Jurisdiction and Jurisprudence of the Courts of the European Union in Competition Cases

Stefan Enchelmaier

Jurisdiction: Direct Actions

Actions brought by persons other than Member States

– Commission implements EU competition policy through (Block Exemption-) Regulations and Decisions.

– Direct action under **Art. 263 TFEU** (ex-Art. 230 TEC)

– Requirement of „addressed to them“ or „direct and individual concern“ (fourth paragraph) easily met with regard to Decisions

– Regulations are typically „regulatory acts“ because their „provisions […] are addressed in abstract terms to an indeterminate number of persons and apply to objectively determined situations“ and thus can only be challenged by individuals if the provisions are, additionally, of „direct concern“ to the individual and do not „entail implementing measures“.

Jurisdiction: Direct Actions

Actions brought by Member States

– Member States‘ *locus standi* under Art. 263 TFEU to challenge Regulations and Decisions implementing EU competition policy is not circumscribed like individuals‘ – „abstract“ control.

– Member States used to be allowed to insist that their action be heard by the Court of Justice; now only in rare cases, Art. 51 of the Statute of the Court of Justice (Protocoll No 3 to the TFEU).

– All actions under Art. 263 assigned in first instance to the General Court (formerly, the Court of First Instance), Art. 256(1) TFEU.

Jurisdiction: Direct Actions

Appeals

– An appeal lies from decisions by the General Court to the Court of Justice on points of law only, Art. 256(1) TFEU.

– Appeal lies on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as infringement of Union law by the General Court, Art. 58 of the Statute.

– No challenge to the General Court‘s appraisal of the facts, unless appraisal is in breach of the rules of logic (i.e. is contradictory) or based on evidence obtained in breach of procedural rules.

Jurisdiction: Indirect Actions (Preliminary References)

Art. 267 TFEU (ex-Art. 234 TEC)

– All preliminary references come before the CJEU; Court Statute has assigned none to the General Court yet.

– Judicial dialogue between CJEU and national courts.

– Obligation to refer incumbent only on courts of last instance, unless „acte claire“.

– Ascertaining the facts, the need for a preliminary reference, the questions to be asked, as well as applying the law to the facts, are the responsibility of the national courts.

– CJEU will, however, point out the relevant EU law if national court has failed to identify it correctly.

– CJEU will decline to answer preliminary references in competition cases if it does not have sufficient information on the economic and legal background to the case, or if its answer cannot serve a useful purpose.

– CJEU does not rule on the compatibility of national law or of private parties‘ conduct with EU law, and does not apply the law to the facts.

Composition of Chambers

Rules of Procedure of the Court of Justice, Art. 27:

(1) The Grand Chamber shall, for each case, be composed of the President and the Vice-President of the Court, three Presidents of Chambers of five Judges, the Judge-Rapporteur and the number of Judges necessary to reach 15. […]

(4) The list of the other Judges shall be drawn up according to the order laid down in Article 7 of these Rules [i.e. seniority], alternating with the reverse order: the first Judge on that list shall be the first according to the order laid down in that Article, the second Judge shall be the last according to that order, the third Judge shall be the second according to that order, the fourth Judge the penultimate according to that order, and so on. […]

Art. 28:

For the composition of Chambers of five Judges, [...t]he lists shall be drawn up in the same way as the list referred to in Article 27(4).

Assignment of Cases to Chambers

Rules of Procedure of the Court, Art. 15: ***Designation of the Judge-Rapporteur*** 1. As soon as possible after the document initiating proceedings has been lodged, the President of the Court shall designate a Judge to act as Rapporteur in the case. […]

Art. 59: ***Preliminary Report*** [...] 2. The preliminary report shall contain proposals […] as to the formation to which the case should be assigned. […]

Art. 60: ***Assignment of cases to formations of the Court*** 1. The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute. […]

↳ No objective, pre-determined criteria for allocation, unlike under Article 12(1) of the Rules of Procedure of the General Court.

