



Reports of Cases

OPINION OF ADVOCATE GENERAL

ĆAPETA

delivered on 17 March 2022¹

Case C-159/20

European Commission

v

Kingdom of Denmark

(Failure of a Member State to fulfil obligations – Protection of designations of origin and geographical indications for agricultural products and foodstuffs – Regulation (EU) No 1151/2012 – Articles 1(1), 4 and 13 – Use of the protected designation of origin (PDO) ‘Feta’ for cheese produced in Denmark but intended for export to third countries – Article 4(3) TEU – Principle of sincere cooperation)

I. Introduction

1. It is ‘Feta’ again. That is how the present case can be introduced to students of EU law, given that it is at least the fourth instalment of what has been called the ‘Feta’ saga.²

2. In the present case, by bringing an action under Article 258 TFEU, the European Commission asks the Court to declare that the Kingdom of Denmark has breached its obligations under Article 13 of Regulation No 1151/2012³ by failing to prevent or stop the use of the name ‘Feta’ on the cheese produced in Denmark intended for export to third countries. The Commission also claims that the Kingdom of Denmark has breached its obligations of sincere cooperation arising under Article 4(3) TEU, either alone or in conjunction with Articles 1(1) and 4 of Regulation No 1151/2012.

¹ Original language: English.

² See, in that regard, O'Connor, B. and Kireeva, I., ‘What’s in a name? The “feta” cheese saga’, *International Trade Law & Regulation*, vol. 9, 2003, p. 110.

³ 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 (OJ 2012 L 343, p. 1). That regulation has been amended most recently by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products and (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union (OJ 2021 L 435, p. 262).

3. ‘Feta’ is a type of cheese, traditionally produced from sheep’s, or sheep’s and goat’s, milk in parts of Greece. For those who want to learn more about ‘Feta’, I refer to the poetic description offered by Advocate General Ruiz-Jarabo Colomer, as I could not put it in better words myself.⁴ Importantly for the case at issue, since 2002, the name ‘Feta’ is registered as a protected designation of origin (‘PDO’) under EU law.⁵

4. The EU has regulated the protection of products based on their geographical origin in relation to agricultural products and foodstuffs,⁶ as well as wines,⁷ spirits⁸ and aromatised wine products.⁹ Protection of agricultural products and foodstuffs and wines is based on the concepts of PDO and protected geographical indication (‘PGI’), while the concept of geographical indication (‘GI’) has been used in connection with spirit drinks and aromatised wine products. The concept of PDO embodies a special link between the product quality and a certain geographical area, which is stronger than a PGI because all of the production stages and relevant components must originate in the defined geographical area.¹⁰ In addition to the PDO ‘Feta’ in Greece, other examples of PDOs are ‘Parmigiano Reggiano’ in Italy, ‘Champagne’ in France and ‘Paški sir’ in Croatia, to name just a few.

5. The registration of the name ‘Feta’ as a PDO came about only after a series of cases in which it was opposed by a number of Member States. The ‘Feta’ saga, however, began even earlier. The first case involved a reference for a preliminary ruling concerning the compatibility with the EU free-movement rules of Greek measures preventing the marketing in Greece of cheese from Denmark bearing the name ‘Feta’. The reference was, however, withdrawn before the Court could rule.¹¹ The second case was an action for annulment against the Commission regulation registering ‘Feta’ as a PDO in 1996,¹² which was brought by the Kingdom of Denmark, the Federal Republic of Germany and the French Republic.¹³ In its judgment, the Court upheld the action, annulling that regulation on the grounds that the Commission had not taken due account of all of the requisite factors in assessing whether a name has become generic.¹⁴ However, in the

⁴ See Opinion of Advocate General Ruiz-Jarabo Colomer in *Canadane Cheese Trading and Kouri* (C-317/95, EU:C:1997:311, points 9 to 19).

⁵ See Commission Regulation (EC) No 1829/2002 of 14 October 2002 amending the Annex to Regulation (EC) No 1107/96 with regard to the name ‘Feta’ (OJ 2002 L 277, p. 10).

⁶ See footnote 3 of this Opinion.

⁷ See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671). That regulation has been amended most recently by Regulation 2021/2117.

⁸ See Regulation (EU) 2019/787 of the European Parliament and of the Council of 17 April 2019 on the definition, description, presentation and labelling of spirit drinks, the use of the names of spirit drinks in the presentation and labelling of other foodstuffs, the protection of geographical indications for spirit drinks, the use of ethyl alcohol and distillates of agricultural origin in alcoholic beverages, and repealing Regulation (EC) No 110/2008 (OJ 2019 L 130, p. 1).

⁹ See Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation and labelling and the protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91 (OJ 2014 L 84, p. 14). That regulation has been amended most recently by Regulation 2021/2117. See further footnote 28 of this Opinion.

¹⁰ See Regulation No 1151/2012, Article 5(1) and (2). For wines, see Regulation No 1308/2013, Article 93(1)(a) and (b).

¹¹ See order of the President of the Court of 8 August 1997, *Canadane Cheese Trading and Kouri* (C-317/95, EU:C:1997:393). But see Opinion of Advocate General Ruiz-Jarabo Colomer in *Canadane Cheese Trading and Kouri* (C-317/95, EU:C:1997:311).

¹² Commission Regulation (EC) No 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation (EEC) No 2081/92 (OJ 1996 L 148, p. 1) in so far as it registered the designation ‘Feta’ as a PDO.

¹³ See judgment of 16 March 1999, *Denmark and Others v Commission* (C-289/96, C-293/96 and C-299/96, EU:C:1999:141).

¹⁴ See judgment of 16 March 1999, *Denmark and Others v Commission* (C-289/96, C-293/96 and C-299/96, EU:C:1999:141, paragraphs 81 to 103).

third case, the Court dismissed the action for annulment brought by the Kingdom of Denmark and the Federal Republic of Germany against Regulation No 1829/2002, by which the Commission, following further review, registered ‘Feta’ as a PDO once again.¹⁵

6. On the basis of Regulation No 1151/2012, registration of the name ‘Feta’ as a PDO means that it can be used only for cheese originating in the specified geographical area in Greece and complying with the product specification in Regulation No 1829/2002.

7. Article 13(3) of Regulation No 1151/2012 obliges the Member States to take the necessary measures to prevent or stop the unlawful use of registered PDOs on their territory. The Commission, supported by the Hellenic Republic and the Republic of Cyprus, claims that the Kingdom of Denmark has breached that obligation by not preventing or stopping the use of the name ‘Feta’ for cheese produced in Denmark and intended to be exported to third countries.

8. The Kingdom of Denmark does not deny that it does not prevent or stop the producers on its territory from using the name ‘Feta’ if their products are intended to be exported to third countries. It considers, however, that Regulation No 1151/2012 applies only to products sold in the EU, and does not cover exports to third countries. In its view, therefore, the use of the name ‘Feta’ for cheese produced in Denmark, but destined only for export to the markets of third countries where the name ‘Feta’ is not protected on the basis of an international agreement does not amount to an infringement of Regulation No 1151/2012. Therefore, failure to prevent or stop the use of the name ‘Feta’ for exported cheese does not breach the obligation under Article 13(3) of Regulation No 1151/2012 because such an obligation does not arise under that provision.

9. In essence, the main dispute between the parties to the present case is about whether the relevant EU law prevents the use of the name ‘Feta’ for products exported to third countries which are not produced in accordance with the product specification of ‘Feta’ as a registered PDO.

10. To be clear, the dispute is not about the competences of the EU. The Kingdom of Denmark does not claim that the EU lacks competence to legislate with a view to prohibiting the use of the name ‘Feta’ for exported products. It only claims that, under current legislation, the EU legislature did not choose to prohibit such use.

