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Court of Justice of the European Communities

Frans van Heemstra and Guy Suermondt***

THE COURT OF JUSTICE of the European Communities functions under the treaties establishing the European Economic Community (hereinafter referred to as EEC), the Steel Community (hereinafter ECCS), and the European Community of Atomic Energy.¹ In connection therewith, a convention was concluded relating to certain institutions common to the three European Communities, and providing for a single court for them.

The role of the Court under Article 164² is to assure the rule of law in the Community in the interpretation and application of the Treaty. The Court, and its predecessor under the ECCS, has, in the course of these ten years, created an important body of European Community Law, which derives not only from the Treaties establishing the European Communities but also from general principles of the laws of the Member States.³ When the Treaty is silent, the Court applies these general principles of law; indeed, the Court would fail in its duties under the Treaty if it refused to decide a case because of lack of a specific rule or unclearness or incompleteness of its provisions.⁴

The Executive Institutions of the Community are the Council of Ministers and the Commission. Under Article 189, they can act by: a) "regulations," which have general application and are binding and directly applicable in each Member State; b) "directives," which bind the Member State to which they are addressed; c) "decisions," which are binding on the addressees; and d) "recommendations" and "opinions," which have no binding effect. Article 190 provides that regulations, directives, and decisions must state reasons.

The jurisdiction of the Court is, in some respects, that of an administrative court, determining the "objective legality" of

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¹ On October 7, 1958 the Court replaced a predecessor, which functioned since December 4, 1952 under the ECCS.

² References are to Articles of the EEC Treaty unless otherwise stated.

³ *Hauts Forneaux v. High Authority*, July 21, 1958, REC. IV, Page 223; *SNUPAT v. High Authority*, March 22, 1961, REC. VII-2, Page 146; *Mannesmann v. High Authority*, 19-61, July 13, 1962, REC. VIII, Pages 675-709.

⁴ *Algera v. High Authority*, July 12, 1957, REC. III, Pages 80, 115.

acts, or refusals to act, of the Institutions of the Community. On the other hand, the Court may also act as a regular law court adjudicating issues of contract and tort. In addition it may render "preliminary" decisions on questions submitted to it by the national courts of the Member States involving the Treaties.

The Action for Annulment

Articles 173 and 174 provide for annulment of acts of the Executive Institutions of the Community if they are illegal. A Member State, the Council, or the Commission may appeal to the Court to review the legality of such acts on the ground of: a) lack of competence; b) failure to observe important requirements of form; c) violation of a rule of law of the Community; or d) abuse of authority. The action must be brought within two months from the date of publication of the act, or its notification to the party concerned. The appeal against a regulation is open only to the Member States and the Institutions, but not to private parties. Private parties may appeal against decisions addressed to them, and also, against decisions which have the mere appearance of a regulation, or are addressed to another, if they are of direct and specific interest to the petitioner.⁵

The Court has found lack of competence where there was unauthorized delegation of authority by an Institution. The Court has held that such delegation is generally prohibited because it tends to disturb the balance which the Treaty has tried to establish between the various administrative bodies.⁶ Failure to observe important requirements of form is a particularly weighty ground for annulment, because of the duty under Article 190 to give reasons for a decision, which the Court considers to be a requirement of form. The reasons must be specific and must mention the bases for the findings of fact; such facts must logically support the particular decision.⁷ However, since the duty to give reasons is one of form, in testing compliance with this duty, it is irrelevant whether the opinion is, in fact, correct.

In principle, an annulment operates against all the world

⁵ Confederation Nationale v. Council, Cases No. 16, 17, 19 to 22-62, December 17, 1962, REC. VIII, Pages 901, 943.

⁶ Meroni v. High Authority, June 13, 1958, REC. IV, Page 9.

⁷ Geitling v. High Authority, March 20, 1957, REC. III, Page 9; Nold v. High Authority, March 20, 1959, REC. V, 1958-59, Page 63; President & Others v. High Authority, July 15, 1960, REC. VI-2, Page 857; Netherlands Government v. High Authority, March 21, 1955, REC. I, Page 201.

and its effect is retroactive. Because such result may conflict with the principle of certainty of the law, an illegal regulation or decision will be voided only after the relative interests involved have been carefully examined and only if the decision is not too old.⁸ The evaluation of these interests is the responsibility of the Institution which, under Article 176, must give effect to the judgment of annulment; the Court is limited to stating the legal principle involved. Article 174 gives the Court the unorthodox power to indicate, where it deems this necessary, what effects of an annulled regulation shall remain.

The Defense of Inapplicability of the Regulation on the Ground of Illegality.

Under Article 184 any party before the Court may challenge the legality of a regulation on any one of the grounds provided for in Article 173. The defense may be raised even though the period of two months required under Article 173 has expired. It may be raised by a private party who could not have challenged the regulation in an action for annulment. Its sole purpose is to protect the party involved against application of an illegal regulation without the regulation itself being affected by the action; its validity having become unimpeachable after the expiration of the two month period of Article 173.⁹

Action for Failure of an Institution to Act

Article 173 would not be completely effective if an Institution could, by refusal to act, shirk its responsibilities under the Treaty. Therefore, under Article 175 Member States, Institutions of the Community, and private persons may bring an action to establish such failure to act by the Council or the Commission. The Institution must previously have been invited to act and must have neglected to do so for a period of at least two months after such invitation. The action must then be brought within two months.

⁸ *SNUPAT v. High Authority*, Joint Cases 42, 49-59; March 22, 1961, REC. VII, Pages 101, 159, 160.

⁹ *Woerman & Lutticke v. Commission*, Joint Cases No. 31 & 33-62, Decision December 14, 1962, REC. VIII, Page 965.

