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Editorial:

The Impact of the State-of-Origin Principle on the Protection of Public Concerns in International Trade

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1. The State-of-origin principle has been the pivotal component of the strategy, aimed at liberalising services in the Community, which was launched by the Prodi Commission following the enlargement of the European Union in 2004. As widely known, such a strategy is at present being reshaped. Through the European Parliament and the Barroso Commission, political opponents and wide segments of European public opinion have succeeded in having the original proposal for a Directive of the European Parliament and of the Council on services in the internal market substantially amended¹. As a result, the role entrusted to the State-of-origin principle is being curtailed.

These vicissitudes notwithstanding, the State-of-origin principle remains more than well rooted in the legal framework governing the free circulation of goods and specific services in the EU. Within such a framework, the said principle is a corollary of mutual recognition² and applies to regulated fields that are hardly or not harmonized. In these fields member States tend to pursue primary non-economic interests by imposing legal and administrative requirements on the exercise of free economic initiative. It is precisely because such requirements vary from one member State to the other that the State-of-origin principle comes into play. It does so by solving intra-Community administrative-law conflicts, and sometimes conflicts of administrative jurisdiction, too. In the latter case, professionals and service providers established in any such State are allowed to provide services in the internal market at large³ under the administrative supervision of the member State-of-origin (*home*

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¹ See the Legislative Resolution of the European Parliament on the proposal for a directive of the European Parliament and of the Council on services in the internal market - P6_TA-Prov(2006)0061 A6-0409/2005 - and the provisional version of the amended proposal of 4 April 2006 - Com(2006)160 Provisional Version 2004/0001(Cod) - respectively.

² O. De Schutter et S. Francq, "La proposition de directive relative aux services dans le marché intérieur: reconnaissance mutuelle, harmonization et conflits de lois dans L'Europe élargie", *Cahiers de droit européen*, 2005, pp. 603-660.

³ This trend was inaugurated in 1989 for the banking sector and developed through directives meant to ensure the free circulation of services in time for the completion of the internal market by the end of 1992. See, from among many: Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities OJ L 298, 17.10.1989, p. 23, as amended by Directive 97/36/EC of the European Parliament and of the Council OJ L 202, 30.7.1997, p. 60; Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market OJ L 395, 30.12.1989, p. 13; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce") OJ L 178, 17.7.2000, p. 1; Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions OJ L 125, 5.5.2001, p. 15; Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial

country control). This supervision brings about the extraterritorial application in the European Union of that State's administrative law⁴. From the angle of both administrative jurisdiction and the administrative law applicable, under the State-of-origin principle conflicts are solved to the expenses of the host member Country.

The ground is thus laid for greater competition in the Community, but also for what various segments of European society fear as social and environmental dumping - especially from new Members, in their capacity as States-of-origin - in the markets of other member Countries⁵. It is precisely such fear that brought about, along with other sources of anxiety, the recent changes in the proposal of a Directive for the liberalization of services that drop the Country-of-origin administrative jurisdiction in favour of that of the host Member country. The Country-of-origin administrative law would instead still obtain on the basis of articles 5-15 of the amended proposal.

2. The bearing of the State-of-origin principle is enhanced and, conversely, hindered when trade in goods and services takes place between the Community and the world market. That bearing is enhanced when goods (and services) reach Europe from the outside and is curtailed when goods or services flow from Europe into the world market.

This result is due to different State interests at stake. On the one hand, developing States have the obvious interest to enjoy access to the European market for their products (and services) and, in so doing, to exploit the competitive advantage offered by their basically less stringent process and production methods (PPM)⁶. On the other hand, the European Countries share an interest in resorting to a double standard to face the European and the world market, respectively.

The developing Countries' interest commands a full-range application of the State-of-origin principle. To this day, this principle is thus basically upheld in the WTO case-law covering general exception clauses, namely in favour of developing Countries claiming access to advanced-economy Countries for their goods (and services). It is instead the law of the host/importing State that must apply if also corporations of European origin exporting goods and services in the world market are to exploit the competitive advantage offered by the low standards of protection of public concerns and non-economic interests possibly in force in developing and other Countries.

In conclusion, the State-of-origin principle deserves exploring in its interplay with the rules of international trade; more precisely, with the room these rules make for the so-called public concerns at a world-wide scale (public morals, basic labour standards, core human rights, environment and/or consumer protection, animal welfare etc.)⁷.

services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC OJ L 271, 9.10.2002, p. 16.

⁴ Cf. S. Nicolin, *Il mutuo riconoscimento tra mercato interno e sussidiarietà*, Cedam, Padova, 2005, pp. 205-206.

⁵ In doctrine a balanced and thorough appraisal of the prospective social costs the original proposal would have implied may be found in O. De Schutter et S. Francq, *op. cit.*, pp. 615-639.

⁶ Through the access granted to the goods in question in the European market, their process and production methods end up by enjoying a sort of recognition: cf. L. S. Rossi, ed., *Verso un commercio internazionale sostenibile? WTO e Unione europea*, Il Mulino, Bologna, 2003, pp. 21-22.

