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CASE NOTE: CASE C-159/20 *FETA IV*

JUDGMENT OF THE EU COURT OF JUSTICE OF 14 JULY 2022

COURT'S FINDING: INTERNAL EU GI RULES APPLY TO EXPORTS OF GIs

Background

The Court of Justice of the European Union (the EU's Supreme Court) was asked to determine whether the EU's internal foodstuffs GI rules apply to products not complying with the product specifications but destined for export rather than the domestic, internal market.

Unlike the Regulations protecting Geographical Indications for wines,[1] spirit drinks[2] and aromatic wines,[3] Regulation 1151/2012 on the protection of Geographical Indications for foodstuffs does not have a specific Article providing that the internal EU rules apply to exports.[4]

Prior to the adoption of Regulation 1151/2012, the Committee of the Regions had recommended inclusion into the law of an Article clearly stating that internal EU GI law on foodstuffs also applied to exports. In addition, the European Parliament had proposed that the European Commission should be given the power to adopt subsidiary law on what steps Member States would have to take to prevent the export to third countries of products not complying with the GI product specifications and the foodstuffs Regulation in general. Despite this, the final text did not include a provision on exports.

In *FETA IV*,[5] Case C-159/20,[6] the Court of Justice of the European Union was asked to address a claim by the European Commission, which has the competence to ensure that EU law is complied with by each of the EU Member States, that Denmark was failing to stop Danish dairy producers from using the designation 'feta' on cheese for export that did not conform to

[1] Regulation (EU) No 1308/2013, as last amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021

[2] Regulation (EU) 2019/787, as last amended by Commission Delegated Regulation (EU) 2022/1303 of 25 April 2022.

[3] Regulation (EU) No 251/2014, as last amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021.

[4] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, as last amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021.

[5] This is the fourth time the Court of Justice has had to address legal issues in relation to the Greek cheese feta. *FETA I,* Case C-317/95 concerned the free movement of 'feta' from Denmark into Greece and preceded the registration of feta as a PDO (see in particular the opinion of the Advocate General); In *FETA II*, joined Cases C-289/96, C-293/96 and C-299/96, the CJEU ruled that the Commission had not examined the factors necessary to determine if feta was, or was not, generic and annulled the registration of feta as a PDO; in *FETA III,* Cases C-465/02 and C-462/02, the Court held that the Commission had made a legitimate evaluation that the name feta was not generic. See also O'Connor B. and Kireeva I. 'What's in a name? the 'feta' cheese saga', International Trade Law and Regulation, Vol. 9, 2003, page 110.

[6] Case C-159/20 Commission v Denmark [2022], Judgement of 14 July 2022.

the product specification (production outside the defined GI area and the using different raw materials and method of production, such as, in particular, cows' rather than sheep and goats' milk and specific colorants).

The Commission's claim against Denmark

The Commission's legal claims were that Denmark had failed to fulfil its obligations under Article 13 of Regulation 1151/2012 and, in addition, Denmark had infringed the principle of sincere cooperation within the terms of Article 4 of the Treaty of the Union. Article 13 of the foodstuffs GI Regulation sets out the protection granted to registered names. They are protected against and direct or indirect false commercial use or any imitation or evocation of the protected name and in general any practice liable to mislead the consumer. Article 4 of the Treaty on the Union[7] sets out the division of competences between the Union and the Members States and provides that both the Union and the Member States '*in full mutual respect, assist each other in carrying out the tasks which flow from the Treaties*'.

The facts underlying the dispute

There was no dispute as to the facts. In the past, Danish dairy producers, in correct compliance with the law on GIs in the internal EU market, had stopped using the designation 'feta' on their white cheese in brine made from cows' milk for sale in the Union and had started using terms such as Greek salad cheese, Danish White and the like.[8] However, they continued to use the designation 'feta' for the same cheese destined for export outside the Union. The issue here is not the product but the label or GI used on the product.

Denmark's defence

On the basis of the text of the Regulation, Denmark argued, in addition to the absence of specific provisions on exports, that the objective of the foodstuffs GI Regulation was, as clearly seen in Recital 2 and Article 1 of that Regulation, to establish a system of protection for products placed on the internal market only. In addition, it argued, referring to Article 13 that the protection of the consumer must mean the EU consumer only. By linking the reference to consumers to other objectives of the Regulation such as that of fair competition and a fair reward for farmers efforts, Denmark argued that the Regulation was to regulate the internal market and not global markets.

On the basis of general law, Denmark argued that the principle of legal certainty precluded an interpretation of Article 13 so as to apply to exports as there was no reference to exports in that

[7] One of two Treaties making up the 'constitution' of the Union.
[8] See for example reference to "feta-style cheese" on the following sources https://nordexfood.dk/en/feta-cheese/, https://www.cheese.com/danish-feta/, https://www.real-farmers.org/product/mediterranean-cheese-cubes/.

provision. In effect, Denmark was arguing that the Court could not write into the law something that the legislator had not included in that law.

The findings of the Court of Justice: Article 13 on protection of GIs

The Court finds that to correctly interpret EU law consideration must be taken not only of the wording of the law but its context.

