

Case C-399/22

Request for a preliminary ruling

Date lodged:

15 June 2022

Referring court:

Conseil d'État (France)

Date of the decision to refer:

9 June 2022

Applicant:

Confédération paysanne

Defendants:

Ministère de l'agriculture et de la souveraineté alimentaire

Ministère de l'économie, des finances et de la souveraineté industrielle et numérique

CONSEIL D'ÉTAT

acting

in a judicial capacity

[...]

Decision of 9 June 2022

Having regard to the following procedure:

By application, pleading and rejoinder, registered on 2 October 2020, 12 November and 15 December 2021, respectively, at the Judicial Affairs Secretariat of the Conseil d'État, the Confédération paysanne claims that the Conseil d'État should:

1) annul the implied refusal of the Minister for Agriculture and Food and the Minister for Economic Affairs, Finance and Recovery to issue an order

prohibiting the importation of certain agricultural products originating in Western Sahara pursuant to Article 23a of the Customs Code, on the ground that that implied refusal is *ultra vires*;

2) order the Minister for Economic Affairs, Finance and Recovery and the Minister for Agriculture and Food to issue, pursuant to Article 23a of the Customs Code, within two months from the date of the prospective decision, an order prohibiting the importation of cherry tomatoes and melons originating in Western Sahara under conditions that do not comply with EU law;

3) in the alternative, refer to the Court of Justice of the European Union the questions, in the first place, whether, in the light of the separate and distinct status of Western Sahara, EU law, and in particular Regulations No 1308/2013, No 543/2011 and No 1169/2011, must be interpreted as requiring, in accordance with the obligation to indicate the origin of fresh fruit and vegetables on packages and packaging, instead of Morocco, a reference to Western Sahara, in the second place, whether the approval granted in that respect to the Moroccan authorities allows them to carry out compliance checks on produce originating in that territory and, in the last place, whether Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, derogates from the rules for determining non-preferential origin, as contained in the Union Customs Code and, if so, whether that decision complies with primary EU law.

[...]

The Confédération paysanne claims that:

- the contested decision adversely affects it;
- the competent ministers cannot legally refrain from exercising their powers under Article 23a of the Customs Code;
- the contested decision, in so far as it refuses to refer, with regard to the origin of the food in question, to internationally recognised borders, both in terms of the provision of food information to consumers, in particular the labelling of fruit and vegetables, and the compliance checks and certificates of conformity for tomatoes and melons originating in Western Sahara, infringes Article 74 of Regulation No 1308/2013, Articles 3(1) and (2), 5(1) and 8 of Regulation No 543/2011, Regulation No 1169/2011, Article 60 of the Union Customs Code, Article 31 of Delegated Regulation 2015/2446 of 28 July 2015 and the position adopted by the European Commission;
- it infringes Article 9[(1)](i), Article 26(2)(a) and Article 7(1)(a) of Regulation No 1169/2011, as interpreted in the light of the judgment of the Court

of Justice of the European Union in Case C-104/16 concerning the indication of the territory of provenance of a food, when in fact ‘national food’ for the purpose of Article 23a of the Customs Code falls within the scope of that regulation, the produce concerned is harvested in Western Sahara and the indication ‘Origin: Morocco’ is therefore incorrect;

- [...]

By statements of defence, registered on 12 November 2021 and 15 February 2022, the Minister for Economic Affairs, Finance and Recovery contends that the application should be dismissed. He submits, as his principal argument, that the application is inadmissible, since the contested implied decision does not constitute an act capable of being the subject of an action on grounds of *ultra vires*, and, in the alternative, that the pleas in law raised are unfounded.

By statement of defence registered on 15 November 2021, the Minister for Agriculture and Food contends that the application should be dismissed, agreeing with the observations made by the Minister for Economic Affairs, Finance and Recovery.

