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A Possible Exit Strategy from the 'Halloumi Affair': How to Solve Problems with CETA Ratification[1]

Abstract: This article explores the importance of geographical indications within the new trade policy of the European Union, using the example of the CETA and the dispute over Cypriot halloumi cheese. The authors point out that geographical indications occupy an important place within the European Commission's negotiating strategy primarily because of their significance for the EU economy. In negotiations with third countries, such as Canada, a crucial problem is the different approaches to the protection of typical regional products. Therefore, the Union is trying to transfer its internal solutions to the international level. The detail of regulations, combined with the mixed nature of new trade agreements, makes trade policy vulnerable to blackmail by individual EU Member States. According to the authors, a reasonable solution to this problem – which was highlighted by Cyprus's veto of the CETA – is to rely on the treaty provisions and the judgements of the Court of Justice of the EU. These indicate the exclusive competence of the EU in this area and impose an obligation on EU Member States to cooperate sincerely.

Keywords: CETA, common trade policy, European Union, exclusive competences, geographical indications, sincere cooperation

1 The introduction and sections 1, 2 and 3.2 of this article were written by F. Tereszkiewicz, sections 2, 3.1, 4 and the final remarks by V. Rubino. In any case, authors shared all their ideas and the conclusions of this work.

Introduction

In 2006, the European Union (EU) launched the Global Europe Strategy (GES), signalling a significant change in its external trade policy by putting emphasis on the conclusion of a new generation of free trade agreements (FTAs). This new type of arrangement (such as the CETA) is a political response to ineffectiveness in World Trade Organisation (WTO) practices. With FTAs, the EU is keen to pursue its deep trade agenda by going beyond what is currently provided at the WTO level and regulating behind-the-border issues. Because tariff barriers between the EU and other developed countries are already relatively low, it follows that any arrangement would put the issue of prohibitive barriers resulting from divergences in domestic regulation at the very top of its agenda.[2] Therefore, the focus of these agreements is on regulatory divergences as possible barriers to trade. Nonetheless, their broad agenda includes not only provisions on technical barriers to trade but also rules on intellectual property rights (IPRs). IPRs – and especially geographical indications (GIs) – are more than an insignificant detail in trade agreements. According to a former UK trade negotiator, 'EU geographical indications are the number one "ask" of the EU in all trade talks'.[3] Greece, France and Italy have threatened not to ratify the CETA because of insufficient GI protection.[4] Significantly, in August 2020, the Cypriot parliament unexpectedly voted against ratification of the CETA because of the lack of protection for halloumi cheese in the agreement; this decision demonstrated the importance of GIs for EU trade policy. The main objective of this article is therefore to analyse the regulations concerning GIs in the new trade agreement with Canada in the context of problems with its ratification, as well as to present a possible strategy for getting out of the resulting crisis situation. The authors try to answer the question of whether it is possible to reconcile – on the basis of EU law – two opposing processes: striving for the protection of European food products with attempting to liberalise international trade. The article is based on the analysis of the texts of legal acts and the case law of the Court of Justice of the EU (CJEU), as well as the literature on the subject.

2 R.R. Ludwikowski, Overview of the Trade Relations Between the European Community/Union and the United States at the Threshold of Globalization and Post-Globalization Era, "Białostockie Studia Prawnicze" 2020, vol. 25, no. 3, pp. 27–42; F. Tereszkiewicz, The Politicization of European Union Trade Policy, "Journal of Economic Integration" 2021, vol. 36, no. 3, pp. 409–410; E. Vranes, The Contents of CETA, TTIP, and TiSA: The (Envisaged) Trade Disciplines, (in:) S. Griller, W. Obwexer and E. Vranes (eds.), Mega-Regional Trade Agreements. CETA, TTIP and TiSA, Oxford 2017, pp. 47–48.

3 P. Foster and J. Brunsden, UK Pushes Back on Brexit Promises on EU Regional Trademarks, "Financial Times" 2 April 2020, https://www.ft.com/content/a53e81a0-b2bd-4da8-a6ce-28904fa9879a (12.07.2021).

4 N. Malkoutzis, CETA, Feta and Trade Deal Difficulties, "Ekathimerini" 23 October 2016, https://www.ekathimerini.com/213096/article/ekathimerini/business/ceta-feta-and-trade-deal-difficulties (13.07.2021).

