electoral list for the Turkish Cypriot community in view of the post-1974 *status quo*, the impediments to the exercise of such electoral rights become evident.

Interestingly enough, the political rights of the Turkish Cypriot ethno-religious segment attached to the concept of citizenship of the Republic and to Union citizenship are effectively protected in the aftermath of the judgment of the European Court of Human Rights in *Aziz v. Cyprus*.³⁹ In that case, the Strasbourg Court relied on its decision in *Matthews v. United Kingdom*⁴⁰ in the aftermath of which the Gibraltarians could finally exercise their right to vote for the European Parliament elections, although they had been British nationals for the purposes of Community law since 1972.⁴¹ In *Aziz*, the ECt.HR found that the refusal of the Cypriot Ministry of Interior to enrol the applicant, a Turkish Cypriot, on the electoral roll in order to exercise his voting rights in the parliamentary elections of 2001, was a breach of the obligations of the Republic as a Contracting Party to the Convention under Article 3 of Protocol No. 1. According to that provision, the States should 'hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'. Moreover, this practice was a clear breach of the non-discrimination principle contained in Article 14 of the Convention.⁴²

In the aftermath of this decision, the Turkish Cypriots residing in the South can be included in the Greek Cypriot electoral system while Turkish Cypriots residing in northern Cyprus can cross the Green Line to vote in the South provided that they have registered there. The Strasbourg Court thus not only acted as a guardian of the

37. Uebe, 'Cyprus in the European Union' (2004); Hoffmeister, *Legal Aspects of the Cyprus Problem* (2006), 207–215; De Mestral, A., 'The Current Status of the Citizens of the Turkish Republic of Northern Cyprus in the Light of the Non-Application of the *Acquis Communautaire*', in Breitenmoser, S., et al. (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Baden-Baden: Nomos, 2007), 1423.

38. Hoffmeister, *Legal Aspects of the Cyprus Problem* (2006), 211.

39. ECt.HR *Aziz v. Cyprus* [2004] Appl. No. 69949/01.

40. ECt.HR *Matthews v. United Kingdom (Merits)* [1999] Appl. No. 24833/94.

41. Declaration by Government of United Kingdom of Great Britain and Northern Ireland on the Definition of 'Nationals', [1972] OJ L 73/196. In view of the entry into force in the UK of new legislation on nationality, that declaration was replaced in 1982 by a further declaration ([1983] OJ C 23/1) which did not alter significantly the status of the Gibraltarians.

42. ECt.HR *Aziz* [2004] Appl. No. 69949/01, para. 38.

bi-communal structure of the Republic but also indirectly enhanced the exercise of EU citizenship rights concerning the election of representatives to the European Parliament. Obviously, the situation is far from ideal⁴³ given also that if the Annan Plan had been approved, the whole Turkish Cypriot community would have been participating in the electoral process and represented by two European Parliamentarians.⁴⁴ Nevertheless, it should still be noted that, theoretically speaking at least, all the Turkish-speaking Cypriots could participate in the political life of the Union, although the Republic of Cyprus does not have a legal obligation to hold European Parliament elections in an area where the *acquis* is suspended, as was held in the *Eman and Sevinger* case,⁴⁵ and cannot de facto hold elections in the northern part of the island given the post-1974 *status quo*.

Recently, it was suggested that the Union should create 'forms of political representation for Turkish Cypriots which can be implemented without violating the suspension' of the *acquis* 'and the EU's non-recognition policy towards the TRNC, while at the same time providing an effective voice to the Turkish Cypriots in EU public policy making'.⁴⁶ More precisely, the introduction of some form of observer status for Turkish Cypriot representatives in the European Parliament has been recommended.⁴⁷ In a way, this development would follow the example set by the Parliamentary Assembly of the Council of Europe, which has developed a mechanism to meet the demands of the Turkish Cypriots for access to the political debates.⁴⁸ In July 2007, however, the Conference of Presidents of the European Parliament rejected such a proposal, as, 'from a legal point of view, it is not possible for the European Parliament to invite observers from the Turkish Cypriot community'.⁴⁹

Furthermore, Turkish Cypriots can participate in Union programmes⁵⁰ and work in the institutions of the Union. With regard to the latter, in the first recruitment competition after Cyprus's Union accession, the European Commission required that examinations should be passed in the Greek language.⁵¹ Two Turkish Cypriots brought an action before the Court of First Instance (CFI, now the General

43. At the elections for the European Parliament on 13 Jun. 2004, approximately 500 Turkish Cypriots were registered, out of which ninety-seven actually voted. With respect to the 2009 EP elections held on 6 Jun. 2009 in Cyprus, 1305 Turkish Cypriots were registered on the electoral lists, of which 757 were residents in the Areas (117 actually voted); Laulhé Shaelou, *The EU and Cyprus* (2010), 202.