⁷ An updated enlarged list of this kind of concerns may be found in the Revised Proposal for a Directive on Services *cit.*, art. 4 (7a).

Non-economic interests are defined as public concerns when they are conceived in global, not merely national, terms and thus adopted as ground for action and reaction by other States than those who, while primarily bound to protect the said interests, actually jeopardize them. Typically, public concerns will be invoked by importing States at the expense of States of origin that do not comply with internationally-agreed standards in the production of given goods. The application of the importing or host Country's rules has in this respect only a pale resemblance to the role assigned to the host State administrative law as between the European Union member States (see para. 1 above).

First examples that come to mind for the extraterritorial application of host Countries' rules at world market level are: the reaction to the exploitation of child labour, the protection of dolphins⁸ and sea turtles as species endangered by given fishing techniques⁹, the ban on abusive methods of fur animals' hunting¹⁰, etc.). Regulation (EC) 980/2005, applying a scheme of European Union generalised tariff preferences¹¹, represents the latest, if not the least, example of that very trend. In article 9 it actually provides for a special incentive arrangement to be offered to vulnerable countries: namely to those, from among the developing Countries already listed as beneficiary States, that are ready to enter a full range of additional commitments to sustainable development and good governance. A comprehensive protection of human rights and the environment, as spelled out in the same art. 9 by reference to the Annex III, is thus pursued.

3. Emerging perceptions of public concerns in international trade call for a reversal of the trends described under para. 2 above. These new perceptions claim for attention to be paid to PPM of imported goods and services. This kind of attention could actually result in a limitation being imposed on the application of the law of the developing Country-of-origin, to the extent needed to meet such concerns. To that same extent, the host or importing European Country's law and standards would instead apply. Prospective developments along these lines are based on the construction of WTO agreements' general exception clauses (art. XX Gatt, art. XIV Gats etc.) as allowing the said concerns to take precedence over import or access commitments. At one and the same time the non-economic interests envisaged by those clauses - health, morals, etc. - are conceived by some in global, not merely national, terms. This is what is meant by referring to them as public, not private (namely: individual States'), concerns.

The same concerns would in turn command application of the European State-of-origin law when goods and services flow from Europe into the world market, and also in developing Countries' markets, if international trade is to be fair,

⁸ United States, *Restrictions on Imports of Tuna* DS21/R, Report of the Panel submitted to the Parties on 16 August, 1991 (not adopted), Gatt Basic Instruments and Selected Documents 39S/155, <http://www.wto.org>.

⁹ The *Shrimp cases* (DS 58) - India, Malaysia, Pakistan, Thailand v United States - were handled by the Wto between 8 October 1996 and 22 October 2001, when the Appellate Body Follow-Up Report was adopted (WT/DS58/AB/RW).

¹⁰ EC Regulation n. 5/2001 of December 2000, in OJ L 2, 5.1.2001, p. 1.

¹¹ 27 June 2005, OJ L 169, 30.6.2005, p. 1.

and not only free. Certain trends emerged in the United States legislation and case-law¹² seem to encourage such a shift.

The protection of non economic interests in international trade should weigh also on the role of the State-of-origin principle in private international law. For instance, the close connection with the Community that calls into play the mandatory protection of consumers under European Community law¹³ should already be construed in keeping with solidarity requirements. That very protection would then benefit also consumers of goods and services of European origin in third Countries. A sufficiently close connection with the Community would actually exist, not only when consumers have their habitual residence in the European Union, but also when professionals are of European origin. Any such application of European law would in turn fulfil required standards of protection of human rights by ensuring non-discrimination between individuals and persons on either side of the EU borders¹⁴.

Even the Charter on Fundamental Rights of the EU could ultimately play a role in the same direction. Chap. VI makes room for fair labour conditions and consumer protection (as well as for the right to health and to a healthy and preserved environment). In due course these provisions could well be construed as liable to extra-territorial application, so as to apply to economic actors of European origin whatever the reach of their activities in the world arena.

¹² Cf. Alien Tort Claims Act (28 USC al. 1350) and US 9th Circuit Appeal Court, *John Doe I v Unocal Corp*, Opinion 18 Sept. 2002, N°. 005603, p. 14187. Adde US Supreme Court, *Crosby v National Foreign Trade Council*, 530 US 363 (2000) and, for a very first case, US Supreme Court of Texas, Opinion in *Dow Chemical Co. and Shell Oil Co. v Domingo Castro Alfaro et al.*, March 28, 1990, in *International Legal Materials*, 1990, pp. 749-82.

¹³ Cf. Picchio Forlati, "Critères de rattachement et règles d'applicabilité à l'heure de la protection des droits de l'homme en Europe", in *Rivista di diritto internazionale privato e processuale*, 2005, pp. 949 et seq.

¹⁴ The persistent role of nationality in international relations, and the limitation of States' non-discrimination commitments to the exclusive advantage of persons within their jurisdiction, makes it difficult to construe these commitments as open to solidarity at world-wide scale. For some alternative paths to be possibly followed to overcome such difficulties, see same place, pp. 955-58.