Regulating for Globalization

Trade, Labor and EU Law Perspectives

The ECJ's decision on labelling of foodstuff imported from the territories occupied by Israel

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Introduction

The definition of the territorial limits of the State of Israel is one of the main reasons behind the conflict in the Middle East, with consequences that often extend beyond the classic issues of international politics. As known, the last massive Israeli expansion occurred in 1967 with the Six-Day War and currently the Golan Heights, the Gaza Strip and the West Bank, including East Jerusalem, are controlled by Israel. Most of the international community and, *in primis*, the UN bodies have deplored the occupation by referring to the rules of international law which apply in this field, first and foremost those deriving from the principle of self-determination of peoples enjoyed by those living in those territories. In line with this orientation, the EU does not recognise Israel's sovereignty over the territories occupied and, as already recalled in the *Brita* case (ECJ, *Brita Gmbh vs. Hauptzollamt Hamburg-Hafen*, case C-386/08, judgement of 25 February 2010), does not consider them as part of Israel's territory (see, inter alia, M. Maresceau, "The Brita Ruling of the European Court of Justice: A Few Comments", in I. Govaere, R. Quick, M. Bronckers (eds.), *Trade and Competition Law in the EU and Beyond*, Edward Elgar Publishing, 2011, p. 276 ff).

On 12 November 2019, the Grand Chamber of the ECJ issued its decision on the case *Organisation juive européenne and Vignoble Psagot* (ECJ, *Organisation juive européenne, Vignoble Psagot Ltd vs. Ministre de l'Économie et des Finances*, case C-363/18, judgement of 12 November 2019) concerning the interpretation of Regulation (EU) No 1169/2011 on the provision of food information to consumers. The main proceedings concerned a dispute in France regarding the legality of a notice regarding the indication of origin of goods originating in the territories occupied by the State of Israel since June 1967 and requiring that those foodstuffs bear the indications in question. As it will be underlined in the following sections, the decision of the Court has introduced a symbolic bridge between two different needs, that to protect consumer rights under EU law and that to respect the principle of self-determination at international level.

Consumer protection and right to information

In the EU context, consumer protection has gradually become an essential

requirement for both the EU institutions and the Member States (I. Benöhr, *EU Consumer Law and Human Rights*, Oxford University Press, 2013). Alongside Article 38 of the EU Charter of Fundamental Rights, Article 169 TFEU incorporates and clarifies the innovations that have been progressively introduced into the regulatory landscape relating to consumer protection, including the need of introducing high standards of protection and specific subjective consumers' rights, such as the right to information. Among the different measures to ensure its respect, it has become crucial to regulate the information on the composition of food and its origin through labelling. The label, in fact, plays a strategic role as it informs consumers about the characteristics of the product thus allowing them to choose the one that best meets their needs (C. MacMaoláin, EU Food Law. Protecting Consumers and Health in a Common Market, Hart Publishing, 2007, p. 77 ss.; B. M. J. Van Der Meulen, EU food law handbook, Wageningen: Wageningen Academic Publishers, 2014). At present, the legal reference for the provision of food information is Regulation 1169/2011, adopted on 25 October 2011 and entered into force on 13 December 2014 (Regulation (EU) No. 1169/2011 of the European Parliament and of the Council, of 25 October 2011 on the provision of food information to consumers, in OJ L 304 of 22 November 2011). With this legislative act, which is directly applicable in all the EU Member States, the EU aims to guarantee consumer protection by collecting in a single legislative text the rules on presentation and advertising, nutrition labelling and allergenic information of food not only from EU Member States but also from third countries. To this end, Article 9 of the Regulation provides for a list of situations in which the food economic operators are required to provide mandatory information. These include the information about the 'country of origin' and 'place of provenance' of the product where, as further detailed in Article 26, "failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance" (to integrate the scope of this provision, Implementing Regulation (EU) No 2018/775 regulating the indication of country of origin or place of provenance of the primary ingredient of a food, in OJ L 131 of 29 May 2018). However, Article 26 of the Regulation provides that the reference to the country of origin or place of provenance must be intended as mandatory only when it may be relevant to consumers' purchasing choices. Hence, economic operators are left with a wide margin of discretion in determining whether it is necessary to provide such a detail in the product label (I. Carreño, T. Dolle, "A Myriad of EU Member States' Measures on Mandatory Country of Origin Labelling (COOL) of Food Compromise the EU Internal Market", in European Journal of Risk Regulation, 2017, p. 779 ff.).

