Analysis of AG opinion (for publication)

In recent weeks it has emerged that Fine Gael's continued refusal to support the Occupied Territories Bill has become a sticking point in government formation talks. The Bill seeks to prohibit imports of goods produced in colonial settlements established illegally on occupied territories – including, of course, Israel's illegal settlements established on occupied Palestinian territory. It was introduced to the Dáil by Fianna Fáil in January 2019, having been passed by Seanad the previous month, and in both houses it received the support of all parties bar Fine Gael. In opposing the Bill, Simon Coveney has repeatedly referred to the advice of the Attorney General that the Bill is contrary to EU law and would, if enacted, expose Ireland to both fines of up to "tens of millions of euros per year"and compensation claims brought by persons affected by its provisions.

Supporters of the Occupied Territories Bill, on the other hand, have relied on a range of legal opinions which make clear that a Member State of the EU can unilaterally ban trade with illegal settlements. One such opinion, which was procured by Senator Frances Black as the Bill's original sponsor, is authored by Professor Takis Tridimas of King's College in London – one of the most cited authorities on EU law, including by both the EU courts and our own Supreme Court. His opinion, along with the other opinions which support the Occupied Territories Bill, have been made public from the outset, while the Government has consistently refused to share the Attorney General's opinion with the TDs and Senators who support the Bill.

As government formation talks draw to a close, I have obtained a copy of the Attorney General's opinion. Quite simply, it exposes the weakness of the basis for Fine Gael's opposition to the Bill all along. Firstly, a brief explanation of the legal issue that arises: the general rule is that it is for the EU to decide what goods can and cannot be imported by Member States. The exception is that States can unilaterally ban imports of certain goods on grounds of "public policy." So the question is whether the Occupied Territories Bill is consistent with the "public policy" ground because it applies to goods produced in circumstances amounting to both a "grave breach" of the Fourth Geneva Convention and a War Crime under International Criminal Law.

The opinion of Professor Tridimas cites over twenty decisions of the European courts to support his unequivocal conclusion that the Occupied Territories Bill is compatible with EU law. These decisions, he notes, make clear that the public policy ground, though narrowly interpreted, allow Member States to adopt unilateral measures which are consistent with the aim of upholding both human rights (including the right to self-determination) and fundamental principles of international law.

He also cites a decision of the EU Court of Justice in a case called *Rosneft* which concerned the EU trade restrictions imposed in connection with Russian breaches of international law in Ukraine. In that case the EU Court of Justice's Advocate-General (i.e. one of the independent advisors to the Court whose opinions are almost always followed) stated explicitly that trade restrictions adopted in response to breaches of international law would be "justified on grounds of public policy."

The Attorney General's opinion criticises the view that the Occupied Territories Bill is consistent with the public policy ground on the basis of an alleged "absence of supporting ECJ case law." Ironically, however, it makes no reference whatsoever to the decisions, including *Rosneft*, cited by Professor Tridimas. The opinion is, furthermore, most notable for what it does not address. There is not one mention in the opinion about exposure of the State to any fines or compensation claims, let alone liabilities of tens of millions of Euro.

Both EU law and Irish law are very clear on what would happen if the European courts were to find, after its enactment, that the Bill cannot be justified on the "public policy" ground. As Irish Senior Counsel Michael Lynn stated in a submission he was invited to make on the Bill to the Oireachtas Foreign Affairs Committee, in the event of such a finding by the Court of Justice, Ireland would first be given an opportunity to amend or repeal the measure before any question of fines or compensation would arise. And under Irish law – the European Communities Act 1972, specifically – the Government can amend or repeal legislation to bring it into line with EU law without any need for approval by the Dáil or Seanad.

The Government sought to dispute this view in its submission to the Foreign Affairs Committee by making what was nothing short of an astonishing legal argument. Referring to another section of the European Communities Act, it claimed that the Dáil or Seanad's approval could in fact be required to amend the Bill should the Court of Justice find that it breaches EU law. Its argument, in effect, was that the Court of Justice could find that the Bill breaches EU law because the penalties it creates are not strong enough and that TDs and Senators could not be trusted to agree to increase them!

It was no surprise to see that this is not a view expressed in the Attorney General's opinion. What did come as a surprise was to see quoted in the opinion a simple observation which I made (in a document shared with the Government) some time ago that there will be no absolute certainty as to the compatibility of the Bill with EU law until the issue is tested before the European courts. This is no reason not to support the enactment of the Bill. The whole system for enforcing EU law is based on the understanding that certain points of EU law are not black and white and that a Member State should not be exposed to fines or compensation claims until any ambiguity on a particular legal point has been clarified by the European courts.

When speaking in support of this Bill in the Dáil, Green Party leader Eamon Ryan stated:"There is no doubt in my mind that we should proceed with this legislation. Let us test it in the European Commission or European Court of Justice and see what they decide." This view is perfectly consistent with how EU law is designed to operate. He and Fianna Fáil leader Micheál Martin therefore ought to maintain this position in the final days of the negotiations. The Tánaiste, on the other hand, must stop misleading the public with claims that the enactment of the Occupied Territories Bill could expose the State to financial cost.

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