11. Consequently, the present case requires the Court to interpret the scope of application of Regulation No 1151/2012. The prerequisite for that is an understanding of the underlying reason and purpose of protection of geographical indications, and more precisely of PDOs, as intended by the EU legislature. This case also raises some important questions concerning the principle of sincere cooperation laid down in Article 4(3) TEU in the context of infringement actions brought against the Member States.

¹⁵ See judgment of 25 October 2005, *Germany and Denmark v Commission* (C-465/02 and C-466/02, EU:C:2005:636).

II. Legal framework

12. In order to decide this case, the Court has to interpret Regulation No 1151/2012. Article 1 thereof, entitled ‘Objectives’, which appears in its Title I (‘General provisions’), states:

‘1. This Regulation aims to help producers of agricultural products and foodstuffs to communicate the product characteristics and farming attributes of those products and foodstuffs to buyers and consumers, thereby ensuring:

- (a) fair competition for farmers and producers of agricultural products and foodstuffs having value-adding characteristics and attributes;
- (b) the availability to consumers of reliable information pertaining to such products;
- (c) respect for intellectual property rights; and
- (d) the integrity of the internal market.

The measures set out in this Regulation are intended to support agricultural and processing activities and the farming systems associated with high quality products, thereby contributing to the achievement of rural development policy objectives.

...’

13. Article 4 of Regulation No 1151/2012, entitled ‘Objective’, which forms part of Title II of that regulation (‘Protected designations of origin and protected geographical indications’), states:

‘A scheme for protected designations of origin and protected geographical indications is established in order to help producers of products linked to a geographical area by:

- (a) securing fair returns for the qualities of their products;
- (b) ensuring uniform protection of the names as an intellectual property right in the territory of the Union;
- (c) providing clear information on the value-adding attributes of the product to consumers.’

14. Article 13 of Regulation No 1151/2012, in the version applicable at the relevant time,¹⁶ entitled ‘Protection’, which also forms part of Title II thereof, states:

‘1. Registered names shall be protected against:

- (a) any direct or indirect commercial use of a registered name in respect of products not covered by the registration where those products are comparable to the products registered under that name or where using the name exploits the reputation of the protected name, including when those products are used as an ingredient;

¹⁶ Regulation No 1151/2012 was amended by Regulation 2021/2117. It introduced changes, inter alia, to the text of Article 13 of Regulation No 1151/2012, which are, however, not of significance for the present case.

- (b) any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation” or similar, including when those products are used as an ingredient;
- (c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product that is used on the inner or outer packaging, advertising material or documents relating to the product concerned, and the packing of the product in a container liable to convey a false impression as to its origin;
- (d) any other practice liable to mislead the consumer as to the true origin of the product.

Where a protected designation of origin or a protected geographical indication contains within it the name of a product which is considered to be generic, the use of that generic name shall not be considered to be contrary to points (a) or (b) of the first subparagraph.

2. Protected designations of origin and protected geographical indications shall not become generic.

3. Member States shall take appropriate administrative and judicial steps to prevent or stop the unlawful use of protected designations of origin and protected geographical indications, as referred to in paragraph 1, that are produced or marketed in that Member State.

...’

III. Pre-litigation procedure

15. Following complaints made by the Greek authorities, on 26 January 2018, the Commission sent the Kingdom of Denmark a letter of formal notice, in accordance with Article 258 TFEU, in which it set out its view that, by failing to prevent or stop Danish producers from exporting cheese bearing the name ‘Feta’ to third countries, despite the fact that such cheese did not comply with the product specification for ‘Feta’ in Regulation No 1829/2002, that Member State was in breach of EU law, and in particular Article 4 TEU and Article 13 of Regulation No 1151/2012.

16. On 21 March 2018, the Kingdom of Denmark replied to the letter of formal notice and contested the Commission’s arguments.

17. On 25 January 2019, the Commission addressed a reasoned opinion to the Kingdom of Denmark, requesting that Member State to put an end to the alleged infringements of Article 4(3) TEU and Article 13 of Regulation No 1151/2012 within a period of two months of receipt of that reasoned opinion.

18. On 22 March 2019, the Kingdom of Denmark responded to the reasoned opinion and maintained its position that the alleged infringements were unfounded.

IV. Procedure before the Court

19. By its application lodged on 8 April 2020, the Commission brought the present action before the Court under Article 258 TFEU. It claims that the Court should:

- declare that the Kingdom of Denmark has failed to fulfil its obligations under Article 13 of Regulation No 1151/2012 by failing to prevent or stop the use by Danish producers of the registered name ‘Feta’ for cheese that does not comply with the product specification in Regulation No 1829/2002;
- declare that the Kingdom of Denmark has failed to fulfil its obligations under Article 4(3) TEU in conjunction with Articles 1(1) and 4 of Regulation No 1151/2012 by allowing Danish producers to produce and sell imitations of ‘Feta’; and
- order the Kingdom of Denmark to pay the costs of the proceedings.

20. In its defence lodged on 6 October 2020, the Kingdom of Denmark contends that the Court should:

- dismiss the present action in its entirety as unfounded; and
- order the Commission to pay the costs of the proceedings.

21. The Commission and the Kingdom of Denmark also respectively lodged a reply and a rejoinder on 1 December 2020 and 29 January 2021.

22. By orders of 8 and 18 September 2020, the President of the Court granted the Hellenic Republic and the Republic of Cyprus leave to intervene in the present case in support of the form of order sought by the Commission.

23. No hearing was requested and none was held. The Court addressed certain questions to the Commission, the Kingdom of Denmark, the Hellenic Republic and the Republic of Cyprus for written response in accordance with Article 61(1) of the Rules of Procedure of the Court. All of those parties provided timely written responses to the questions addressed to them.

V. Analysis

A. The first complaint, alleging infringement of Article 13 of Regulation No 1151/2012

24. It should be noted at the outset that Regulation No 1151/2012 does not contain a provision which expressly indicates that it applies to exports to third countries. Consequently, it is not obvious whether that regulation can be interpreted as applicable to such exports or not. Taken in isolation and without prejudice to my analysis which follows, the positions taken by the Commission and the Kingdom of Denmark on the matter appear to me to be equally reasonable. There are therefore two possible interpretations of Article 13(3) of Regulation No 1151/2012.

25. The two opposing understandings of Regulation No 1151/2012 appear to stem from different interpretive frameworks.

1. Interpretive frameworks

26. I would describe the Commission’s perspective as one that stresses the importance of intellectual property protection and understands PDOs as necessary to promote values for local communities. I will refer to this perspective as the intellectual property interpretive framework.

27. The Kingdom of Denmark rather builds its understanding of Regulation No 1151/2012 by starting from the perspective of the liberalisation of trade. I understand that interpretive framework as one that relies on the logic that trade is in principle good and should not therefore be prevented. Obstacles to trade can be allowed, but they should be seen as the exception, and not as the rule. I will refer to this perspective as the trade liberalisation interpretive framework.

28. This Danish position is hardly surprising. It is necessary to bear in mind the fact that the production and export of cheese under the name ‘Feta’ existed in Denmark since the 1960s.¹⁷ This predates the registration of ‘Feta’ as a PDO in 2002. It even seems that an incentive to export cheese under the name ‘Feta’ existed as a result of EU export refunds.¹⁸ Unlike the ‘Feta’ protected today as a PDO, ‘Danish Feta’ is produced from cow’s milk by use of different production methods. Danish producers compete, together with other producers of what I will call ‘fake Feta’, with genuine ‘Feta’ producers on the markets of third countries where the name ‘Feta’ is not protected.

29. The two different interpretive perspectives result in the various arguments which the Commission and the Kingdom of Denmark put forward in this case and lead to the underlying disagreement about what this case is really about.