1. Geographical Indications in the New Generation of EU Free Trade Agreements

The GES intends to encourage the negotiation of stronger IPR provisions inspired by existing EU laws. This position has resulted from the EU's failure to force higher standards of intellectual property (IP) protection and enforcement at WTO level. It has led to an emphasis on negotiating and signing bilateral and regional agreements that included IPR provisions with a distinctly European flavour. Therefore, a chapter about IPRs have become standard in the new generation of FTAs, mainly with provisions about GIs.[5]

However, in contrast to others IPRs, there is a divergence between the EU and co-signatories about GIs. As Melo Araujo notices, this results from historical differences that have led to the existence of contrasting regulatory ideologies. In his opinion, GIs are perhaps the most 'European' of all IPRs and, therefore, they occupy a special place in the EU's external trade policy. The system of global recognition and protection of GIs would allow the EU to differentiate the number of agricultural products developed in Europe over time (wines, spirits and foodstuffs) from those produced by competitors from third-party countries, and would stop other entities from using European regional names and 'free riding' on the reputation and quality of European products.[6]

The underlying concern is that in the absence of legal protection, GIs will lose their economic value: their reputations will be undermined, and consumer confusion about the nature and characteristics of the products will be created. The main problem is that the European affection for GIs is not shared by all WTO members. In fact, it is common in many countries to find that GIs protected under EU law are terms that are either covered by registered trademarks or are considered to be generic terms elsewhere (e.g. champagne, Chablis and halloumi cheese). These countries tend to view GIs as a disguised form of protectionism, prohibiting market entrance for goods that may traditionally have been produced in specific geographical locations but that currently are being produced elsewhere. Therefore, the aim of the new generation of FTAs is to ensure the automatic protection of European GIs in the jurisdictions of the co-signatories to the particular arrangements. The provisions relating to this area are often extensive and detailed and, to a large extent, the EU's current regulatory framework is necessarily incorporated in co-signatories' legal systems. As Cottier notices, the exact wording used in EU law is often replicated in the provisions of these agreements, and, in doing so, secures a level of protection that is far higher than that

5 J. Pelkmans, Business Dimensions of EU's new FTAs, "Journal of European Integration" 2017, vol. 39, no. 7, pp. 781–794.

6 B.A. Melo Araujo, The EU Deep Trade Agenda. Law and Policy, Oxford 2016, pp. 132–139.

currently provided under the WTO framework.[7] Typically, the agreements include annexes which list those GIs that must be protected by the contracting parties. Once listed in the annexes, a GI benefits from automatic protection in the jurisdiction of the other party without the requirement to register in accordance with the relevant domestic procedures.

2. The 'Mixed' Agreements and the CETA Ratification Issue

The decision of the EU to pursue negotiations with Canada for the CETA came at a time when it became obvious that efforts by the WTO to foster global trade liberalisation were running into serious problems. Canada's interest in a bilateral agreement with the EU was a diversification of its trade in goods and services, which is strongly directed towards the US. The EU was interested in conducting the CETA negotiations because it was a chance to 'test' one of the goals of its GES, namely the aforementioned inclusion of the GIs' protection system in the new generation of FTAs.[8]

The CETA has gone through a rather rough time, both before and after its formal signature. The legal character of this agreement was the main source of these problems: until July 2016, the European Commission (EC) considered the CETA as exclusively an EU prerogative, according to the mandates it had received from the Council in 2009 and 2011, which meant the EU–Canada agreement could be approved only by the Council and the European Parliament. However, after objections were made by several EU Member States, on 5 July 2016 the EC formally proposed to the Council the signature and conclusion of the CETA as a mixed agreement which required ratification by each EU member state in addition to the ratification by EU institutions.[9] As a result, public salience increased as national (and sometimes regional) parliaments became actors in trade policy. So the decision to mark the CETA as a mixed agreement drastically increased the number of actors, and thus the number of potential veto players, which we can also observe in the 'Halloumi Affair'.

In the Opinion on the Agreement with Singapore (which is identical to the CETA Treaty), the CJEU highlights that some parts of the text were not covered by the exclusive competence of the EU on the issue, therefore the involvement of the Member States was considered inevitable. Analysing the different paragraphs of the text, the Court particularly stressed shared competence on the investment chapters, the dis-

7 T. Cottier, Intellectual Property and Mega-Regional Trade Agreements: Progress and Opportunities Missed, (in:) S. Griller, W. Obwexer and E. Vranes (eds.), Mega-Regional Trade Agreements, *op. cit.*, pp. 151–174.