Jurisprudence: Drafting and Style of Judgments

REPUBLIQUE FRANCAISE
AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, PREMIÈRE CHAMBRE CIVILE, a rendu l'arrêt suivant :

Sur le moyen unique :

Vu l'article L. 551-2 du code de l'entrée et du séjour des étrangers et du droit d'asile, dans sa rédaction résultant de la loi n° 2011-672 du 16 juin 2011, et l'article R. 551-4 du même code ;

Attendu, selon l'ordonnance attaquée et les pièces de la procédure, que Mme X..., de nationalité turque, qui faisait l'objet d'un arrêté portant obligation de quitter le territoire français, a été interpellée le 20 décembre 2011 et placée en garde à vue pour vol et infraction à la législation sur les étrangers ; qu'elle a ensuite été placée en rétention administrative en exécution de la décision prise, le jour même, par le préfet de la Nièvre ; qu'un juge des libertés et de la détention a refusé de prolonger sa rétention ;

Attendu que, pour confirmer cette décision, l'ordonnance retient que la décision du préfet mentionne que Mme X... pourrait exercer ses droits à tout moment à compter de son arrivée au centre de rétention administrative et qu'il est constant qu'elle n'a pas été en mesure de le faire pendant la durée de son transfèrement ;

Qu'en statuant ainsi, alors qu'il résulte des dispositions de l'article L. 551-2, alinéa 2, du code de l'entrée et du séjour des étrangers et du droit d'asile, dans sa rédaction résultant de la loi du 16 juin 2011, et de l'article R. 551-4 du même code que c'est à compter de son arrivée au lieu de rétention que l'étranger peut demander l'assistance d'un interprète, d'un conseil ainsi que d'un médecin et qu'il peut communiquer avec son consulat et avec une personne de son choix, le premier président a violé les textes susvisés ;

Vu l'article L. 411-3 du code de l'organisation judiciaire ;

Et attendu que les délais légaux étant expirés, il ne reste rien à juger ;

PAR CES MOTIFS :

CASSE ET ANNULE, dans toutes ses dispositions, l'ordonnance rendue le 27 décembre 2011, entre les parties, par le premier président de la cour d'appel de Paris ;

DIT n'y avoir lieu à renvoi ;

Dit que sur les diligences du procureur général près la Cour de cassation, le présent arrêt sera transmis pour être transcrit en marge ou à la suite de l'ordonnance cassée ;

Ainsi fait et jugé par la Cour de cassation, première chambre civile, et prononcé par le président en son audience publique du quinze mai deux mille treize.

[15 May 2013]

Jurisprudence: Drafting and Style of Judgments

the most it would be possible to inquire whether the imposition of prohibitive charges, that is to say, of charges completely paralysing the movement of goods, is not prohibited. However, this question only has a theoretical importance because such a case has never arisen and will never arise having regard to the economic interpenetration in Member States. Meanwhile, this question may be left aside first as clearly not a case of this kind which is at the basis of the decision to make the reference.

The *Commission* is of the opinion that the prohibition on imposing charges having an effect equivalent to a customs duty takes effect when, in the cases mentioned in the order making the reference, a Member State imposes a charge on an imported product "in an arbitrary manner", that is to say, beyond the general level of indirect taxation, for such a charge has the same effect as a customs duty added to a internal indirect charge.

However, this question does not arise in the present action because the turnover equalization tax charges in Germany on lemons remains within the limits of the usual rates of taxation under the turnover tax on ordinary and tropical fruits.

Grounds of Judgment

By order of 19 August 1967, which reached the Court on 18 August 1967, the Finanzgericht, Hamburg, by virtue of Article 177 of the Treaty establishing the EEC, asked several questions relating to the interpretation of the said Treaty and in particular Article 95 thereof.

(1) Question (a) inquires substantially whether the Treaty must be interpreted as prohibiting a Member State from imposing internal taxation on imported products originating in another Member State "which compete neither with similar domestic products within the meaning of the first paragraph of Article 95 of the Treaty establishing the EEC nor with domestic products which may be substituted for them within the meaning of the second paragraph of Article 95 of the Treaty".

In Question (b) the court making the reference inquires whether, in the event of the Treaty's prohibiting the imposition of charges on the products referred to in Question (a), such a rule has direct legal effect in favour of individuals.

The questions put, having regard to the fact that the court making the reference mentions the provisions of Article 95, refer to the internal taxation dealt with in that Article.

Taxation such as that which is the subject of the main action, levied within the framework of legislation relating to the turnover tax, does not constitute a specific tax on imported products, but a general tax applying without distinction to all categories of products, whether domestic or imported, even if charged at the moment of importation.