30. For the Kingdom of Denmark, this dispute is about the intention of the EU legislature which, according to it, did not, when adopting Regulation No 1151/2012, intend to prevent exports of ‘fake Feta’ to third countries. That regulation cannot therefore be read so as to prohibit Danish (or other) ‘fake Feta’ producers to compete on the available international markets (those which do not protect ‘Feta’). For that reason, the Kingdom of Denmark considers that it does not have an obligation to prevent such exports.

31. For the Commission, supported by the Hellenic Republic and the Republic of Cyprus as interveners, this dispute is about the illegal use of the name ‘Feta’ by Danish producers. According to their perspective, the destination of the product is irrelevant for establishing the infringement alleged.

32. The parties offer the usual types of arguments to justify their positions based on the wording, context, objectives and history of the legislation at issue in the light of the approach taken in the Court’s case-law.¹⁹ I will show that, if seen within their own interpretive frameworks, those arguments seem convincing, or at least, largely convincing for each side. That is so because the parties select those arguments which best fit their respective interpretive frameworks.

¹⁷ See Regulation No 1829/2002, recital 11.

¹⁸ See Regulation No 1829/2002, recital 32.

¹⁹ See, in that regard, judgment of 2 May 2019, *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego* (C-614/17, EU:C:2019:344, paragraph 16).

33. Consequently, in my view, what the Court has to do in the present case is not to weigh and choose between the arguments, but rather to choose between the two interpretive frameworks. The framework that, in the Court’s opinion, better fits²⁰ the policy underpinning the protection of designations of origin is the framework whose arguments should prevail.

34. Given that they are used within the different interpretive frameworks, the arguments of the parties do not always ‘talk to’ each other. However, occasionally, one or the other party offers arguments also within the interpretive framework used by the other side. In the following section, I will present a summary of the most pertinent arguments offered by the parties, systematising them under the traditional categories relating to wording, context, objectives and legislative history, along with those relating to the Court’s case-law.²¹ I will then propose my point of view as to the perspective which I consider that the Court should favour and explain why.

35. With a warning of a spoiler alert, I will reveal at the outset that my preference is for the interpretive framework endorsed by the Commission and the interveners. I will therefore propose to the Court to accept the Commission’s claim that the Kingdom of Denmark has failed to fulfil its obligations under Article 13 of Regulation No 1151/2012.

2. Systematisation and assessment of the arguments of the parties

(a) Arguments from wording

36. The Commission relies on the wording of Article 13(1) of Regulation No 1151/2012, which provides for the protection of registered names against ‘any’ direct and indirect use.²² It also relies on the wording of Article 13(3) thereof, which indicates that the obligations of the Member States arise when the registered name is used for products which are ‘*produced or* marketed in that Member State’.²³ Those provisions make it clear, in the Commission’s understanding, that the Member States must ensure protection against the use of names registered as PDOs in two types of situations: first, when the products that use such names are produced on their territory or, second, when products from other Member States or third countries that unlawfully use the registered name are marketed on their territory.

37. The Kingdom of Denmark does not consider Article 13(3) of Regulation No 1151/2012 to be as clear as the Commission does. It argues that the fact that that provision concerns products ‘produced or marketed in that Member State’ is not sufficient in itself to determine the scope of application of that regulation. The existence of unlawful use which has to be prevented under that provision depends on whether the cheese is intended to be marketed on the internal market or exported to third countries. The Kingdom of Denmark agrees with the Commission that protection is to be afforded already at the moment of production, but only if the name registered as a PDO is used unlawfully at that moment. However, the use of registered names on products intended for export to third countries is not an unlawful use. There is therefore no obligation to

²⁰ See, in that regard, Dworkin, R., *Law’s Empire*, Harvard University Press, Cambridge, 1986. Even if I am sceptical about Dworkin’s proposal regarding the existence of one correct legal answer, I am convinced of his idea that the search for the best fit is one of the principles that should guide judges.

²¹ I find it necessary to explain that some arguments might be placed in more than one category. For the sake of simplification, I have placed such arguments in the category I have understood as most pertinent.

²² My emphasis.

²³ My emphasis.

prevent the use of the name ‘Feta’ for cheese produced in Denmark, but intended to be exported to third countries. Had the EU legislature intended that exports to third countries should be covered by Regulation No 1151/2012, it would have had to state so explicitly.

38. Viewed in the context of the trade liberalisation interpretive framework, such an argument is persuasive. Prohibition of the use of a name under which an exported product is marketed represents an obstacle to trade.²⁴ One can therefore accept that, under a trade liberalisation interpretive framework, such an obstacle cannot be implied, but has to be expressly envisaged and, to be lawful, it also has to be justified and proportionate. The Kingdom of Denmark supports its argument requiring express mention of exports to third countries by the principle of legal certainty. Given the consequences for exporters of cheese under the name ‘Feta’, it claims, prohibition of such exports should be clear on the basis of the provisions of Regulation No 1151/2012.

39. In an attempt to address such arguments from within the trade liberalisation interpretive framework, the Commission claims that its interpretation, under which the use of the name ‘Feta’ is to be prevented also if the product is intended for export to third countries, does not represent an export ban because Danish producers can still export the cheese; they just cannot call it ‘Feta’. However, even if not an export ban, the prohibition of the use of that name is still an obstacle to exports. Therefore, from the perspective of the trade liberalisation interpretive framework, the Commission’s argument is not convincing.

40. Answering, however, from within its own interpretive framework, the Commission characterises the Kingdom of Denmark’s exclusion of exports to third countries as an attempt to introduce a derogation to the wording of Regulation No 1151/2012. That wording, from the perspective of the intellectual property interpretive framework, clearly prohibits any use of names registered as PDOs. An express exclusion of the exports to third countries therefore seems superfluous from that perspective.

(b) Arguments from context

41. According to the Court’s case-law, the assessment of the general scheme and context of a provision of EU law encompasses, inter alia, other provisions of the same measure, along with other measures that are related or linked in some substantive way to the measure in question.²⁵ Both parties rely on other provisions of Regulation No 1151/2012, as well as on other related EU measures in support of their positions.

42. In particular, the Kingdom of Denmark claims that recitals 20 and 27 of Regulation No 1151/2012, which call for mechanisms to protect EU designations of origin at the international level through the World Trade Organisation (WTO) and by signing bilateral and

²⁴ In the first ‘Feta’ case, which concerned Greek measures that prevented the marketing of cheese from Denmark bearing the name ‘Feta’, Advocate General Ruiz-Jarabo Colomer considered that such measures constituted an obstacle to the free movement of goods and thus were caught by the EU rules prohibiting measures of equivalent effect on imports (what is now Article 34 TFEU). However, the Advocate General was of the opinion that such measures, even if being an obstacle to trade, could be justified by the protection of industrial and commercial property. See footnote 11 of this Opinion.

²⁵ See, for example, judgment of 2 May 2019, *Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego* (C-614/17, EU:C:2019:344, paragraphs 23 to 28).

multilateral international agreements,²⁶ are superfluous if Regulation No 1151/2012 itself relates to exports. On the contrary, the Commission is of the opinion that the same recitals cannot be interpreted as meaning that international agreements would be necessary to ensure that EU producers do not undermine the EU’s efforts to protect PDOs at the international level. Such agreements are necessary to protect EU PDO producers from fake products placed on foreign markets by foreign producers. The Kingdom of Denmark’s reading of those recitals conflicts, according to the Commission, with their aim and encourages the Member States to undermine such agreements.

43. The Republic of Cyprus, supporting the Commission in its intellectual property interpretive framework, points to Article 13(2) of Regulation No 1151/2012. That provision provides that PDOs shall not become generic. The Republic of Cyprus remarks that that provision is not limited to the territory of the EU.