The *Psagot* case before the ECJ

The reference for a preliminary ruling was prompted by a French judge who deemed to be necessary to ask to the ECJ two questions concerning the interpretation of the indication of the origin of a product within the meaning of Regulation 1169/2011. First, it was asked whether Article 9 of the Regulation, read in conjunction with Article 26 thereof, requires that a product from a territory occupied by Israel must be indicated as originated from that territory and, where it originates from an Israeli settlement, a specification of that as place of provenance. Secondly, the referring Court asked whether, in the absence of an obligation according to the Regulation, it is

possible for a Member State to impose such an indication in an autonomous way.

The judges of the Grand Chamber of the ECJ evaluated the question at the basis of the preliminary ruling by moving from an interpretive analysis of the terms ‘territory’ and ‘settlement’. In particular, the Court was interested in ascertaining whether, on the one hand, the concept of ‘territory’ could fall within the scope of Article 26 of Regulation 1169/2011, in the same way as the term ‘country of origin’ and, on the other hand, whether the concept of ‘settlement’ could be regarded as an indication of the ‘place of provenance’ within the meaning of the above provision.

Can a ‘territory’ be compared to a ‘country’?

In its assessment, the Grand Chamber pointed out that the term ‘country’ equals the notion of State as understood by international law, that is a sovereign entity exercising full and effective control within its geographical borders. As for the notion of ‘territory’, it was recalled that it may include geographical areas which, although under the jurisdiction or responsibility of a different State, have a separate and distinct status under international law (Court of Justice, Council v. Front Polisario, Case C-104/16 P, judgment of 21 December 2016; Court of Justice, Western Sahara Campaign UK, Case C-266/16, judgment of 27 February 2018). Turning to the case in hand, the West Bank should be recognised as a separate entity from Israel because the populations living there enjoy the right to self-determination as recalled by the International Court of Justice in its Opinion on the Legal consequences of the Construction of a Wall in the Occupied Palestinian territory (ICJ Reports 2004, p. 136). It may therefore be argued that, in this circumstance, the provisions enshrined in Article 9 and 26 of the Regulation apply to foodstuffs originating both in ‘countries’ and in ‘territories’, where the latter are distinct from the State exercising its jurisdiction.

Can the ‘Israeli settlement’ be compared to the ‘place of provenance’?

The concept of ‘place of provenance’ is quite different from that of ‘country of origin’. Indeed, it cannot coincide with the country or territory of origin, but it must be understood as referring to any specific geographical area within the country or territory of origin of a foodstuff. At first sight, it would not be appropriate to approximate the concept of ‘place of provenance’ to that of ‘settlement’ which, because of its generic nature, is likely to refer not to a single place, but to a number of localities. However, the Court ruled that it is possible to establish such a correlation where the term ‘settlement’ also coincides with a specific geographical area. As a result, the indication that a foodstuff comes from an ‘Israeli settlement’ located in the occupied territories may be regarded as an indication of the ‘place of provenance’ within the meaning of Article 26 of Regulation 1169/2011.

The conclusion of the Court

The Grand Chamber of the Court concluded that foodstuffs originating in territories occupied by the State of Israel must bear the indication of their territory of origin accompanied, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, by the indication of that

provenance. The mandatory nature of these indications stems from the consumers' right to information. Indeed, consumers must be aware about the fact that the Golan Heights, the Gaza Strip and the West Bank must be understood as separated from the State of Israel which, instead, is present as an occupying power in violation of the rules of general international humanitarian law as well as of the principles of the UN Charter. Conversely, to omit the explicit reference to the occupied territories would mean to mislead consumers in the assessment of the real country of origin or place of provenance, thus undermining the purpose that is at the basis of the discipline on labelling. Moreover, according to the Luxembourg judges, the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be subjected of *ethical evaluations* capable of influencing consumers' purchasing decisions. Based on an interesting reasoning on consumers' rights and respect of international law, the decision of the Court is prone to meet both challenges at internal level and opportunities with regard to the external world.

