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PSAGOT JUDGEMENT– COURT OF JUSTICE OF THE EUROPEAN UNION (C-363/18)

Organisation juive européenne and Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances: interpretation of the Regulation (EU) 1169/2011 concerning foodstuffs originating in the territories occupied by the State of Israel

I. SUMMARY OF THE CASE

1. INTRODUCTION

In the judgement *Organisation juive européenne and Vignoble Psagot v. Ministre de l'Économie et des Finances*, delivered on 12 November 2019, the Grand Chamber of the Court of Justice of the European Union (CJEU) ruled on the interpretation of Regulation (EU) No 1169/2011 (the Regulation) in relation to foodstuffs produced in the territories occupied by the State of Israel since June 1967. The Court stated that these products not only have to bear the indication of the territory of origin, but also specify if they come from an Israeli settlement within that territory, if that is the case.

2. LEGAL FRAMEWORK AND FACTS OF THE CASE

The preliminary reference procedure arose from the main proceedings between *Organisation juive européenne* and *Vignoble Psagot Winery Ltd* against the *Ministre de l'Économie et des Finances* before the Conseil d'État, the last-instance French administrative jurisdiction. This concerned the legality of the Ministerial Notice implementing the 2015 European Commission's Interpretative Notice on the indication of the origin of goods originating in the territories occupied by Israel since June 1967, according to which foodstuffs must be labeled with the indication in question. EU Commission's interpretative notices are non-binding acts that provide guidance on the application of EU law. The two applicants brought an action before the Conseil d'État asking for the annulment of the Ministerial Notice and arguing that this did not comply with the EU Regulation No 1169/2011, the primary piece of legislation relating to food information and labelling in the European Union.

The *Psagot* case needs to be situated in the broader context of EU-Israel trade relations, grounded on the 2000 EC-Israel Association Agreement. As stated in the *Brita* case of the European Court of Justice (*Brita Gmbh vs. Hauptzollamt Hamburg-Hafen*, C-386/08, judgment of 25 February 2010), the territorial scope of the Agreement does not extend to the West Bank, meaning that products originating in Israeli settlements do not enjoy the preferential tariffs treatment under the Agreement but still have access to the EU market.

The Conseil d'État, after examining the pleas alleged by the parties, stayed the proceedings and referred the case to the CJEU for a preliminary ruling, posing the following two questions: first and foremost whether the Regulation requires the indication of the origin from the occupied territories and if it is likewise needed the specification that products come from an Israeli settlement when this is the case. Second – subject to a negative answer to the first –, if the provisions of the Regulation allowed Member State to require those indications, thus raising the issue of any potential discretion of Member States in this field.

3. THE JUDGMENT OF THE COURT

First, the Court observed that the combined reading of Article 9 and Article 26 of the Regulation demonstrates that the indication of the country of origin or the place of provenance of a foodstuff is compulsory insofar as its omission might mislead consumers as to the true origin of the product (§ 25).

The Court analyzed the notion of "country of origin" and clarified that its definition is set out in Article 2 of the Regulation by reference to the Union Customs Code. Pursuant to it, products which have either been wholly obtained in a single "country" or "territory", or that underwent there their last substantial processing or working, are deemed to be originated in that country or territory. On the one hand, the term "country" is frequently used in the EU Treaties to refer to the notion of "State", which identifies a sovereign entity exercising the full range of powers recognized by international law, within its geographical boundaries, as upheld in the *Front Polisario* judgment of December 2016. On the other, since under Article 60 of the Union Customs Code the term "territory" is alternative to that of "country", it follows that it must describe different entities. According to the Court, these include "*geographic spaces which, whilst being under the jurisdiction or the international responsibility of a State, nevertheless* ***have a separate and distinct status from that State*** *under international law*" (§ 31), thus including areas under military occupation. Hence, since the goods at issue in the main proceedings originate in "territories occupied by the State of Israel since 1967", the Court clarified that displaying the indication of the State of Israel as the "country of origin" on foodstuffs obtained in these territories would deceive consumers as to the fact that Israel is present there "*as an occupying state and not as a sovereign entity*" (§§ 36-37).

Consequently, it remains of primary importance to inform consumers about the true origin of those products. To that end, the Court finally focused on the notion of "place of provenance", which under the Regulation refers to *"any specific geographical area within the country or territory of origin of a foodstuff, with the exception of a producer's address*" (§ 41). For that reason, the Court considered that the indication that foodstuffs come from an "Israeli settlement" located in one of the Occupied territories, despite the generic and demographic nature of the term, falls within the bounds of "place of provenance" insofar as it refers to a specific geographical area (§§ 42-45).