44. Considering the broader context, the Kingdom of Denmark invokes other EU measures relating to the protection of designations of origin and geographical indications in respect of wines, spirits and aromatised wine products. It points out that those measures contain provisions that expressly refer to exports to third countries.²⁷ Therefore, by omitting such express reference in Regulation No 1151/2012, the EU legislature obviously intended not to cover exports to third countries. However, according to the Commission and the interveners, the express mention of such exports in those measures can be explained by their broader scope. Unlike Regulation No 1151/2012, they also cover product-related requirements. Moreover, references to exports to third countries are not mentioned in the relevant sections regarding geographical indications.²⁸ That leads to the conclusion that the fact that exports to third countries are expressly mentioned in those measures cannot be used as an argument that the lack of such mention in Regulation No 1151/2012 means that it does not apply to such exports.

45. Stepping into the intellectual property interpretive framework, the Kingdom of Denmark argues that other EU measures in the field of intellectual property rights contain explicit provisions regarding exports to third countries.²⁹ If Regulation No 1151/2012 were to be applied to exports to third countries, it would also have had to mention that.

²⁶ Recital 20 of Regulation No 1151/2012 states in relevant part: ‘Provision should be made for the development of designations of origin and geographical indications at [EU] level and for promoting the creation of mechanisms for their production in third countries in the framework of the World Trade Organisation (WTO) or multilateral and bilateral agreements, thereby contributing to the recognition of the quality of products and of their model of production as a factor that adds value.’ Additionally, recital 27 of Regulation No 1151/2012 mentions that the EU ‘negotiates international agreements, including those concerning the protection of designations of origin and geographical indications, with its trade partners’ and that, in order to ensure protection and control of the use to which the names are put, they may be entered in the register of PDOs and PGIs.

²⁷ For wines, see Regulation No 1308/2013, in particular Articles 89, 119(1) and 122(4). For spirit drinks, see Regulation 2019/787, Article 1(2) and recital 7. For aromatised wine products, see Regulation No 251/2014, Article 1(3) and recital 6.

²⁸ For wines, see Regulation No 1308/2013, Articles 93 to 111. For spirit drinks, see Regulation 2019/787, Articles 21 to 42. For aromatised wine products, by amendments introduced by Regulation 2021/2117, the provisions relating to the protection of geographical indications of such products were moved within the scope of Regulation No 1151/2012 (see Regulation 2021/2117, Article 3 and recital 77). The provisions of Regulation No 251/2014 now concern only the definition, description, presentation and labelling of aromatised wine products, and the references to exports to third countries have remained unchanged.

²⁹ As indicated by the Kingdom of Denmark, such measures include, inter alia, Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ 2002 L 3, p. 1), Article 19(1); Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ 2015 L 336, p. 1), Articles 10(3)(c), 11(b) and 16(5)(b); Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1), Articles 9(3)(c), 10(b) and 18(1)(b).

46. As regards the broader context, the Commission invokes Regulation No 608/2013,³⁰ which provides for the uniform protection of intellectual property rights (including PDOs) in customs procedures, including when they are intended for export to third countries. Under that regulation, goods that infringe intellectual property rights may, for instance, be destroyed by customs authorities. That would include fake PDOs intended for export, which is an argument in support of the prohibition of the use of registered names on products produced in the EU and intended for export to third countries.

(c) Arguments from objectives

47. Each piece of EU legislation has, or at least might be understood as having, multiple objectives. Regulation No 1151/2012 enumerates several objectives in Articles 1(1) and 4 thereof. Therefore, according to the different interpretive frameworks, the parties emphasise the objectives pursued by that regulation relating either to consumer protection or intellectual property protection.

48. The Kingdom of Denmark puts emphasis on the objective to ensure proper information for consumers. It therefore relies on Article 1(1) of Regulation No 1151/2012, which states that one of the objectives of that regulation is to help producers to communicate the product characteristics to consumers. When read in the light of recitals 2, 29 and 40 of Regulation No 1151/2012,³¹ it is clear, according to the Kingdom of Denmark, that that regulation has in mind consumers in the internal market. As the products marketed outside of the EU do not transmit information about products to consumers in the internal market, construing Regulation No 1151/2012 as referring to exports to third countries does not contribute to its objective.

49. The Commission denies that the only, or indeed the principal, objective of Regulation No 1151/2012 is the protection of EU consumers. On the contrary, the Commission claims that among the most important objectives of Regulation No 1151/2012 is the protection of the owners of intellectual property rights based on PDOs. Their rights are only protected if Regulation No 1151/2012 is construed as also applying to exports to third countries. Such protection serves to guarantee fair competition for PDO producers. That is in line with the objectives of the common agricultural policy ‘to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture’, as stated in Article 39 TFEU. The Commission points out that the legal basis of Regulation No 1151/2012 is, together with Article 118 TFEU concerning intellectual property rights, Article 43(2) TFEU, providing for EU competence to adopt measures for the achievement of the objectives of the common agricultural policy.

50. The Kingdom of Denmark additionally relies on Article 1(1)(d) of Regulation No 1151/2012, stating as one of the objectives the integrity of the internal market. It understands that provision as meaning that Regulation No 1151/2012 concerns the internal market, and not the markets of third

³⁰ Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (OJ 2013 L 181, p. 15).

³¹ Recital 2 of Regulation No 1151/2012 states: ‘Citizens and consumers in the Union increasingly demand quality as well as traditional products. They are also concerned to maintain the diversity of the agricultural production in the Union. This generates a demand for agricultural products or foodstuffs with identifiable specific characteristics, in particular those linked to their geographical origin.’ Recital 29 of that regulation provides in relevant part that: ‘Protection should be granted to names included in the register with the aim of ensuring that they are used fairly and in order to prevent practices liable to mislead consumers.’ Additionally, recital 40 thereof states: ‘In order to protect registered names from misuse, or from practices that might mislead consumers, their use should be reserved.’

countries. The Commission responds to such arguments by stating that the objective of safeguarding the integrity of the internal market is in fact compromised by the unlawful use of PDOs registered in the EU on the markets of third countries.

(d) Arguments from legislative history

51. The Kingdom of Denmark argues that, during the legislative process, the Parliament proposed to insert an additional subparagraph in Article 13(3) of Regulation No 1151/2012 as originally proposed.³² The proposed amendment read as follows: ‘In order to prevent the marketing in the Union *or the export to third countries* of products not labelled in conformity with this Regulation, the Commission shall be empowered to adopt delegated acts in accordance with Article 53 concerning the definition of the actions to be implemented by Member States in this respect.’³³ That amendment did not, however, find its way into the final version of Regulation No 1151/2012. As the EU legislature considered exports to third countries, but did not include them in the final text, the Kingdom of Denmark concludes that the scope of that regulation does not cover such exports.

52. The Commission explains that the amendment at issue did not find its place in the final version of Regulation No 1151/2012 not because it mentioned exports, but rather because it proposed to grant delegating powers to the Commission.

53. The Kingdom of Denmark further invokes the opinion of the Committee of the Regions on the Commission’s proposal.³⁴ One of its sections devoted to policy recommendations concerned ‘protecting and promoting quality in international trade’. In that context, the Committee of the Regions called for ‘specific measures to be taken in order to avoid the sale within the EU *or export to non-EU countries* of products whose labelling does not comply with the legislation governing the quality of EU agricultural products’.³⁵ The Kingdom of Denmark infers from the fact that the wording referring to exports was not reflected in the final text of Regulation No 1151/2012 that the EU legislature decided not to include exports to third countries in the scope of Regulation No 1151/2012. The Commission, however, explains that it was in fact through the proposed amendment of the Parliament that Article 13(3) of Regulation No 1151/2012 mentions the obligation for the Member States to prevent or stop the unlawful use of PDOs and PGIs that are ‘produced or marketed in that Member State’. It cannot therefore be inferred from this point of the Committee of the Regions’ opinion that exports to third countries were not intended to be covered by Regulation No 1151/2012.