44. Article 7, Appendix D of the Annan Plan, Draft Act of Adaptation of the Terms of Accession of the United Cyprus Republic to the European Union; available at <www.unficy.org/nqcontent.cfm?a_id=1637>.

45. Case C-300/04, *Eman and Sevinger* [2006] ECR I-8055, paras 46–48.

46. Brus, M. et al., *A Promise to Keep* (2008), 36.

47. *Ibid.*

48. *Ibid.*

49. *Ibid.*, 42; citing PE392.496/cpg: Summary of Decisions of the Conference of Presidents Meeting on 12 Jul. 2007.

50. See Commission Decision C/2006/6533 of 15 Dec. 2006; and The European Union Scholarship Programme for the Turkish Cypriot community; available at <www.benavrupadaokumakistiyorum.org>.

51. Open Competition EPSO/A/1/03 [2003] OJ C 120 A.

Court), arguing that this requirement constituted unlawful discrimination against Cypriot citizens whose mother tongue is not Greek. By its Order of 5 May 2007, the CFI held that the action was inadmissible.⁵² On 19 October, the ECJ upheld the order of the CFI.⁵³ Undoubtedly, were it not for the procedural issues, the judgment of the Court would have been particularly interesting. It is not coincidence, however, that new recruitment competitions for Cypriots may now be passed in any official EU language.⁵⁴

Overall, we can safely conclude that the Turkish Cypriots residing in the North have access to the nationality of the bi-communal Republic in accordance with the 1960 Constitution, and thus to Union citizenship. Obviously, the relevant provisions of the Constitution do not provide access to Union citizenship to the whole population of northern Cyprus. The ‘settlers’ are not considered legitimate claimants of Cypriot and thus of Union citizenship. Moreover, the limits for the exercise of the rights that are associated with the Union citizenship concept are extremely narrow in an area where the application of EU law is suspended and there are two competing claims of legitimate authority. The fact that EU citizens cannot invoke any rights derived from primary or secondary Union law against the ‘TRNC’ administration is of fundamental importance. Arguably, however, the Turkish Cypriots can still exercise the rights that are attached to Union citizenship in a similar manner to Union citizens residing in the OCTs. Although it is hard to find evidence that would suggest the contrary, the practical hurdles that the antagonistic relationship between the two competing claims of legitimate authority pose to such exercise should be borne in mind. It is hard to overemphasize the fact that the internationally recognized Government of the Republic cannot guarantee effective implementation of EU law in the North.

3. CROSSING THE GREEN LINE

As we have extensively analysed in the previous part of this paper, the special status of northern Cyprus within the EU is described in Protocol No. 10. However,

52. Case T-455/04 *Derya Beyatli and Armagan Candan v. Commission of the European Communities* [2007] Order of the Court OJ C 95/40.

53. Case C-238/07P *Derya Beyatli v. Commission of the European Communities* [2007] ECR I-140.

54. Despite Turkish being one of the official languages of the Republic, Cyprus’ Government had requested that this language only be included as an official EU one after the approval of the Annan Plan settlement; Hoffmeister, *Legal Aspects of the Cyprus Problem* (2006), 188. After the rejection of the Annan Plan and despite the fact that the 667th Council Meeting of the Council of the European Union in Luxembourg on 13 Jun. 2005 (available at <http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/gena/85437.pdf>), decided to authorize the limited use at an EU level of ‘languages other than the languages referred to in Council Regulation 1/1958 (Regulation 1/1958 determining the language to be used by the European Economic Community and Regulation 1/1958 [1958] OJ L 17/385 last amended by Council Regulation 1791/2006 of 20 November 2006 [2006] OJ L 363/1) whose status is recognised by the Constitution of a Member State on all or part of its territory or the use of which as a national language is authorised by law’; nonetheless, the internationally recognized Government of the island has not yet used this provision.