8 K. Hübner, A.-S. Deman and T. Balik, EU and Trade Policy-Making: The Contentious Case of CETA, "Journal of European Integration" 2017, vol. 39, no. 7, pp. 843–857.

9 S. Puntscher Riekmann, The Struggle For and Against Globalisation: International Trade Agreements and the Democratic Question, (in:) S. Griller, W. Obwexer and E. Vranes (eds.), Mega-Regional Trade Agreements, *op. cit.*, p. 290.

pute-resolution mechanism between investors and states, as well as the provisions related to the Objectives and General Definitions, Transparency, Dispute Settlement between the Parties, Mediation Mechanism and Institutional, General and Final Provisions of that agreement.[10] In particular, in the ambit of the evaluation of the 'nature' of the Agreement, the European judges stated that according to Article 3(1)(e) TFEU,[11] the EU has exclusive competence in the area of common commercial policy.

This competence is defined by Article 207(1) TFEU. From this point of view, the 'exclusive' competence is directly connected to the need to guarantee that obligations – deriving from international agreements to which the Member States are party – do not affect the autonomy of EU law and the goals of the Union itself. So in order to classify an agreement for the purpose of the evaluation of the nature of the EU's competences, one should first of all analyse the contents of the proposed treaty and consider if it falls within the ambit of the Common Commercial Policy or within another exclusive competence of the EU. In fact, European case law consistently confirms that

> the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it. Only the components of the envisaged agreement that display a specific link, in the above sense, with trade between the EU and the third country fall within the field of the common commercial policy.[12]

Furthermore, in the judgement of the CJEU of 31 March 1971, Commission v. Council[13] – the first and the most significant judgment in this field – the Court stated that when the EU adopts provisions laying down common rules, the Member States no longer have the right, acting either individually or collectively, to undertake obligations with third-party states which affect those rules.[14]

In line with that case law, Articles 216 TFEU – 3.2 TFUE grant to the EU the exclusive competence to conclude, inter alia, any international agreement which 'is likely to affect common rules or alter their scope'. Finally, it seems useful to point out that if some elements of an international agreement are not referable to the '*direct im-*

10 J. Glavanits, Dispute Resolution That Divides: The EU–USA Conflict on Investment-State Dispute Resolution, "Białostockie Studia Prawnicze" 2020, vol. 25, no. 3, pp. 45–46.

11 Treaty on the Functioning of the European Union (O.J. C 326, 26.10.2012), pp. 47–390.

12 See the judgment of the CJEU on the case of Daiichi Sankyo and Sanofi-Aventis Deutschland, para. 51; the judgment of the CJEU of 31 March 1971 on the case of Commission v. Council, C 22/70, in Rec., 1971, para. 57; and the Opinion of the CJEU 3/15 Marrakesh Treaty on access to published works, para. 61.

13 See Commission v. Council, *op. cit*., p. 00263.

14 See the judgment of the CJEU on the case of Commission v. Denmark, para. 77 to 80.

pact qualification' as mentioned above, they could in any case be included in the ambit of the exclusive competence of the Union if they can be considered subsidiary to the regulated matter.

With regard to the specific case of the protection of geographical names of foodstuffs, first of all we can point out that, after the Lisbon reform, Article 3(1) TFEU explicitly includes the common aspects of IP rights. This point draws every element of IP rights into the orbit of the exclusive competence of the EU linked to the international exchange of goods.

With regard to the IGs, the CETA Agreement – in line with other similar international treaties negotiated by the EU – contains a list of toponyms that each party is committed to protect and a number of terms which are considered generic (and, as such, can be registered as trademarks in Canada). So one can consider that they are strictly related to the promotion of trade in goods between the two parties. Moreover, as stated by the Advocate General in their opinion on the parallel agreement with Singapore (Point 436), it is clear, finally, that in the light of the key role that the protection of IPRs plays in trade in goods and services in general, and in combatting unlawful trade in particular, the provisions of the envisaged agreement are such as to have direct and immediate effects on trade between the parties.