³² See European Commission, Proposal for a Regulation of the European Parliament and of the Council on agricultural product quality schemes, COM(2010) 733 final, 10 December 2010. The originally proposed wording of Article 13(3) in that proposal was the following: ‘Member States shall take the appropriate administrative and judicial steps to prevent or stop the unlawful use of protected designations of origin and protected geographical indications as referred to in paragraph 1, in particular at the request of a producer group as provided for in point (a) of Article 42.’

³³ See European Parliament report on the proposal for a regulation of the European Parliament and of the Council on agricultural product quality schemes, draft European Parliament legislative resolution, A7-0266/2011, 12 July 2011, amendment 55. Emphasis added.

³⁴ See the opinion of the Committee of the Regions on ‘Towards an ambitious European policy for agricultural policy schemes’, 12 May 2011 (OJ 2011 C 192, p. 28) (‘Committee of the Regions’ opinion), section C.

³⁵ See Committee of the Regions’ opinion, cited in footnote 34 of this Opinion, point 24. Emphasis added.

(e) *Arguments from the Court’s case-law*

54. The Kingdom of Denmark relies on the judgment of 10 December 2002, *British American Tobacco (Investments) and Imperial Tobacco*.³⁶ That case arose from a reference for a preliminary ruling on the interpretation and validity of an EU directive concerning the manufacture, presentation and sale of tobacco products. The Court, among other things, held that Article 7 of that directive, which concerned product descriptions, only applied to cigarettes marketed within the EU, and not to those exported to third countries. The Kingdom of Denmark points out that the Court came to that conclusion by relying on the context and objectives of the directive at issue in order to conclude whether the EU legislature intended to extend that provision to exports to third countries. The Commission, for its part, considers that the context of the *BAT* judgment was different from that of this case, as the directive at issue in that judgment had as its object to improve the functioning of the internal market, whereas the present case concerns the infringement of intellectual property rights recognised by EU law.

55. To uphold its argument that the EU legislature was obliged to mention explicitly exports to third countries to bring it under the scope of Regulation No 1151/2012, the Kingdom of Denmark also relies on the judgment of 24 September 2019, *Google (Territorial scope of de-referencing)*.³⁷ That case concerned the territorial scope of the right to de-referencing and the potential extraterritorial effects of Directive 95/46³⁸ and its successor, Regulation 2016/679.³⁹ The Court found that it was not apparent that the EU legislature would have intended to impose on an operator, like Google, a de-referencing obligation going beyond the territory of the Member States. Consequently, the relevant provisions of Directive 95/46 and Regulation 2016/679 did not apply outside the EU. The Commission replies by stating that the *Google* judgment concerned the possible extraterritorial application of EU law. However, in the present case, as it explains, the Commission is not trying to apply the EU legislation to a third country. The case only concerns the application of Regulation No 1151/2012 in the EU itself. The *Google* judgment is therefore irrelevant for the present case.

(f) *Interim conclusion*

56. None of these arguments, whether relating to the wording, context, objectives or legislative history of Regulation No 1151/2012, is, to my mind, conclusive, so as to point to one of the two opposing interpretations. It is therefore necessary to choose between the two interpretive frameworks and endorse those arguments that justify the solution offered by the chosen framework.

³⁶ C-491/01, EU:C:2002:741 (‘the *BAT* judgment’), paragraphs 203 to 217.

³⁷ C-507/17, EU:C:2019:772 (‘the *Google* judgment’), paragraphs 53 to 65.

³⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

³⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46 (General Data Protection Regulation) (OJ 2016 L 119, p. 1), and corrigendum (OJ 2018 L 127, p. 2).

3. Regulation No 1151/2012 should be interpreted as prohibiting the export of ‘fake Feta’ to third countries

57. As I have disclosed at the outset, I endorse, and propose to the Court to accept, the Commission’s interpretation according to which Regulation No 1151/2012 also applies to products produced in the Member States, but intended for export to third countries.

58. I have come to that conclusion for two principal reasons. First, such an outcome can be justified in the context of both interpretive frameworks, namely, those relating to intellectual property and trade liberalisation. On the contrary, the interpretation according to which Regulation No 1151/2012 does not apply to products bearing registered names which are intended to be exported to third countries can work only in the context of the trade liberalisation interpretive framework. Second, inasmuch as the unambiguous intention of the EU legislature could ever exist and could be ‘found’, I consider the proposed interpretation to be a better fit with regard to how I understand the intention of the EU legislature underlying the protection of designations of origin and geographical indications.

59. As regards my first reason, free trade is undoubtedly one of the values respected by the EU legal order. However, the liberalisation of trade was surely not the only, nor even the most important, motivating force. Starting early on in the case-law, the Court has recognised that the interests of free trade are to be balanced against other interests.⁴⁰ It is true that the judicial analysis of rules when undertaken in the context of the trade liberalisation interpretive framework starts from the premiss that obstacles to trade are prohibited. Nonetheless, an obstacle can be found acceptable, provided that it is justified by and proportionate to other interests besides trade, such as environmental protection, consumer protection or intellectual property protection, to name but a few.

60. The protection of designations of origin and geographical indications is without doubt important from the point of view of trade. According to recent studies,⁴¹ this regime has considerable economic value to the EU, with estimated sales of over EUR 77 thousand million in 2017 and a sizable portion of extra-EU sales accounting for 22%. It therefore creates important trade opportunities for PDO producers. On the other hand, those opportunities, created through protection of their rights, result in trade obstacles for others. The prohibition on using the name ‘Feta’ for products placed on the markets of third countries is an obstacle to exports. The Commission’s line of argument that such a prohibition does not represent an export ban, as the cheese can be marketed under a different name, makes no difference. An obstacle to exports to third countries already exists when the exports are made more difficult.

61. Nevertheless, obstacles to trade created by either national or EU legislation are permissible if they are justified. I would agree with the Kingdom of Denmark that the justification based on consumer protection (enabling the credible information about the product) would already fail the suitability test, especially if the consumers to be protected are those in the internal market. Exported ‘fake Feta’ cannot misinform those consumers, as they are not present in the markets of

⁴⁰ To take a classic example, already in the judgment of 20 February 1979, *Rewe-Zentral (Cassis de Dijon)* (120/78, EU:C:1979:42), the Court has enlarged the list of possible justifications for the maintenance of obstacles to trade in comparison to the one envisaged by the Treaties and left the list open.

⁴¹ See, for example, European Commission, *Study on economic value of EU quality schemes, geographical indications (GIs) and traditional specialities guaranteed (TSGs)*, Publications Office of the European Union, Luxembourg, 2021.

third countries. Therefore, the obstacle to trade created by the interpretation under which Regulation No 1511/2012 also applies to the export of products to third countries cannot be justified by concerns relating to consumer protection.

62. However, I am of the opinion that the prohibition on exporting to third countries ‘fake Feta’ produced on the EU territory can be justified by reasons based on the protection of intellectual property rights. Even if the EU cannot regulate the markets of third countries by its own legislation and the EU PDOs can therefore be exposed to competition from fake products on those markets, the participation of fake products produced in the EU still worsens the competitive position of genuine PDOs on such markets. Prohibition of exports to third countries of cheese called ‘Danish Feta’ produced in Denmark is within the reach of the EU legislative powers,⁴² whereas, for example, the prohibition of selling ‘Wisconsin Feta’⁴³ on the United States market is not. In my opinion, it is not disproportionate for the EU to do what it can to safeguard the competitive position of the EU PDO producers. For that reason, the lack of the protection of EU PDOs in the markets of third countries cannot be used as an argument to claim that interpreting Regulation No 1151/2012 as relating to exports to third countries fails the proportionality test when intellectual property protection is offered as justification. Therefore, the interpretation of Regulation No 1151/2012 which prohibits exports of ‘fake Feta’ to third countries seems defensible even in the context of the trade liberalisation interpretive framework.