the relationship between those areas where the legitimate Government of the Republic of Cyprus does not exercise effective control with those where it does is largely governed by the Green Line Regulation. Article 2 of Protocol No. 10 read together with Article 6 of Protocol No. 3 of the Act of Accession, have allowed the Council, acting unanimously on the basis of a proposal from the Commission, to define the terms under which the provisions of EU law apply to the ‘Green Line.’⁵⁵

3.1. CROSSING OF PERSONS

Given the suspension of the *acquis*, Article 21 TFEU, according to which every EU citizen has the ‘right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down’ in the Treaty and by the measures adopted to give it effect,⁵⁶ does not apply. Instead, the Council of the EU has unanimously defined the terms under which the provisions of EU law on the free movement of persons apply to the line in the Green Line Regulation. Since the Government of Cyprus closed the ports of entry in the north of the Green Line,⁵⁷ the Regulation not only provides the rules for access to the ‘Areas’ for EU citizens and third country nationals but also for those lawfully residing in the North. The Regulation provides the terms under which those persons can move lawfully from Cyprus via the line to other destinations, and thus provides for the partial but effective lifting of their isolation.

Therefore, although in principle the line does not constitute an external border of the EU,⁵⁸ special rules are established by the Regulation for the crossing of persons, the prime responsibility for which belongs to the Republic of Cyprus. While considering the legitimate concerns of the Republic’s Government concerning the recognition of any authority in the ‘Areas’, it was deemed necessary that those special rules should enable EU citizens to exercise their free movement rights within the EU. This was achieved by setting minimum rules for carrying out checks on persons at the line and at the same time by ensuring the effective surveillance of

55. Article 2(1) Protocol No. 10 [2003] OJ L 236/955. For a comprehensive analysis of the Green Line Regulation regime see Skoutaris, N., ‘The Application of the *Acquis Communautaire* in the Areas not under the Effective Control of the Republic of Cyprus: The Green Line Regulation’, 45 *CMLRev.*, 2008, 727.

56. E.g., Directive 2004/38/EC of the European Parliament and of the Council of 29 Apr. 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 229/35.

57. The Letter of 19 Aug. 2005, from the Chargé d’affaires a.i. of the Permanent Mission of Cyprus to the UN addressed to the Secretary-General, stated: ‘On the specific matter of airports and ports in the occupied area of Cyprus, it should be stressed that, following the Turkish military invasion and occupation of the northern part of the island, the Government of the Republic of Cyprus declared all ports of entry into the Republic of Cyprus which are situated in those areas as closed.’

58. Rec. 4, Preamble, Green Line Regulation.

the line in order to combat the illegal immigration of third country nationals, as well as any threat to public security and public policy.⁵⁹ It was thus also deemed necessary to define the conditions under which third country nationals are allowed to cross the line.⁶⁰ For the purpose of checks on persons, the term ‘line’ means the line between the Government-Controlled Areas and those areas in which the Government of the Republic of Cyprus does not exercise effective control.⁶¹ According to Article 2(1) of the Green Line Regulation, to combat illegal immigration of third country nationals and to detect and prevent any threat to public security and public policy the Republic has the responsibility to carry out checks on all persons crossing the line. All persons crossing the line should undergo at least one such check in order to establish their identity.⁶² The line, however, can be crossed only at crossing points authorized by the competent authorities of the Republic of Cyprus.⁶³

With regard to third country nationals, Article 2(3) of the Green Line Regulation provides that they should only be allowed to cross the line if they possess either a residence permit issued by the Republic or a valid travel document and, if required, a valid visa for the Republic. They must also not represent a threat to public policy or public security.⁶⁴ According to Article 1(2), the term ‘third country national’ is defined as any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU. Given the special historical and political circumstances that have arisen in the post-1974 *status quo*, the seemingly technical and neutral definition of ‘third country nationals’ has some important political connotations. The Union tries to get around the thorny issue of ‘settlers’ by falling back on the technical rules on the crossing of ‘third country nationals’. In other words, the Council of the EU deals effectively with one of the most important aspects of the conflict, which also has implications for the partial application of the *acquis* in northern Cyprus, in a rather depoliticized manner, by refraining from referring *expressis verbis* to it.