3. The Protection of Toponyms of Foodstuffs

3.1. Protection in the European Union

The issue on which this controversy came about has been regulated by the EU law since 1992. Regulation No. 2081/92 of the Council[15] created a new protection regime of GIs for foodstuffs in Europe, dividing products into two categories: Protected Designation of Origins (PDOs), where the quality of the foodstuff depends totally or essentially on the area of production and is completely produced in that geographical area, and, on the other hand, the PGIs, in which the link to the specified territory is reduced to one or more 'production steps', where it is possible that the food is composed of raw materials from other countries or is transformed elsewhere.

The regulation centralised the registration process, creating a co-administration regime, where Member States have to manage the starting phase (consisting of the verification of formal and substantial requisites, analysis of the documentation, a decision on possible national oppositions, etc.), and the Union has the responsibility to verify the formal correctness of the procedure, to extend the examination to the other Member States and to adopt the final decision.

15 Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (O.J. L 208, 24.7.1992, pp. 1–8).

The CJEU has examined the very nature of the regulations in many different cases, also with regard to the 'pre-emption' issue. In the Warsteiner judgment[16] the Court stated that the regulation was focused on GIs with a strong link between a specific quality, reputation or another characteristic on the one hand, and its origin on the other. On the contrary, the Court stated that nothing in Regulation No. 2081/92 indicated that generic GIs of source cannot be protected under the national legislation of a Member State (points 44–45 of the judgment). In the subsequent judgment, 'Bud II',[17] the Court went further, stating that the EU regulation on PDOs and GIs is exhaustive in character. Therefore it is not possible to allow the co-existence of a national complementary protection system as it is provided for trademarks. So the protection of toponyms of foodstuffs is to be considered 'uniform' in the EU and, as such, not available for further regulatory initiatives of the Member States.[18]

3.2. The specific CETA provisions about GI protection

An analysis of the CETA text shows that while trade liberalisation is a key element of the agreement, it is not the abolition of tariffs that makes it so important. The relevance of this agreement is due to the issue on IPRs, mostly because at the time of signing Canada did not have a comprehensive protection system for GIs. The CETA has a distinct emphasis on GIs, whereas Canada often uses trademarks – rather than GIs – to protect quality and originality.[19] Therefore, the EU requires its co-signatory to establish a system of protection that fulfils certain minimum conditions. The CETA, while not prescribing a particular regulatory system, provides certain clues that the legislation, once adopted, will have a distinctly European flavour.

For example, Article 20(16) states that GI means 'an indication which identifies an agricultural product or foodstuff as originating in the territory of the EU and Canada, or a region or locality in that territory, where a given quality, reputation or other characteristics of the product are essentially attributable to its geographical origin'. However, the CETA provisions apply only to GIs identifying products falling within one of the product classes listed in Annex 20-C to this agreement. These provisions can be viewed as an indication of a preference towards a system similar to that currently in place in the EU.

In Article 20(19)(3) this agreement provides that the use of a geographical designation identifying a product as either a 'similar product' or as 'in the same class' –

16 See the judgment of the CJEU of 7 November 2000 on the case of Schutzverband gegen Unwesen in der Wirtschaft eV v. Warsteiner Brauerei Haus Cramer GmbH & Co. KG., C 312/98, in European Court Reports, 2000, p. I–09187.

17 See the judgment of the CJEU of 18 November 2003 on the case of Budéjovický Budvar, národnípodnik v. Rudolf Ammersin GmbH, C 216/01, in European Court Reports, 2003, p. I–13617.

18 G. Coscia, The International Framework of GIs and DOs Protection and the European Approach, "Studi sull'integrazione europea" 2009, no. 3, p. 615.

19 J. Pelkmans, Business Dimensions, *op. cit*., pp.781–794.

which does not originate in that area – is prohibited even where the GI is used in translation or accompanied by terms such as 'kind', 'type', style', 'imitation' or other similar terms. The CETA goes further by prohibiting a person from manufacturing, preparing, packaging, labelling, selling, importing or advertising a food commodity in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its origin.

According to Article 20(19)(7), there shall be no obligation to protect GIs which are not – or cease to be – protected in their place of origin, or which have fallen into disuse in that place. Additionally, if a GI listed in Annex 20-A ceases to be protected in its place of origin or falls into disuse in that place, the EU and Canada should notify the partner and request cancellation.

The CETA also regulates homonymous GIs. In this case, the EU and Canada shall determine the practical conditions under which the homonymous indications in question will be differentiated from each other, considering the need to ensure equitable treatment of the producers concerned and that consumers are not misled.