In principle such taxes come within the concept of internal taxation referred to in Article 95, which is moreover confirmed as far as the turnover tax is concerned by several articles in the same chapter relating to fiscal provisions.

Article 95 is intended to ensure that the application of internal taxation in one

Member State does not have the effect of imposing on products originating in other Member States taxation in excess of that imposed on similar domestic products or taxation of such a nature as to protect other domestic products referred to in the second paragraph of the same Article.

Although in essence Article 95, both by the precision of the first paragraph and by the general nature of the terms of the second paragraph, contributes to the creation of a Common Market ensuring the free movement of goods, nevertheless its ambit would be extended beyond its proper objectives if one were to deduce from it a prohibition on the imposition of internal taxation on imported goods which do not compete with a domestic product.

Internal taxation and especially the turnover tax have an essentially fiscal objective.

Hence there are no reasons why certain imported products should benefit from a privileged system by reason of the fact that there are no national products capable of being protected.

In fact such a tax, when charged on importation, even on products not competing with domestic products, is intended to place in a comparable fiscal situation all categories of products, whatever their origin.

Accordingly it is appropriate to reply to the first question by a finding that Article 95 does not prohibit Member States from imposing internal taxation on imported products when there is no similar domestic product or other domestic product capable of being protected.

Consequently, Question (b) has no purpose.

(2) Question (c) inquires whether, in the cases referred to in Question (a), the Treaty fixes limits with regard to the amount of internal taxation affecting the imported product, and, if so, requests the Court to rule what those limits are.

Although Article 95, as has just been stated, does not prohibit Member States from imposing taxation on imported products, nevertheless it would not be permissible for them to impose on products which, in the absence of comparable domestic production, would escape from the application of the prohibitions contained in Article 95, charges of such an amount that the free movement of goods within the Common Market would be impeded as far as those products were concerned.

Such a restraint on the free movement of goods cannot however be presumed to exist when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part.

The costs incurred by the Government of the Federal Republic of Germany and by the Commission of the European Communities, which have submitted their observations to the Court, are not recoverable, and as these proceedings are, in so far

Jurisprudence: Use of Authorities

– Court cites only its own case law; some classic cases invoked regularly, but otherwise largely random selection.

– Direct reference to Advocate General‘s opinions only since late 1990s.

– Occasional reference to the jurisprudence of the European Court of Human Rights and of the EFTA Court of Justice.

– No reference to academic literature or to judges‘ extra-judicial writings. Some (not all) Advocates General cite such sources.

Jurisprudence: Reasoning

– Autonomous interpretation on of EU legal terms, unless explicit reference is made in the enactment to national law.

– Teleological and historical interpretation.

– Comparison of language versions; all equal, and all equally authentic.

– Reasoning is often terse, particularly in judgments by the Grand Chamber.

Reasoning: „Horizontal“ Frictions

– No specialisation among judges and chambers of the CJEU; limited specialisation among Advocates General.

– Traditional specialisation in competition law in General Court, but no jurisdiction on wider internal market law (free movement of goods, freedom to provide services).

– Example: *Copad v Dior* [CJEU, 2009] held that no exhaustion occurs where a licensee in breach of the licensing agreement sells trade-marked goods to discount stores: this leads to a deterioration in the quality of the goods (Art. 8(2) of the Trade Marks Directive) because it impairs their luxurious aura.

– Likewise, „smell-alikes“ of luxury perfumes constitute „exploitation on the coat-tails of the mark with a reputation” even in the absence of any risk of confusion *(L'Oréal v Bellure,* CJEU 2009).

– By contrast, the desire to preserve the prestigious image of goods is not a legitimate aim for restricting competition, namely prohibiting internet sales of luxury cosmetics (*Pierre Fabre,* CJEU 2011).

↳ Lack of a coherent vision of the mutual influences among competition law, intellectual property, and free movement.

Final reflection

Commission Press release IP/13/472 of 28 May 2013:

“The European Commission's 2012 report on competition policy shows that without an effective European competition policy, the internal market cannot deliver its full economic potential. Private barriers to trade and competition would risk replacing the public barriers to free movement that have been painstakingly dismantled.”

↳ Almost verbatim quote from *Consten and Grunding v Commission* (1966), the second judgment by the Court on the substance of Article 101.