As previously mentioned, the Republic of Cyprus does not consider those alien persons who have settled in the ‘Areas’ illegally and without permission as legitimate claimants of the Cypriot citizenship, meaning that they do not have access to EU citizenship via the citizenship laws of the Republic of Cyprus. Therefore, for the purposes of the Green Line Regulation, the ‘settlers’ are deemed to be third country nationals that may cross the line if they comply with the aforementioned criteria provided in Article 2(3).

59. Recs. 4 and 7, Preamble, Green Line Regulation.

60. Rec. 7, Preamble, Green Line Regulation.

61. Article 1(1)(a) Green Line Regulation.

62. Article 2(2) Green Line Regulation.

63. Article 2(4) Green Line Regulation.

64. For a more detailed account of how those terms are defined for EC law purposes see the case law of the Court of Justice in the following cases: Case 41/74 *Yvonne van Duyn v. Home Office* [1974] ECR 1337; Cases 115&116/81 *Rezguia Adoui v. Belgian State and City of Liège*; *Dominique Cornuaille v. Belgian State* [1982] ECR 1665; Case 36/75 *Roland Rutili v. Ministre de l'intérieur* [1975] ECR 1219; Case 67/74 *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Koln* [1975] ECR 297; Case 30/77 *Régina v. Pierre Bouchereau* [1977] ECR 1999.

With regard to the ‘threat to public policy’ criterion, the criminal dimension of ‘settling’ recognized in the legislation of the Republic should be noted.⁶⁵ As far as the ‘valid travel document’ criterion is concerned, we note that the vast majority of ‘settlers’ also hold the citizenship of the Turkish Republic. For Turkish nationals, a valid visa is required to visit the Republic. Given the well-known policy of Turkey not to recognize the Republic of Cyprus, the practical impediments for Turkish citizens to access Cypriot visas are obvious.⁶⁶

3.2. CROSSING OF GOODS

After the rejection of the Annan Plan and the consequent suspension of the *acquis* in the North, the Union had to create a legislative framework which would enable it to create trade relations with the Turkish Cypriot community without recognizing any authority on the island other than the only internationally recognized Government of the Republic. The lifting of the economic isolation of the Union citizens residing in an area where the ports of entry were declared closed thirty years ago has been deemed necessary in the aftermath of the ECJ judgments in the *Anastasiou* saga.⁶⁷

In order to achieve the abovementioned scope, the EU in agreement with the Republic, has authorized the Turkish Cypriot Chamber of Commerce,⁶⁸ through the Green Line Regulation, to issue accompanying documents so that goods originating in the ‘Areas’ could cross the line at the crossing points listed in

65. See in general Ο Περί Αλλοδαπών και Μεταναστεύσεως (Τροποποιητικός) Νόμος του 2004 [*Aliens and Immigration (Amending) Act 2004*].

66. We should recall, however, that the situation on the ground with respect to ‘settlers’ married to Turkish Cypriots is slightly different than Union legislation suggests. Although such individuals cannot claim Republic citizenship, they may still lawfully cross the line. The customs authorities of the Republic of Cyprus have created another list including the names of those who can prove their marriage to a Turkish Cypriot on the basis of a marriage certificate. This practice started in 2003 and continued even after EU accession. This is also the case for the children of ‘settlers’ married to Turkish Cypriots (Interviews with ‘TRNC’ officials). See also Skoutaris, ‘Differentiation in European Union Citizenship Law’ (2005), 167–169; Trimikliniotis, N., ‘Nationality and Citizenship in Cyprus since 1945: Communal Citizenship, Gendered Nationality and the Adventures of a Post-Colonial subject in a divided country’, in Bauböck, R. et al. (eds), *Citizenship Policies in the New Europe*, Amsterdam: Amsterdam University Press, 2007.

67. Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others (Anastasiou I)* [1994] ECR I-3116; Case C-219/98 *Regina v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others (Anastasiou II)* [2000] ECR I-5241; Case C-140/02 *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and Others v. Minister of Agriculture, Fisheries and Food (Anastasiou III)* [2003] ECR I-10635. According to those judgments, since the authorities in the areas not under the effective control of the Republic could not issue valid movement certificates to evidence of the Cypriot origin of the relevant goods, Turkish Cypriot goods could be imported into the Community but were treated as goods from a country not associated with the then EC.