The agreement clearly grants in Article 20(19)(5) a preference to GI protection over trademarks in the case of conflict. The registration of a trademark which contains or consists of a GI listed in Annex 20-A shall be refused or invalidated, *ex officio* if a co-signatory's legislation so permits or at the request of an interested party, with respect to a product that falls within the product class specified in Annex 20-A for that GI and that does not originate in the place of origin specified in Annex 20-A for that GI.

The CETA also predicts a possibility of adding new GIs to Annex 20-A. The Joint Committee, established under Article 26(1), acting by consensus and on a recommendation by the CETA Committee on Geographical Indications, may decide to add GIs to the Annex or to remove one of them if it has ceased to be protected or has fallen into disuse in its place of origin. However, what is important for the halloumi issue is that a GI shall not in principle be added to the European part of Annex 20-A if it is a name that on the date of the signing of the CETA is registered in the EU, or if it is identical to a trademark that has been registered in the other co-signatory in respect of the same or similar products, or if it is identical to the customary name of a plant variety or an animal breed existing in the other party and, finally, if it is identical with the term customary in common language as the common name for such a product in the other party.

4. The Decision of the Parliament of Cyprus and the 'Halloumi Affair'

When the European and Canadian negotiators started the discussions for the conclusion of the CETA, they could never have imagined that the deal would be blocked by the parliament of one of the smallest EU Member States. Least of all, they

could never have guessed the reason: a small cheese that is grilled during parties and celebrations. However, on 31 July 2020 the Parliament of Cyprus, which was called – like all the other Member States – to ratify the CETA agreement, voted against it, opening one of the most complicated economic-political crises of recent times.[20] The decision of the Parliament of Cyprus was not accompanied by an official explanation. At the moment, one has to rely on news stories and comments from members of the parliament who were involved in the event and who had identified the '*casus belli*' in the lack of protection of the typically Cypriot 'halloumi' denomination in the ambit of the CETA. The issue deserves summarising, also because its small importance compared to the complexity of the agreement in question is also part of the evaluation from the legal point of view.

Halloumi is a typical Cypriot cheese, the production of which goes back to the time of the Ottoman invasion of the island in the 12th century A.D. In 2015 the Republic of Cyprus and the Turkish Republic of Northern Cyprus, setting aside their historical enmity, presented to the EU a joint request for a protection of the toponym 'halloumi', according to EU Regulation No. 1151/2012.[21] The *iter* of the decision was, however, significantly slowed down by the divergences in the production method and the standards to be followed: the high level of international demand for the product for some time had resulted in changes to the traditional recipe in the Republic of Cyprus, in particular with the result that cow's milk was increasingly used instead of the traditional sheep and goat's milk.[22]

Furthermore, the extension of the protection of the denomination 'halloumi' to a geographical area outside the EU triggered problems with the embargo on the products coming from that region and with food safety control according to EU standards. The tortuous procedure found a formal conclusion only in 2021, necessarily crossing over with the process of CETA ratification. Therefore halloumi is not included in the annexes of the CETA, as at the moment of the conclusion of the negotiation it was not even registered in the EU.

We can now consider if the Cypriot decision was lawful and if it casts a shadow on the future commercial relationships between the EU and third-party countries. The 'Halloumi Affair' is just the expression of a widespread hostility to the opening of the European internal market to international competition, considered one of the negative effects of globalisation and a source of risk for European citizens. The Covid

20 Parliament of Cyprus Refuses Ratifying EU-Canada CETA Agreement, 3 August 2020, https://www.iisd.org/itn/en/2020/10/05/ceta-faces-hurdle-after-cypriot-parliament-fails-to-ratify-the-agreement (21.07.2021).

21 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 (O.J. L 343, 14.12.2012), pp. 1–29.

22 This approach was disputed for a long time by the Turkish Republic of Northern Cyprus.

crisis has of course contributed to creating stress in the situation, so we can easily imagine that incidents like this will happen again in the future.

Furthermore, the suspicion persists that this clash was caused intentionally in order to overcome the institutional impasse related to the difficult *iter* of the registration of the halloumi name, which in fact happened in 2021. So it seems that we are facing another case in which the national benefit for a Member State is put ahead of the Union's autonomy and interests. This could create a breach in European solidarity and in the loyal cooperation between Member States and the EU.