Challenges

The judgment of the Court has the consequence of binding the national judge that is required to solve the internal dispute by applying EU law as interpreted by the ECJ. At the same time, however, it must be said that such an interpretation will ensure a uniform application of the provisions under Regulation 1169/2011 in all the Member States. Indeed, it will also have an *erga omnes* effect, by affecting the national practice of the other Member States which will have to guarantee that they are properly adapted to the decision of the Luxembourg judges. In practice, this will mean for the national economic operators to take all the necessary steps to comply with the decision of the Court. Specifically, they will have to integrate their system of labelling of foodstuffs originating from the territories in question in such a way as to make it clear whether they originate in territories occupied by Israel and, in case, of the Israeli settlements. At the same time, Member States will be asked to provide for an appropriate system of sanctions against those food business operators that do not comply with the decision of the ECJ. That approach of making the economic operators more accountable is not new but reflects the attitude repeatedly adopted by the Court in relation to the relationship between consumer law and the protection of the economic interests. However, it must be said that this system may impose a burden on the economic operators since it is not always easy for them to obtain information about the place of provenance and the composition of products. In fact, they can only acquire these details from the information provided by the exporter without being able to carry out any further checks or to rely on the documentation issued to customs authorities. Indeed, the control procedure at customs is intended to determine the preferential or non-preferential origin of products for tariff purposes without, however, permitting the acquisition of additional elements useful for labelling. The two regimes thus remain separated. At this point, it is however necessary to reflect at least on the possibility of establishing a more incisive link between the customs procedure and that relating to the determination of the origin of products by economic operators at the EU level.

Opportunities

In a broader perspective, the *Psagot* case has brought to light a number of significant

issues which confirm the extent to which EU law can have extraterritorial implications, while apparently regulating matters of exclusively internal nature. First of all, it seems that the judges have mitigated their cautious attitude in favour of a stronger position on a very controversial issue having implications not only at legal but also political level. In the case under examination, the Court did not refrain from making explicit and reasoned reference to the illegality of the Israeli occupation in the territories of the West Bank, the Gaza Strip and the Golan Heights as well as of the settlement policy. In order to strengthen their position, the judges interestingly elaborated a reasoning that runs along two lines bound to cross exactly in the resolution of the case: on the one hand, that stemming from international law and the principle of self-determination and, on the other hand, that fuelling the EU's consumer protection regime. The judges have thus established a fascinating link between two different legal contexts capable of interacting and strengthening each other. Secondly, the Court confirmed the intention to be an institution capable to raise awareness of the EU citizens and, more in general, of consumers and to educate them to more careful and conscious purchasing choices that take into consideration also the respect of fundamental rules of international law. Hence, the Court has contributed to integrate the instruments intended to give application to Article 3, para. 5, TEU which binds the Union to protect fundamental rights and to ensure the development of international law. In fact, the inclusion of exhaustive information on the origin of products contributes to the positive obligation to adopt all the necessary instruments to recognise an unlawful situation, i.e. the occupation of a territory in violation of the principle of the self-determination and of other international law provisions. It should also be stressed that, as a result, the decision affects the EU Member States' compliance with international law. Indeed, at the time when national authorities will have to update their sanctions regime, it will be given substance to the *erga omnes* obligations arising from international law. Ultimately, it can be argued that the need to ensure the protection of the consumers' right to information, which falls within the framework of the commercial practices, has become an instrument to promote the respect of the right to self-determination.

Conclusion

In view of the numerous internal and external implications of this judgment, it is likely that the Court will be called to take again a position on these issues and it will be interesting to see whether, once again, it will maintain the resolute and active approach taken in the *Psagot* case.

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