68. Article 4(5) Green Line Regulation; Commission Decision 2004/604/EC of 7 Jul. 2004 on the authorization of the Turkish Cypriot Chamber of Commerce according to Art. 4(5) of Council Regulation 866/2004 [2004] OJ L 272/12.

Annex I and the Pergamos and Strovilia crossing points under the authority of the Eastern Sovereign Base Area, and be circulated in the EU market as Union goods. In effect, by authorizing a Turkish Cypriot NGO, the Union got around a fundamental recognition conflict in order to allow legal bilateral trade to take place both between the parties in dispute and between the 'Areas' and EU Member States other than Cyprus.

Overall, although the Green Line Regulation regime has provided for a viable and working framework for the development of bilateral trade relations between the parties in the conflict and has thus brought the two ethno-religious segments closer, it has not become an effective device to enable goods originating in northern Cyprus to penetrate the EU market. Indeed, over the four years of the life of the regime established by the Green Line Regulation, there have only been two instances where goods which had crossed the line subsequently became subject to an intra-Union transaction with another Member State.⁶⁹ This is the main reason why the Commission at every occasion stresses the need for the adoption of a regulation that would allow direct trade relations between the 'Areas' and Union Member States other than Cyprus. The relevant Commission proposal, however, has been criticized for a number of reasons, not least for its proposed legal basis.⁷⁰

With respect to the legal basis, the critical question has been whether a regulation whose essential content is the free circulation of products originating in northern Cyprus into the Union customs territory with 'exemption from customs duties and charges having equivalent effect within the limits of annual tariff quotas' determined by the Commission⁷¹ foresees the partial 'withdrawal of the suspension' of the *acquis*. If that is the case, Article 1(2) of Protocol No. 10 of the Act of Accession 2003 provides for a specific legal basis and procedure for withdrawing the suspension. If not, then the basis proposed by the Commission – ex Article 133 TEC – that which has been also used as a legal basis for regulating customs duties on imports from Member States' territories that are outside the EU customs territory such as Gibraltar and Ceuta and Melilla,⁷² is the appropriate legal basis.

This debate is particularly interesting for the purposes of the present paper given that it highlights the differences between the status of northern Cyprus under Union law and of certain OCTs. The debate underlines the differences between the

69. Communication from the Commission Annual Report on the implementation of Council Regulation 866/2004 of 29 Apr. 2004 and the situation resulting from its application, Brussels 25 Sep. 2006 COM(2006) 551 final, 5; 2007; Communication from the Commission Annual Report on the implementation of Council Regulation 866/2004 of 29 Apr. 2004 and the situation resulting from its application, Brussels 20 Sep. 2007 COM(2007) 553, 11.

70. For a comprehensive analysis of the debate on the proposal for a direct trade regulation see Skoutaris, 'The Application of the *Acquis Communautaire*' (2008), 748–755.

71. Article 4(1) Proposal for a Direct Trade Regulation, Brussels, 7 Jul. 2004 COM(2004) 466.

72. See Council Regulation 2501/2001 of 10 Dec. 2001 applying a scheme of generalized tariff preferences, [2001] OJ L 346/1 and Council Regulation 1140/2004 of 23 Jun. 2004 suspending the autonomous Common Customs Tariff duties on certain fishery products originating in Ceuta and Melilla [2004] OJ L 222/1.

realities that have led to the suspension of the *acquis* in northern Cyprus with the special status that the OCTs enjoy within the legal order of the relevant States and the Union. It is the post-1974 *status quo* that has led to this suspension and not a certain constitutional arrangement. In other words, it is possible to argue that while with OCTs it is their authorities in agreement with the relevant Member State who have decided the degree of their integration in the Union, in the case of northern Cyprus it is the legitimate government of the island which, though unable to exercise effective control over this part of Cyprus, has accepted its very limited integration. In fact, the Republic has vetoed the further integration of the areas not under its effective control by effectively blocking the adoption of the Direct Trade Regulation.