Finally, the Court addressed the question whether the indication "Israeli settlement" must be intended as mandatory in relation to foodstuffs such as those at issue in the main proceedings. In that regard the Court drew attention to the fact that the settlements in the Occupied territories are established in breach of international humanitarian law, in particular of the prohibition on population transfer by the Occupying State to the Occupied territory set out in Article 49(6) of the Fourth Geneva Convention of 1949 and upheld by the International Court of Justice in its 2004 Advisory Opinion on the Wall.

Furthermore, the Court also recalled that, under Article 3(5) TEU, the EU has to *contribute to the strict observance of international law, including the principles of the UN Charter*. As a result, it follows that **omitting "Israeli settlement" from the label of the products in question could be liable of misleading consumers** who, instead, have the **right to be aware** of the fact that those foodstuffs come from a settlement established in breach of international humanitarian law. Such a conclusion is further supported by the very objective of the regulation, that is, "*to ensure a high level of consumers protection in relation to food information*", so as to enable EU citizens to make informed choices, especially having regard to their "*health, economic, environmental, social and ethical assessments*" (Articles 1(1) and 3(1), as well as recitals 3 and 4 of the Regulation). Since this is a non-exhaustive list, the Court pointed out that **the fact that a product may be obtained in settlements established in violation of rules of international humanitarian law is capable to assume relevance for consumers' evaluation**, "*particularly since some of those rules constitute fundamental rules of international law*" (§ 56). This means that it is absolutely essential to make them conscious of the true provenance of goods in order to enable them to make informed choices and that, in other words, the indication "Israeli settlement" is to be regarded as mandatory where the foodstuffs originate in it.

4. CONCLUSION AND FURTHER IMPLICATIONS

In light of all the foregoing considerations, the Grand Chamber of the Court established that under Article 9 and Article 26 of Regulation (EU) No 1169/2011 foodstuffs originating in the territories occupied by the State of Israel since June 1967 must bear both the clear indication of the "Occupied territory" and the specific indication of its provenance from an "Israeli settlement". In other words, the Court identified an EU law obligation on the Member States to accurately label the products at issue, thus rendering unnecessary a ruling on the second question referred by the Conseil d'Etat. Ultimately, this implies upgrading the 2015 Commission's interpretative notice into a real **binding source of EU law**.

This outcome is completely opposite to what the two applicants sought to achieve through the national proceedings – i.e. the annulment of the Ministerial Notice. As a matter of fact, the CJEU ruling has binding effect both on the referring court and on all courts in EU countries. The *Psagot* judgment has become part of EU law and accordingly, in case of Member States' non-compliance with it, may further give raise to an infringement procedure under Article 258 of the TFEU.

Nonetheless, the *Psagot* judgment "merely" upholds EU consumers' rights to make informed purchasing choices but does not solve the fundamental problem, that is, **products coming from Israeli settlements originate from an illegal situation**. In other words, if all EU Member States complied with the judgment and diligently indicate the place of origins of foodstuffs from the illegal settlements, – something that has itself proven to be very difficult to be ascertained, as demonstrated by SOMO's investigative report – products sourced in an illegality would still have access to the EU market. This ultimately entails the violation of the EU's obligation of non-recognizing a situation originating from a serious breach of a peremptory norm of international law and of non-assisting in maintaining it, codified by the International Law Commission's Draft Articles on State Responsibility and upheld by the ICJ in its 2004 Advisory opinion on the Wall.

Certainly the Court could not have dealt with the question of the *legality* of trade with settlements without infringing the *non ultra petita* procedural principle, in accordance with which it shall only decide upon the legal questions referred to. However, one very important element of its ruling deserves further attention. The Court clearly grounds its reasoning in paragraph 56 on the Occupying State's violation of certain *fundamental rules of international law*, which are to be regarded as source of consumers' *ethical assessments*. The wording here seems to recall that of Article 36 of the Treaty of Functioning of the EU, under which Member States have the power to derogate to EU exclusive competence on customs by imposing quantitative restrictions justified on the grounds of *public morality* or *public policy*. Evoking the "public policy exception" would not be a novelty, since this was already raised by Takis Tridimas in his Legal Opinion on the Irish *Occupied Territories* Bill. Such a solution would have the merit of truly bringing States and International Organizations in line with their duty of non-recognition and non-assistance. On this ground it is possible that in the future the Court will push the reasoning further in that direction: anyway, it still remains to be seen how the *Psagot* judgment will condition the future developments in relation not only to EU consumers' rights, but also to the Palestinians ones.