[...] [Procedural considerations at national level]

Having regard to the other documents in the file;

Having regard to:

- [...]
- the Treaty on European Union;
- the Treaty on the Functioning of the European Union, in particular Article 267 thereof;
- the Euro-Mediterranean Agreement of 26 February 1996 establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part;
- Council Decision (EU) 2019/217 of 28 January 2019 on the conclusion of the agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part;
- Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors;

- Regulation (EU) No 116/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers;
 - Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code;
 - 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, which replaced Regulation (EC) No 1234/2007;
 - Commission Delegated Regulation (EU) No 2015/2446 of 28 July 2015;
 - Commission Implementing Regulation (EU) No 2017/892 of 13 March 2017 laying down rules for the application of Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to the fruit and vegetables and processed fruit and vegetables sectors;
 - [...]
 - the Customs Code;
 - [...]
- [...]

Whereas:

- 1 The Confédération paysanne requested that the Minister for Economic Affairs, Finance and Recovery issues, pursuant to Article 23a of the Customs Code, an order prohibiting the importation of cherry tomatoes and Charentais melons harvested in the territory of Western Sahara, on the ground that this territory does not belong to the Kingdom of Morocco and that, consequently, the labelling indicating that the origin of those goods is Morocco infringes the provisions of EU law relating to the provision of information to consumers on the origin of fruit and vegetables offered for sale. It requests the annulment, on grounds of *ultra vires*, of the implied refusal by those two ministers of its application.
- 2 Under Article 23a of the Customs Code: *'Subject to the application of international agreements, the importation of food, materials and products of all types and of any origin, that do not meet the legislative or regulatory requirements laid down in terms of the marketing or sale of national food, materials or similar products, may be prohibited or regulated by joint decrees issued by the Minister for Economic Affairs and Finance, the Minister responsible for resources and the Minister for Agriculture responsible for combatting fraud.'*

The plea of inadmissibility put forward by the Minister for Economic Affairs, Finance and Recovery:

- 3 [...]. [Consideration of national law not relevant to the action]

The legality of the refusal by the Minister for Economic Affairs, Finance and Recovery and the Minister for Agriculture and Food to prohibit the importation of fruit and vegetables originating in Western Sahara:

- 4 [...]
- 5 [...] [Considerations of national law not relevant to the action]
- 6 [T]he Confédération paysanne claims that the contested decision infringes Articles 74 and 76 of [Regulation No 1308/2013], Articles 3(1), 3(2), 5(1) and 8 of [Regulation No 543/2011], Article 26 of [Regulation No 1169/2011], Article 60 of the Union Customs Code, Article 31 of [Delegated Regulation No 2015/2446] and the position adopted by the Commission, in so far as it refuses to refer, with regard to the origin of the food in question, to internationally recognised borders, both in terms of the provision of food information to consumers, in particular the labelling of fruit and vegetables, and the compliance checks and certificates of conformity for tomatoes and melons originating in Western Sahara. It claims, in addition, that the contested decision infringes Article 9(1), Article 26(2)(a) and Article 7(1)(a) of Regulation No 1169/2011, as interpreted in the light of the judgment of the Court of Justice of the European Union in Case C-104/16 concerning the indication of the territory of provenance of a food, when in fact ‘national food’ for the purpose of Article 23a of the Customs Code falls within the scope of that regulation, the produce concerned is harvested in Western Sahara and the indication ‘Origin: Morocco’ is therefore incorrect.
- 7 [...].
- 8 Under Article 9 of [Regulation No 1169/2011]: ‘1. In accordance with Articles 10 to 35 and subject to the exceptions contained in this Chapter, indication of the following particulars shall be mandatory: ... (i) the country of origin or place of provenance where provided for in Article 26; ...’. In accordance with Article 26 of that regulation: ‘... 2. Indication of the country of origin or place of provenance shall be mandatory: (a) where failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance; ...’. Under Article 76 of [Regulation No 1308/2013]: ‘1. In addition, where relevant, to the applicable marketing standards referred to in Article 75, products of the fruit and vegetables sector which are intended to be sold fresh to the consumer may only be marketed if they are sound, fair and of marketable quality and if the country of origin is indicated. 2. The marketing standards referred to in paragraph 1, as well as any marketing standard applicable to the fruit and vegetables sector laid down in accordance with this subsection, shall apply at all marketing stages including import 3. The holder of products of the fruit and vegetables sector covered by marketing standards shall not display such products, offer them for sale or deliver or market them in any manner within the Union other than in conformity with those standards and shall be responsible for