63. That being said, and moving to my second reason, I am also of the opinion that the intellectual property interpretive framework adequately explains the legislative intent behind Regulation No 1151/2012. According to that interpretive framework, the purpose of PDOs as intellectual property rights is to enable fair competition to producers of PDO products in exchange for their efforts to maintain and guarantee the high quality of their products. That enables survival of traditional businesses and ensures the diversity of products in the market. Thus, such a perspective takes into consideration other interests besides economic interests, which are also part of EU citizens’ perceptions as to what is a good quality of life.⁴⁴

64. One indication of the ‘will of the legislature’, which is objectively ascertainable in EU law, is the choice of the legal basis for a measure. Regulation No 1151/2012 was adopted on the dual legal basis of Articles 43(2) and 118 TFEU. That indicates that the main idea behind that regulation is the improvement of the situation of EU agricultural producers through providing intellectual property protection to products involving traditional ways of production, which are practised in and connected with particular geographical areas. The French language has a word to describe this special connection between the quality of products and their geographical origin – *terroir*.⁴⁵

⁴² As already explained, the Kingdom of Denmark does not dispute the existence of such competence. It only claims that it was not exercised when Regulation No 1151/2012 was adopted.

⁴³ This name is invented.

⁴⁴ See, in that regard, Davies, G., ‘Free Movement, the Quality of Life and the Myth that the Court Balances Interests’, in Koutrakos, P. et al. (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality*, Hart Publishing, Oxford, 2016, p. 214.

⁴⁵ The contemporary idea of protection of geographical indications as intellectual property rights has its roots in the French concept of *terroir*, which was developed in relation to wine. It can be traced back to the attempts to prevent fraud on the French wine market after the destruction of vineyards by phylloxera. See Calboli, I., ‘Geographical Indications between Trade, Development, Culture, and Marketing: Framing a Fair(er) System of Protection in the Global Economy?’, in Calboli, I. and Wee Loon, N.-L. (eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture: Focus on Asia-Pacific*, Cambridge University Press, Cambridge, 2017, p. 3. See also, for example, Chaisse, J. et al. (eds), *Wine Law and Policy: From National Terroirs to a Global Market*, Brill Nijhoff, Leiden, 2021; Zappalaglio, A., *The Transformation of EU Geographical Indications Law: The Present, Past and Future of the Origin Link*, Routledge, London, 2021.

65. The EU is, starting from the 1970s, establishing a network of measures governing and protecting certain types of products having designations of origin or geographical indications and the conditions governing the grant, protection and monitoring of the latter.⁴⁶ In addition to agricultural and food products, those measures cover wine, spirits and aromatised wine products. Regulation No 1151/2012 is a key legal instrument in that scheme.⁴⁷

66. Regulation No 1151/2012 establishes a uniform and exhaustive system for the protection of designations of origin and geographical indications for agricultural and food products.⁴⁸ It lays down a procedure for the registration of such products at EU level, so that their protection is guaranteed in every Member State.⁴⁹

67. The specificity of PDOs, as well as other protected geographical indications, as a type of intellectual property right in the EU is that, unlike other intellectual property rights, most importantly trade marks,⁵⁰ it relies on public enforcement, and not only on private enforcement.⁵¹ It is for that reason that Regulation No 1151/2012 obliges the Member States to prevent or stop the unlawful use of names registered as PDOs. The use of public enforcement can be understood in the context in which the protection of PDOs in the EU was developed – as a means to protect and guarantee a fair income to traditional producers who would not necessarily have knowledge (or funding) to protect their rights through private enforcement.

68. That idea is not endorsed globally. Third countries such as Canada and the United States have opted to protect the quality of products through the concept of trade marks (including collective trade marks).⁵²

69. The internal EU legislation cannot regulate the markets of third countries to guarantee the same level of protection of the EU PDOs as that which they enjoy in the internal market. That is possible only through the negotiation at the multilateral (the WTO or the World Intellectual Property Office) or bilateral level. That is why the EU, as part of its wider policy of the protection of products linked to their geographical origin, takes action at the international level with a view to making agreements that will provide the widest possible level of protection for geographical indications, including PDOs.⁵³ The EU’s efforts to ensure protection also on the markets of third

⁴⁶ See, in that regard, judgment of 25 October 2017, *Commission v Council (Revised Lisbon Agreement)* (C-389/15, EU:C:2017:798, paragraph 15).

⁴⁷ See further, for example, Kireeva, I., ‘The new European Regulation on Quality Schemes for Agricultural Products and Foodstuffs’, in McMahon, J.A. and Cardwell, M.N. (eds), *Research Handbook on EU Agricultural Law*, Edward Elgar Publishing, Cheltenham, 2015, p. 285; Nathon, N., ‘The Protection of Geographical Indications for Agricultural Products in the European Union’, in Sundara Rajan, M.T. (ed.), *The Cambridge Handbook of Intellectual Property in Central and Eastern Europe*, Cambridge University Press, Cambridge, 2019, p. 349.

⁴⁸ See, in that regard, judgments of 8 September 2009, *Budějovický Budvar* (C-478/07, EU:C:2009:521, paragraph 114), and of 22 December 2010, *Bayerischer Brauerbund* (C-120/08, EU:C:2010:798, paragraph 59).

⁴⁹ See, in that regard, judgments of 9 June 1998, *Chiciak and Fol* (C-129/97 and C-130/97, EU:C:1998:274, paragraphs 25 and 26), and of 8 September 2009, *Budějovický Budvar* (C-478/07, EU:C:2009:521, paragraph 107).

⁵⁰ The Court has also ruled that geographical indications and trade marks pursue different aims. See judgment of 20 September 2017, *The Tea Board v EUIPO* (C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 62).

⁵¹ See, in that regard, Opinion of Advocate General Pitruzzella in *Syndicat interprofessionnel de défense du fromage Morbier* (C-490/19, EU:C:2020:730, point 29).

⁵² For differences between the EU and the Canadian or United States approaches to the protection of geographical indications, see, for example, Matthews, A., ‘What Outcome to Expect on Geographical Indications in the TTIP Free Trade Agreement Negotiations with the United States?’, and O’Connor, B., ‘The Legal Protection of GIs in TTIP: Is There an Alternative to the CETA Outcome’, in Arfini, F. (ed.), *Intellectual Property Rights for Geographical Indications: What is at Stake in the TTIP?*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2016, pp. 1 and 19.

⁵³ For a listing of the relevant international agreements concluded by the EU which protect the name ‘Feta’ in third countries, see the register GLview, available at <https://ec.europa.eu>.

countries is clearly stated as a policy goal in the preamble to Regulation No 1151/2012.⁵⁴ That policy is evident in the more or less successful negotiations of the agreements with countries such as Canada, China, Singapore or the United States,⁵⁵ as well as in the EU’s endeavours at the multilateral level.⁵⁶

70. The EU’s efforts to ensure adequate protection of EU PDOs on the markets of third countries is also motivated by the significant cultural and economic value which such protection has for local communities.⁵⁷

71. There is therefore a record of EU actions which form a credible and coherent EU policy aimed at the highest possible level of protection of EU products whose quality can be recognised by their connection to a defined geographical area, which can increase the competitiveness of producers of such products.