In any case, by blocking the ratification process, the Cypriot Parliament achieved a new space of 'internal' discussion for the social instances in the EU. In doing so, of course, it emulated the previous actions of many other national institutions which – by boycotting the same process – succeeded in putting items which were otherwise disregarded at the top of the European agenda.

Conclusions

The deadlock of the CETA is a fatal risk for the Global Europe Strategy and for future EU trade policy. Indeed, the new generation FTAs risk being subjected to drastic modifications and changes determined by national public opinions. GIs can become a convenient pretext for this, primarily because there are large differences in approach to these rights not only between the EU and third countries, but also within the Union. As Huysmans notes, GIs are particularly important to southern European countries because of the strong 'gastronationalism' there.[23] In other European countries they do not arouse such emotions. For this reason, countries such as Italy, France, Spain, Greece and Cyprus may block new EU trade agreements, arguing that local and regional products should be protected; the Cypriot veto of the CETA clearly shows this phenomenon. Therefore the credibility of the EU could be questioned within the ambit of the negotiations. How can we be confident that in the future the EC will be able to conduct negotiations if the final draft of the treaty could be hamstrung by a single parliament for such small concerns?

The abandonment of the comprehensive strategy in favour of a return to partial agreements appears neither desirable nor probable. There is no doubt that the affirmation of EU fundamental rights on the international stage represents a 'constitutional' constraint, which can be respected only by increasing the 'weight' of the EU in the international community through agreements which also cover delicate issues such as the rule of law, human rights, environmental standards, etc.[24] The compre-

23 M. Huysmans, Exporting Protection: EU Trade Agreements, Geographical Indications, and Gastronationalism, "Review of International Political Economy" 2020, pp. 1–28.

24 I. Bosse-Platiere and C. Rapoport (eds.), The Conclusion and Implementation of EU Free Trade Agreements. Constitutional Challenges, Cheltenham/Northampton 2019, pp. 1–22.

hensive nature of these agreements is therefore functional in relation to these objectives, as well as – naturally – increasing their level of effectiveness. It is necessary to realise that the Court's opinion, as recently expressed in the Singapore Agreement evaluation, by ruling out that these schemes could be entirely included in the exclusive competences of the EU, will make it necessary to consider these kinds of manipulations and 'gut reactions' to these complex issues also in the future.

The wide-scale consequences of this new commercial strategy, as well as the complexity of the matters involved and the inevitable inclusion of international arbitration clauses in order to resolve conflicts, will require the cooperation of Member States and their specific participation in the negotiations. Many academics emphasise the need for greater transparency in the negotiation process and greater cooperation with stakeholders to identify potential problems in advance, for which the halloumi case is an example. However – apart from the consideration that a certain degree of confidentiality is necessary to avoid giving advantages to the other party during negotiations[25] – the supposed obstacles that have been raised to the ratification of the agreement in question highlight a matter of fact: the issue that is being contested is the whole strategy of opening the EU to international competition, not the need to protect GIs.

The answer to all these questions cannot be handed over only to politics or diplomacy. Of course, the EC would do well in future to link the negotiations to a strong communications campaign and with significant mediation efforts with regard to the needs – even small ones – of individuals and the Member States. Nonetheless, in our opinion it is not possible to avoid future 'ambushes' in the ratification processes only through this route without drawing a 'juridical' line between what the Member States can and cannot do within the ambit of these procedures.

The conferral principle stated by Article 5 of TUE also marks the watershed between the lawful and the unlawful in this field. European Court case law clarified the meaning of this article a long time ago when the judgment Van Gend and Loos[26] portrayed the very nature and direction of European integration. The transfer of sovereignty in the *sui generis* form of the European Communities (today the EU) led – not by chance – to the classification of these entities as 'supranational' so as to underline the difference with respect to the classical types of intergovernmental cooperation and to stress the autonomy of the EU with respect to Member States. So the European institutions have sovereign powers to be exercised in respect of both Member States and their nationals, also through the adoption of international agreements

25 M. Vellano, The Chimera of Transparency in European Union Negotiations on International Agreements, "La Comunità internazionale" 2021, no. 2, p. 331.