ensuring such conformity. ...'. Commission Implementing Regulation No 543/2011, which provides for a general marketing standard for all fruit and vegetables, including melon, and lays down a specific standard for tomatoes, includes in the mandatory information to be included on packaging, invoices and accompanying documents at the retail sale stage, on the one hand, the identification of the name and address of the packer and dispatcher and, on the other, the full name of the country of origin of the produce and, 'optionally', in respect of tomatoes, the 'district where grown'. Article 134 of [Regulation No 952/2013] provides: '*1. Goods brought into the customs territory of the Union shall, from the time of their entry, be subject to customs supervision and may be subject to customs controls. Where applicable, they shall be subject to such prohibitions and restrictions as are justified on grounds of, inter alia, public morality, public policy or public security, the protection of the health and life of humans, animals or plants, the protection of the environment, the protection of national treasures possessing artistic, historic or archaeological value and the protection of industrial or commercial property, including controls on drug precursors, goods infringing certain intellectual property rights and cash, as well as to the implementation of fishery conservation and management measures and of commercial policy measures. They shall remain under such supervision for as long as is necessary to determine their customs status and shall not be removed therefrom without the permission of the customs authorities. Without prejudice to Article 254, Union goods shall not be subject to customs supervision once their customs status is established. Non-Union goods shall remain under customs supervision until their customs status is changed, or they are taken out of the customs territory of the Union or destroyed*'.

- 9 It follows from all those provisions that the requirement that the country or territory of origin must be indicated, the purpose of which is to provide information to the consumer and thus constitutes an element of a marketing standard, must, in principle, be met upon importation. However, none of the regulations expressly confer upon the Member States the power to adopt measures, whether general or individual, to prohibit the importation of produce which does not comply with such a requirement whereas such a measure, in particular where there is a significant lack of awareness of importation conditions making it difficult to carry out the numerous downstream checks once the produce has been introduced into the territory of the EU, could justify, at national level, the adoption of a prohibition on fruit and vegetables from a specific country. Accordingly, the response to the pleas raised by the Confédération paysanne in its application depends, in the first place, on whether the provisions of Regulation No 1169/2011, Regulation No 1308/2013, Regulation No 543/2011 and Regulation No 952/2013 must be interpreted as authorising a Member State to adopt a national measure prohibiting the importation of fruit and vegetables originating from a specific country that infringe Article 26 of Regulation No 1169/2011 and Article 76 of Regulation No 1308/2013 for failing to indicate the country or territory from which they actually originate, in particular where that failure is significant and it is difficult to verify the origin once the produce enters the EU.