72. That policy militates in favour of interpreting the scope of Regulation No 1151/2012 as embracing the prohibition of exports of fake PDOs to the markets of third countries. As pointed out by the Hellenic Republic and the Republic of Cyprus, it would indeed be illogical for the EU to negotiate international agreements with third countries to require them to take measures to prevent the production of products unlawfully bearing registered names and at the same time to tolerate such a practice on its own territory with regard to its own products.

73. Furthermore, the presence of fake PDOs produced in the EU on the markets of third countries contributes to the perception of their names as generic. That in turn makes it more difficult for the EU to ensure through negotiations their protection on such markets. Article 13(2) of Regulation No 1151/2012, which envisages that PDOs should not become generic, could indeed, as proposed by the Republic of Cyprus,⁵⁸ be used to support the position that Regulation No 1151/2012 applies to exports to third countries.

74. Consequently, when placed within the overall EU policy aimed at protection of PDOs as a special type of intellectual property right in the internal market and in the markets of third countries, the interpretation of Regulation No 1151/2012 to the effect that it prohibits the exports of products unlawfully using registered names even to third countries where such protection is not (yet) offered, seems to be a credible option. It appears to be the interpretation that reflects the will of the EU legislature.

75. On the basis of all the foregoing reasons, I propose to the Court to find that the Commission’s first complaint is well founded and to declare that the Kingdom of Denmark has failed to fulfil its obligations under Article 13 of Regulation No 1151/2012 by not preventing or stopping the use of the name ‘Feta’ on cheese produced in Denmark, but intended for export to third countries where the EU has not yet concluded an international agreement guaranteeing the protection of that name.

⁵⁴ See Regulation No 1151/2012, recitals 20 and 27.

⁵⁵ The EU was successful in negotiating the protection of the name ‘Feta’ in agreements signed with Canada, China and Singapore. See footnote 53 of this Opinion.

⁵⁶ For a detailed discussion, see, for example, Gangjee, D.S. (ed.), *Research Handbook on Intellectual Property and Geographical Indications*, Edward Elgar Publishing, Cheltenham, 2016; Blakeney, M., *The Protection of Geographical Indications: Law and Practice*, Second edition, Edward Elgar Publishing, Cheltenham, 2019.

⁵⁷ See Regulation (EU) 2019/1753 of the European Parliament and of the Council of 23 October 2019 on the action of the Union following its accession to the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications (OJ 2019 L 271, p. 1), recital 5.

⁵⁸ See point 43 of this Opinion.

B. The second complaint, alleging infringement of the obligation of sincere cooperation

76. The Commission alleges that the Kingdom of Denmark has committed an infringement of Article 4(3) TEU in conjunction with Articles 1(1) and 4 of Regulation No 1151/2012. That infringement is said to arise from the failure of the Danish authorities to prevent or stop Danish producers from producing and marketing imitations of ‘Feta’, which jeopardises the objectives set out in those provisions of Regulation No 1151/2012. In addition to that claim stated in the *petitum*, the Commission raises another allegation in the grounds and conclusions (but not the *petitum*) of the application. According to that allegation, the Kingdom of Denmark has also committed an independent infringement of Article 4(3) TEU by undermining the EU’s position in international negotiations in respect of the protection of EU registered names.

77. Those two allegations are different. In my view, the second of those two allegations should not be taken into consideration in the present case, as the Commission has not stated it in its *petitum* to the Court. Nevertheless, should the Court decide to rule on that allegation, I will give my opinion relating to it.

78. The Kingdom of Denmark argues that no infringement of Article 4(3) TEU, either alone or in conjunction with Articles 1(1) and 4 of Regulation No 1151/2012, has been committed, taking into account the Court’s case-law and the fact that disagreements about the interpretation of EU law do not in themselves amount to a breach of a Member State’s duty of sincere cooperation.

1. Alleged infringement of Article 4(3) TEU in conjunction with Articles 1(1) and 4 of Regulation No 1151/2012

79. According to Article 4(3) TEU, which expresses the principle of sincere cooperation, the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law and to eliminate the unlawful consequences of a breach of that law. Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned.⁵⁹

80. There are examples in the context of infringement proceedings, when the Court has found that a Member State has infringed Article 4(3) TEU alone⁶⁰ or in conjunction with other provisions of EU law.⁶¹

⁵⁹ See, for example, judgments of 17 December 2020, *Commission v Slovenia* (ECB archives) (C-316/19, EU:C:2020:1030, paragraphs 119 and 124), and of 18 May 2021, *Asociația ‘Forumul Judecătorilor din România’ and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 176).

⁶⁰ See, for example, judgments of 31 October 2019, *Commission v United Kingdom* (C-391/17, EU:C:2019:919), and of 31 October 2019, *Commission v Netherlands* (C-395/17, EU:C:2019:918). In those two cases, however, the Court considered that the breach of Article 4(3) TEU consisted in the refusal by the respective Member States to compensate for the loss of traditional EU own resources, which occurred due to the decisions of the governments of the overseas countries and territories for which the Member States at issue were responsible. Another situation in which the Court has found a self-standing breach of Article 4(3) TEU concerns one in which a Member State did not provide to the Commission necessary information during the pre-litigation infringement procedure. See, for example, judgments of 2 September 2021, *Commission v Sweden (Waste water treatment plants)* (C-22/20, EU:C:2021:669, paragraph 149), and of 8 March 2022, *Commission v United Kingdom (Action to counter undervaluation fraud)* (C-213/19, EU:C:2022:167, paragraph 598).

⁶¹ For a classic example, see judgment of 9 December 1997, *Commission v France* (C-265/95, EU:C:1997:595) (commonly referred to as the ‘Spanish strawberries’ case, in which the Court declared that the French Republic had failed to fulfil its obligations under the EU free-movement rules, in conjunction with what is now Article 4(3) TEU, and under the common organisations of the markets in agricultural products, by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions taken by private individuals).

81. The Court has, however, held that a failure to fulfil the general obligation of sincere cooperation flowing from Article 4(3) TEU is distinct from a failure to fulfil the specific obligations in which that general obligation manifests itself. Therefore, an infringement of that general obligation may be found only in so far as it covers conduct distinct from that which constitutes the infringement of those specific obligations.⁶² If the alleged breach of Article 4(3) TEU concerns the same conduct as the alleged breach of the more specific provisions of EU law, the assessment under those specific provisions suffices.⁶³

82. In the present case, the second complaint, concerning the alleged infringement of Article 4(3) TEU in conjunction with Articles 1(1) and 4 of Regulation No 1151/2012, seems to me to concern essentially the same subject matter and conduct as that which is alleged in the first complaint in respect of the alleged infringement of the specific obligations under Article 13 of Regulation No 1151/2012. It stems from the same difference of opinion regarding the interpretation of the territorial scope of Regulation No 1151/2012 and the same conduct of the Danish authorities in failing to prevent or stop the production and marketing of imitations of ‘Feta’. Indeed, as pointed out by the Kingdom of Denmark, the Danish authorities allow the production and marketing of imitations of ‘Feta’ due to the Kingdom of Denmark’s interpretation of what constitutes unlawful use within the meaning of Article 13(3) of Regulation No 1151/2012. Accordingly, on the basis of the Court’s case-law mentioned in point 81 of this Opinion, it should be considered that it is not necessary for the Court to rule on the second complaint.