4. ARTICLE 4: YET ANOTHER PASSERELLE CLAUSE?

Finally, in the event of a settlement, Protocol No. 10 of the Act of Accession 2003 provides that the Council must decide unanimously on adaptations of the terms concerning the accession of Cyprus with regard to the Turkish Cypriot community. Article 4 clearly expresses the willingness of the Union to accommodate the terms of a solution of the Cyprus issue into the Union legal order and change the status of northern Cyprus under Union law once the island is unified.⁷³ For the purposes of the present chapter, it is crucial to mention that such an enabling clause provides for a simplified procedure for the amendment of the Act of Accession. Therefore, the relevant Council acts – adopted on the basis of Article 4 and accommodating the terms of a future comprehensive settlement – would constitute primary law even if they contained some derogations from the *acquis*.⁷⁴ Such a simplified procedure is similar to the so-called ‘*passerelle clause*’ contained in Article 355(6) TFEU. According to this new procedure the European Council may adopt a decision that would in essence amend primary law so as to change the European legal status of a Member State’s territory. Movements in both directions are possible under the special procedure: an overseas country or territory of Denmark, France and the Netherlands can be made an outermost region and vice versa.⁷⁵

73. If the April 2004 referenda had approved the new state of affairs envisaged in the Annan Plan, the Council of the European Union, having regard to that Article, would have unanimously adopted the Draft Act of Adaptation of the Terms of Accession of the United Cyprus Republic to the European Union as a Regulation. This legislative act, which would have been adopted as a Regulation, would have provided for derogations in three different areas: restrictions on the right of non-residents in the constituent states to purchase immovable property; restrictions on the right of Cypriot citizens to reside in a constituent state of which they do not hold the internal constituent state citizenship status; and restrictions on the right not only of Greek and Turkish nationals but also of Union citizens to reside in Cyprus, after the comprehensive settlement takes place, in order for the demographic ratio between permanent residents, speaking either Greek or Turkish as a mother tongue, not to be substantially altered.

74. Uebe, ‘Cyprus in the European Union’ (2004), 390; Cremona, M. and Skoutaris, N., ‘Speaking of the de . . . rogations’, 11 *Journal of Balkan and Near Eastern Studies*, 2009, 387.

75. Kochenov, ‘Substantive and Procedural Issues’ (2008), 266.

5. CONCLUSION

This brief study emphatically shows that the application of the *acquis* has been influenced on many occasions by certain historical, political and even geographical purposes. Of course, the differences with the partial application in northern Cyprus should be highlighted. On none of those occasions was the suspension a consequence of a military invasion and an age-old political stalemate to reach a peace settlement. The Governments in most of the previously mentioned cases negotiated and achieved such derogations in order to facilitate the lives and respect the sensitivities of their respective populations. On the other hand, the suspension of the *acquis* in northern Cyprus is dictated by the post-1974 *status quo* and the failure to achieve a comprehensive settlement, and it is not the expression of the will of either community on the island.

Given that the suspension of the *acquis* in the areas not under the effective control of the Republic is the result of such a political anomaly, the closest precedent to it is probably the German experience prior to the reunification of the country.⁷⁶ However, we should not try to draw too many analogies, even with that interesting case. This is mainly because despite the Allies recognizing the Government of the Federal Republic of Germany as the sole legitimate Government of Germany as a whole, this never had legal effect on the territory of the German Democratic Republic. More significantly for this research, the relationship of the DDR with the then Community was clarified in the judgment of the Court of Justice in *Norddeutsches Vieh- und Fleischkontor*.⁷⁷ In that decision, the Court held that the relevant rules exonerating West Germany from applying the rules of EEC law to German Internal Trade 'does not have the result of making the German Democratic Republic part of the Community, but only that a special system applies to it as a territory which is not part of the Community'.⁷⁸ Cyprus, on the other hand, has joined the Union as a whole and its Government acts for the island as a whole. The *acquis*, however, is suspended in the areas north of the Green Line until a solution to the Cyprus issue is achieved. It remains to be seen how the evolution of this unique status under Union law after the completion of the current bi-communal negotiations.

76. For an analysis of the Community implications of the German reunification see in general Tomuschat, C., 'A United Germany within the European Community', 27 *CMLRev.*, 1990, 415; Timmermans, C.W.A., 'German Unification and Community Law', 27 *CMLRev.*, 1990, 437.

77. Case 14/74 *Norddeutsches Vieh- und Fleischkontor GmbH v. Hauptzollamt Hamburg-Jonas-Ausfuhrstattung* [1974] ECR 899.

78. Case 14/74 *Norddeutsches Vieh- und Fleischkontor* [1974] ECR 899, para. 6.