- 10 In addition, ruling on the question whether the Association Agreement between Morocco and the European Union, and various subordinate agreements, apply to Western Sahara, the Court of Justice, by judgments of 21 December 2016, *Council v Front Polisario* (C-104/16 P) and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16), held on the basis of the principle of self-determination and the principle of the relative effect of treaties that Western Sahara could not be considered as forming part of Morocco for the purpose of those rules. However, following those judgments, the European Union and the Kingdom of Morocco concluded an agreement in the form of an Exchange of Letters, approved by Council Decision of 28 January 2019, amending Protocols 1 and 4 to the Euro-Mediterranean Agreement relating to the regime applicable to the importation, into the European Union, of agricultural products originating in Morocco and to the definition of the concept of ‘products originating’, to extend to products originating in Western Sahara the benefits of the tariff preferences granted to products originating in Morocco and exported into the EU. Although that agreement was annulled by the General Court by judgment of 29 September 2021 in Case T-279/19, the effects of that agreement were maintained in order to preserve the European Union’s external action and the legal certainty of the commitments to which it has consented, in particular until the delivery of the judgment of the Court of Justice ruling on the appeal brought by the Commission against the judgment of the General Court. In those circumstances, if the question set out in paragraph 9 above is answered in the affirmative, the response to the pleas raised by the Confédération paysanne depends, in the second place, on whether that agreement in the form of an Exchange of Letters must be interpreted as meaning that, for the purpose of applying Articles 9 and 26 of Regulation (EU) No 1669/2011 and Article 76 of Regulation (EU) No 1308/2011, on the one hand, fruit and vegetables harvested in Western Sahara have Morocco as the country of origin and, on the other, the Moroccan authorities have the power to issue the certificates of conformity provided for by Regulation No 543/2011 to fruit and vegetables harvested in Western Sahara.
- 11 If the question set out in paragraph 10 is answered in the affirmative, the response to the pleas raised in the application depends, in the third place, on whether the Council Decision of 28 January 2019 approving the agreement in the form of an Exchange of Letters complies with Articles 3(5) and 21 TEU and the customary international law principle of self-determination set out, in particular, in Article 1 of the United Nations Charter.
- 12 Lastly, the response to the pleas raised in the application depends, in the fourth place, on whether, in the light of the Court’s analysis of the situation in that territory in its judgments of 21 December 2016, *Council v Front Polisario* (C-104/16 P) and of 27 February 2018, *Western Sahara Campaign UK* (C-266/16) and the answers to the previous questions, Articles 9 and 26 of Regulation (EU) No 1669/2011 and Article 76 of Regulation (EU) No 1308/2011 must be interpreted as meaning that, at the stages of importation and sale to the consumer, the packaging of fruit and vegetables harvested in Western Sahara cannot indicate

Morocco as the country of origin but must indicate the territory of Western Sahara.

- 13 Those questions, which are decisive to the outcome of the proceedings pending before the Conseil d'État, [...] present a serious difficulty. It is therefore necessary to refer the questions to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU and, until the Court has given a ruling in that regard, to stay the proceedings in respect of the application brought by the Confédération paysanne.

DECIDES:

Article 1: The proceedings on the application by the Confédération paysanne are stayed pending a ruling from the Court of Justice of the European Union on the following questions:

1. Must the provisions of Regulation No 1169/2011, Regulation No 1308/2013, Regulation No 543/2011 and Regulation No 952/2013 be interpreted as authorising a Member State to adopt a national measure prohibiting the importation, from a specific country, of fruit and vegetables that infringe Article 26 of Regulation No 1169/2011 and Article 76 of Regulation No 1308/2013 for failing to indicate the country or territory from which they actually originate, in particular where that failure is significant and it is difficult to verify the origin once the produce enters the EU?
2. If the first question is answered in the affirmative, must the agreement in the form of an Exchange of Letters, approved by the Council Decision of 28 January 2019, amending Protocols 1 and 4 to the Euro-Mediterranean Agreement of 26 February 1996 establishing an association between the European Union and its Member States, and Morocco, be interpreted as meaning that, for the purpose of applying Articles 9 and 26 of Regulation (EU) No 1669/2011 and Article 76 of Regulation (EU) No 1308/2011, on the one hand, fruit and vegetables harvested in Western Sahara have Morocco as the country of origin and, on the other, the Moroccan authorities have the power to issue the certificates of conformity provided for by Regulation No 543/2011 to fruit and vegetables harvested in Western Sahara?
3. If the second question is answered in the affirmative, does the Council Decision of 28 January 2019 approving the agreement in the form of an Exchange of Letters comply with Articles 3(5) and 21 TEU and the customary international law principle of self-determination set out, in particular, in Article 1 of the United Nations Charter?
4. Must Articles 9 and 26 of Regulation (EU) No 1669/2011 and Article 76 of Regulation (EU) No 1308/2011 be interpreted as meaning that, at the stages of importation and sale to the consumer, the

packaging of fruit and vegetables harvested in Western Sahara cannot indicate Morocco as the country of origin but must indicate the territory of Western Sahara?

[...] [Procedural requirements]

WORKING DOCUMENT