83. There is, in my view, an important reason underlying the Court’s case-law that the finding of a breach of a specific obligation under EU law does not also result in breach of the principle of sincere cooperation. That reason originates in the purpose of the infringement procedure and judicial ways of solving disputes more generally. The procedure under Article 258 TFEU to establish a failure to fulfil obligations on the part of a Member State affords a means of determining the obligations of the Member States in cases where there exists a difference of interpretation of the same legal rule. In such situations of a dispute about the meaning of a legal rule, in which the Commission has one, and the Member State a different, understanding, the infringement procedure empowers the Court to resolve such an interpretive dispute. That is recognised by the case-law.⁶⁴

84. I am therefore in agreement with the arguments put forward by the Kingdom of Denmark that Article 4(3) TEU cannot be found to have been infringed by a Member State because it disagrees with the Commission as regards the interpretation of provisions of EU law, as is the case here. The fact that a Member State has a different understanding of EU law than the Commission does not amount in itself to infringement of the principle of sincere cooperation on the part of that Member State.

85. Indeed, it would be dangerous if this were to be the case, since this would be liable to prevent disputes regarding the interpretation of EU law to come before the Court. Disagreements about the meaning of the law are part of every legal system. Systems based on the rule of law resolve such disputes by empowering courts to say what the meaning of the law is. Finding the Member States in breach of the obligation of sincere cooperation because of the difference in the

⁶² See, for example, judgments of 15 November 2005, *Commission v Denmark* (C-392/02, EU:C:2005:683, paragraph 69), and of 17 December 2020, *Commission v Slovenia* (ECB archives) (C-316/19, EU:C:2020:1030, paragraph 121).

⁶³ See, for example, judgments of 30 May 2006, *Commission v Ireland* (C-459/03, EU:C:2006:345, paragraphs 168 to 182), and of 17 December 2020, *Commission v Slovenia* (ECB archives) (C-316/19, EU:C:2020:1030, paragraphs 122 to 129).

⁶⁴ See, for example, judgments of 14 December 1971, *Commission v France* (7/71, EU:C:1971:121, paragraph 49), and of 11 September 2014, *Commission v Germany* (C-525/12, EU:C:2014:2202, paragraph 24).

understanding of the law would be contrary to the efforts to secure the resolution of such disagreements in judicial proceedings. The meaning of the law in liberal democracies has to be open for contestation, and the party whose understanding is not upheld by the court cannot be deemed disloyal to the system of the law only for being ‘wrong’. It would be different if, after the Court pronounces what the law is, a Member State continued to apply it contrary to that pronouncement.

86. In that regard, it should be recalled that the dispute arising in the present case essentially stems from a disagreement between the Commission and the Kingdom of Denmark concerning the interpretation of Article 13 of Regulation No 1151/2012. Disagreement exists about whether that regulation can be interpreted as being applicable to products intended for export to third countries. Outside of this disputed area of the application of Regulation No 1151/2012, the Danish authorities have indicated to the Court (and this was not contested by the Commission) that they carry out appropriate enforcement measures in respect of the internal market. They do not carry out such measures only in the case of exports to third countries (in so far as there is no international agreement concluded with the EU) because they take the view that such exports are not covered by the provisions of Regulation No 1151/2012. In those circumstances, the alternative interpretation of that regulation put forward by the Kingdom of Denmark does not constitute in itself conduct amounting to a breach of the principle of sincere cooperation under Article 4(3) TEU.

87. It might be added that the circumstances of this case are not comparable with those giving rise to the judgment of 19 February 1991, *Commission v Belgium*,⁶⁵ referred to by the Commission. In that case, the complaint consisted in the Member State’s refusal to provide information to the Commission and the Member State fulfilled its obligations only under the direct threat of an application to the Court and then acted in breach of them as soon as the threat appeared to have passed. No such deliberate acts or omissions of that sort have been demonstrated by the Commission to have been carried out by the Kingdom of Denmark in the present case.

88. Therefore, the complaint according to which the Kingdom of Denmark infringes Article 4(3) TEU because it does not act in fulfilment of the objectives of Regulation No 1151/2012, which it understands differently, cannot be upheld.

2. *Alleged infringement of Article 4(3) TEU alone*

89. The Commission alleges that the Kingdom of Denmark has also infringed Article 4(3) TEU by weakening the EU’s position in international negotiations concerning the protection of registered names.

90. In that respect, as pointed out by scholars,⁶⁶ the obligation of sincere cooperation has indeed particular importance in the context of the EU’s external relations.

91. That is also reflected in a number of judgments of the Court resulting from infringement proceedings.

⁶⁵ C-374/89, EU:C:1991:60, paragraphs 12 to 16.

⁶⁶ See, for example, De Baere, G. and Roes, T., ‘EU loyalty as good faith’, *International & Comparative Law Quarterly*, vol. 64, 2015, p. 829; Cremona, M. (ed.), *Structural Principles in EU External Relations Law*, Hart Publishing, Oxford, 2018; Van Elsuwege, P., ‘The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations’, in Varju, M. (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law*, Springer, Cham, 2019, p. 283; Eckes, C., ‘Disciplining Member States: EU Loyalty in External Relations’, *Cambridge Yearbook of European Legal Studies*, vol. 22, 2020, p. 85.

92. For example, in the judgment of 12 February 2009, *Commission v Greece*,⁶⁷ the Court found that the Hellenic Republic breached its obligations under EU law, including Article 4(3) TEU, by submitting a proposal to an international organisation which set in motion a procedure which could lead to the adoption of new rules likely to affect the provisions of EU law, and thereby acted on an individual basis in an area in which the EU enjoys exclusive external competence.

93. In the judgment of 20 April 2010, *Commission v Sweden*,⁶⁸ the Court held that the Kingdom of Sweden infringed Article 4(3) TEU by unilaterally proposing the addition of a particular substance to the annex to an international convention in an area of shared competence. By doing so, that Member State dissociated itself from a concerted common strategy within the Council, which had consequences for the EU.

94. Furthermore, in the judgment of 27 March 2019, *Commission v Germany*,⁶⁹ the Court held that the Federal Republic of Germany failed to fulfil its obligations under an EU decision and Article 4(3) TEU by having voted against the EU’s position laid down in that decision and having publicly opposed that position and the arrangements for the exercise of voting rights provided for therein. In particular, the Court considered that, by its conduct, that Member State distanced itself from the EU’s position as established in that decision which ran the risk of undermining the EU’s power of negotiation within the framework of the international convention concerned.

95. In the present case, however, no information has been put before the Court that establishes that the Kingdom of Denmark has attempted to undermine EU negotiations about the protection of registered names at the international (multilateral or bilateral) level. The Court’s case-law set out in points 92 to 94 of this Opinion differs from this case. In particular, it has not been shown that the Kingdom of Denmark has taken any kind of concrete action on the international stage or in the context of international negotiations, contrary to an agreed EU position.

96. In the light of the foregoing reasons, the second complaint raised by the Commission should be dismissed.

VI. Costs

97. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. However, according to the first sentence of Article 138(3) thereof, the Court may order the parties to bear their own costs if each party succeeds on some and fails on other heads. Therefore, since the Commission and the Kingdom of Denmark have each been unsuccessful in part, they should be ordered to bear their own costs.

98. Moreover, under Article 140(1) of the Rules of Procedure, the Member States that intervened in the proceedings bear their own costs. Accordingly, the Hellenic Republic and the Republic of Cyprus should be ordered to bear their own costs.

⁶⁷ C-45/07, EU:C:2009:81.

⁶⁸ C-246/07, EU:C:2010:203.

⁶⁹ C-620/16, EU:C:2019:256.

VII. Conclusion

99. In the light of the foregoing considerations, I propose that the Court should:

1. Declare that, by failing to prevent or stop the use by Danish producers of the registered name ‘Feta’ for cheese intended for export to third countries, the Kingdom of Denmark has failed to fulfil its obligations under Article 13 of 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;
2. Dismiss the action as to the remainder;
3. Order the European Commission and the Kingdom of Denmark each to bear their own costs; and
4. Order the Hellenic Republic and the Republic of Cyprus each to bear their own costs.