26 See the judgment of the CJEU of 5 February 1963 on the case of NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, C 26/62, in English special edition, 1963, 00001.

which contain obligations for the Member States, and have limits with respect to their powers. A similar approach to the 'normative issue' corresponds to the 'political' side of the coin, considering the extremely wide nature of the matters included in the EU competences and related EU politics that we should also consider with regard to the freedom of action which is necessary for the EU in order to act outside its boundaries.

In its Opinion No. 1/91 relating to the creation of the European Economic Area[27] the Court uses the same arguments as the recalled judgments, where the autonomy and the supremacy of the Community law were at issue:

the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (…) The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.

It would be quite impossible to report accurately here all the statements and developments that this case law of the Court triggered on this issue: we can only say that there is no judgment in which this special relationship between integration and autonomy was not outlined and recalled. We consider it much more useful, for our purposes here, to focus on the consequences of the previously mentioned characteristics of the EU legal order, and, in particular, on the distinction of roles between the EU and the Member States regarding sincere cooperation. This obligation, which can be considered an expression of the good faith obligation in international relations, takes on a particular meaning when it is applied in external actions of the EU.[28]

The structure of Article 4 TEU highlights the essential contents of the principle: it imposes, first of all, so-called 'mutual respect', which implies for the Member States 1) an obligation to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union; 2) a ban on interfering in the performance of EU actions. The final part of Article 4 TEU states the requirement for the Member States to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'.

We can consider this provision as an expression of the costmary rule *pacta sunt servanda* and, at the same time, it is a sort of 'loyalty clause' quite similar to those con-

27 See the Opinion of the CJEU of 14 December 1991, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, No. 1/91, in Reports of Cases, 1991, p. I–06079.

28 E. Neframi, The Duty of Loyalty: Rethinking Its Scope Through Its Application in the Field of EU External Relations, "Common Market Law Review" 2010, vol. 47, no. 2, p. 323.

tained in federal legal orders that govern the interests of the central state with respect to local administrations. So the scope of the obligation in the EU Treaty goes beyond the duty to ensure compliance with EU law. In fact, the 'refrain obligation' which falls upon the Member States is not limited to breaches of EU law but is extended to all the measures that can in any way create obstacles to the achievements of EU tasks.

In fact, the CJEU case law on Article 10 EEC Treaty shows a wide approach to this matter, focused on the consistency of national measures with the EU sources, as well as to the general tasks of the common policy on the specific topic. So, for example, in the judgments on Deutsche Grammophon[29] and on Commission v. Italy,[30] the Court stated that Article 10 EEC establishes a general obligation on the Member States, the content of which depends, case by case, on the Treaty articles or on the general principles of EU law. In the judgment on AETS[31] the Court stated that there is not only an infringement of EU law if a national rule can be considered a direct obstacle to the application of EU law, but also if a national measure can alter the effectiveness of the EU rule. In conclusion, if a national measure is in contrast with a specific source of EU law it should be set aside; if it is in contrast with the general tasks of the Union, Article 4 TEU stands for the protection of common interests.

On the basis of this background, we believe that the EC should take resolute action in the specific 'halloumi case', firstly asking Cyprus to formally provide the reasons for its refusal to ratify the CETA treaty. If in the following institutional dialogue the argument of the lack of protection for the GI 'halloumi' were upheld, the EC might formally open an infringement procedure for the violation of the exclusive competence within this ambit, with specific reference to Article 207 TFEU and on the basis of the previous harmonisation by the regulation 2081/92/EEC (today 1151/2012/EU).

Alternatively, the EC should in any case recall the obligation of non-interference in the external action of the EU which follows by Article 4(3) TFEU, considering that reasons for the refusal of ratifications would be referred to a part of the Agreement which is no longer covered by national sovereignty and on which, as a consequence, no assessment of benefits and convenience can be made by national parliaments.

This 'reaction' – which of course could be considered very strong – is aimed to draw a 'juridical' line between what can be politically evaluated at a national level and what, on the contrary, cannot be subject to any national discretion because it is no longer part of national sovereignty: a sort of 'exit strategy' from the 'Halloumi Affair'.

29 See the judgment of the CJEU of 8 June 1971 on the case of Deutsche Grammophon, C 78/70, in Rec., 1971, p. 478.

30 See the judgment of the CJEU of 7 February 1973 on the case of European Commission v. Italy, C 39/72, in Rec., 1973, p. 101.

31 See Commission v. Council, *op. cit*.

It also marks a compromise between the desire to liberalise international trade and the will to protect European food products.

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