As to the wording of Article 13, the Court first observes that there is nothing in that provision that excludes its application to exports, observing that it provides protection against 'any use' exploiting its reputation. Secondly, it is clear that the rules apply not only to the marketing in the internal market but also to the production in the market. As to the context of Article 13, the foodstuffs GI Regulation was adopted to provide uniform protection of intellectual property in the Union meaning that Member States must, *'since they* [the rules on protection] *do not exclude from such verification* [of compliance with the specifications] *products intended for export'* must take appropriate steps to stop the unlawful use of the GI.

The Court then examines the object and purpose of the foodstuffs GI Regulation. The Court finds that use of the designation of 'feta' on cheese produced in the Union, not complying with the GI specifications, undermines the objectives of protecting consumers and ensuring that producers secure fair returns for the qualities of their products. It concludes, therefore, that it follows from the wording and the context of Article 13 means that '*such use* [use of the designation on cheese produced in the Union and destined for export] *constitutes conduct prohibited by Article 13'* of the foodstuffs GI Regulation.

The findings of the Court of Justice: sincere cooperation

The Court found that the Commission had not established, other than failing to prevent the use of the designation 'feta' on exports, that Denmark had encouraged such unlawful use. Thus, Denmark was not in breach of Article 4 of the Treaty of the Union on sincere cooperation.

Comment on the core finding on exports

The findings of the Court of Justice are clear and precise as far as they go. On the basis that the internal rules on foodstuffs GIs apply to production in the internal market, the Court found that they also apply to production for export.

The Court could have found that, as there was a lacuna in the law and that as production for export was not specifically prohibited by the text of Article 13, it was still open to an interpretation that would allow producers to label their products with a protected denomination without complying with the technical specifications, if such products were destined for export from the Union. Thus, Denmark would not have been in breach of its obligations under the Regulation and under the Treaty in allowing those producers to act in that way. This approach, if taken by the Court would, in effect, have thrown the matter back to the legislature for a

decision, one way or the other, but in the meantime, it would have maintained uncertainty as to the law.

The approach taken by the Court is to provide an immediate solution and clarify the issue. The approach taken by the Court is not, in legal interpretation of law, unreasonable. The prohibition on the misuse of a GI applies, according to the clear text of Article 13(3) of Regulation 1151/2012 not only to the marketing but also the production of GIs. This text provides: '*Member States …. shall take steps to prevent or stop the unlawful use …* [of protected GIs] *… that are produced* ***or*** *marketed in that Member State*.' (emphasis added). There is no difference in understanding if the provision was written 'marketed or produced' or 'produced or marketed'. It clearly applies to both.

However, the Court does not address the responsibility of Denmark in relation to downstream importers or distributors in third countries. Must Danish dairies exporting white cheeses in brine ensure that the importers or distributors of those products in the third country do not re-label the product as 'feta'? If the scope of the protection in Article 13 not applies to exports it seems clear that it should also apply so as to prevent re-labelling.

FETA IV has importance not only for EU producers but also for consumers outside the EU: the ruling ensures that any product bearing an EU GI name and originating in the EU must be made according to the specification and is thus the genuine product.

Comment on the object and purpose of EU law on GIs for foodstuffs

The Court of Justice of the EU is assisted by Advocates General. The role of the AG is to provide an advisory opinion, to the bench hearing a case, that sets out not only the arguments of the parties but the legal consequences of those arguments and the consequences of following one party or the other. The AG recommends how the Court should rule on the case and explains why. Those interested in the nature of EU GI law will want to read carefully the Opinion of AG Capeta published on 17 March 2022 in this case.[9]

The Advocate General considered that both the Commission and Denmark had valid arguments, based on the text, the context and the objectives of the foodstuffs GIs Regulation, when examined from their own interpretative framework. Denmark claimed, in effect, that the Regulation should be interpreted in the light of the liberalisation of trade: any exception to this principle must, in accordance with the general idea of law in relation to rules and exceptions, be specifically provided for. The Commission claimed, in effect, that the Regulation must be interpreted as intellectual property to promote values for local communities.

In the light of the Advocate General's opinion the findings of the Court become clearer. The Court found that Regulation 1151/2012 had a double objective: i) '*ensuring that producers secure fair returns for the qualities of their products*' and ii) '*ensuring respect for intellectual*

[9] https://curia.europa.eu/juris/documents.jsf?num=C-159/20

property rights'.[10] Thus the liberalisation of trade in general, and in consequence, the free movement of goods within the EU's internal market, is somehow a lesser objective.[11]

The Court also noted that '*the objectives of informing consumers and of ensuring that producers secure fair returns for the qualities of their products are linked'*.[12] In other words, securing higher returns for quality can only be achieved through the protection of GIs as an intellectual property and the communication of the nature and purpose of that form of intellectual property to consumers.

It can be seen that the protection of Feta as a designation of origin in the EU enriches not only consumers and producers but also the law and our understanding of the law in relation to this complex form of intellectual property.

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[10] See paragraph 59 of the Court's judgement *in FETA IV*.
[11] The authors consider that the Court should have given protection of intellectual property priority over the interests of the users of the GI.
[12] See paragraph 58 of the Court's judgement in *FETA IV*.