Full Jurisdiction as to the Merits

In addition to its jurisdiction as an administrative court controlling the "objective" legality of administrative acts, the Court of Justice also has jurisdiction to adjudicate on the merits actions involving "subjective" personal rights of a contractual or tort nature, referred to in the Treaty as "Recours de pleine juridiction," a term derived from French Administrative law. In the specific instances provided by the Treaty, the Court has the powers of an ordinary judge to examine all facts and circumstances surrounding the subjective right which is sought to be enforced and may give such relief as it deems just. Although the characteristics of the action for annulment and the action "de pleine juridiction" are different in principle, these differences should not be exaggerated in practice. The action for annulment may also require an examination of the facts and circumstances determining the legality of the act; on the other hand, the action with full jurisdiction involving a Treaty violation by a Member State may very well be limited to examination of the legality of the State's conduct. However, in a specific case one should always remain aware of the basic differences between the two types of action.

Review of Sanctions

Under Article 172, regulations may confer on the Court full jurisdiction as to the merits in connection with fines and penalties levied pursuant to violations thereof. Accordingly, Article 17 of Regulation 17 provides for an appeal of decisions of the Commission fixing a fine or penalty, and the Court may cancel, reduce or increase these.

It should be noted that under Article 184 parties may always object to the application of a regulation, including its penalty provisions, for illegality of the regulation on one of the grounds contained in Article 173.

Treaty Violation by Member States

Under Articles 169 and 170, the Court has full jurisdiction to adjudicate a complaint of either the Commission or of a Member State directed against a Member State for failure to fulfill any of its obligations under the Treaty. Under Article 169, the Commission must first propose a remedy for the violation to the

Member State involved. If such state does not comply, the Commission may then refer the matter to the Court of Justice.¹⁰

Under Article 170, if one Member State considers that another Member State has violated the Treaty, it may refer the matter to the Commission which in effect becomes a court of first instance. If the complainant is not satisfied by the Commission's opinion, or if no such opinion is forthcoming within a period of three months, it may bring an appeal to the Court. While Article 171 provides that if the Court finds a violation, the errant State must implement the decision of the Court, no penalties are provided. Thus the matter is dependent on voluntary compliance by the Member States.

Tort Actions

Under Article 178 the Court may adjudicate complaints in tort relating to payment for damages which are caused by the Institutions or their agents. Although reference is made to the general principles of administrative tort law common to the Member States, these in fact differ considerably among the states. In its jurisprudence under the ECCS Treaty the Court has developed a pragmatic approach, weighing the duties and responsibilities of the administration and the interests to be protected against the degree and character of the negligent act.¹¹ For example, liability for negligent service (*faute de service*) and anonymous direct liability of the administration without necessity to identify the agent who acted, have both been adopted from French Administrative Law.

Jurisdiction to Give Preliminary Decisions on Questions Submitted by National Courts

Article 177 of the Treaty authorizes the Court to give preliminary decisions concerning the interpretation of the Treaty, the validity and interpretation of Acts of the Institutions, and the interpretation of the statutes of administrative bodies set up by the Council. A national court or tribunal of one of the Member States may, if in its opinion the matter before it depends on an interpretation of the Treaty, request the Court of Justice to rule

¹⁰ *Commission v. Republic of Italy*, Case No. 10-61, February 27, 1962, REC. VIII, Page 1.

¹¹ *Meroni v. High Authority*, Case No. 14-60, July 31, 1961, REC. VII, Page 319, opinion Advocate General, Page 347.

thereon. If the national court is one of last resort, it must refer the preliminary question to the Court of Justice. Pursuant to Article 20 of the Protocol on the Statute to the Court of Justice, the reference of the preliminary question to the Court suspends the proceedings of the national court.

The first case to come before the Court under Article 177 involved the question of the interpretation of Article 85 paragraph 1.¹² It was referred to the Court of Justice by the Court of Appeal of the Hague, the Netherlands and the question was whether Articles 85 to 90 of the Treaty, containing the Rules of Competition, were directly applicable to the nationals of a Member State even though no regulations under Article 87 had been issued.

The Court of Justice, considering that the national law and the law of the Community are two distinct and different legal orders, ruled that it had jurisdiction because Article 177 requires merely that a request for a preliminary decision be made by a court of a Member State, and it is irrelevant that under the national law this decision to make the request is not final.

It was argued that this was not a request for interpretation of Article 177 but rather involved the application of the Treaty to a specific case. But the Court held that Article 177 allows the national court to state its question in direct and simple form; so the Court of Justice is within the limits of its authority, so long as the issue involves interpretation of the Treaty. The question submitted, whether a private contract violated the terms of the Treaty, was held to be such a question of interpretation. However since an examination of the facts is not within the competence of the Court of Justice deciding under Article 177 the Court limited itself to a general interpretation of the Treaty provision in issue.

The next case arising under Article 177 established that nationals of the Member States are granted enforceable rights under the Treaty, and can raise the preliminary question before their national courts and thereby force these courts to ask for a preliminary decision from the Court of Justice. This case, *Van Gend and E. N. Loos against Tarief Commissie*¹³ was referred to the Court by the *Tarief Commissie*, the tribunal of last resort

¹² *De Geus v. Bosch and Van Ryn*, April 6, 1962, REC. VIII, Pages 89, 130, 134.

¹³ Case No. 26-62, Decision Feb. 5, 1963, REC. IX, Page 1.

concerning import duties in the Netherlands. The question was whether Article 12 of the Treaty prohibiting increase in custom duties, had such internal effect that it could be invoked by the petitioner in its objection to payment of the duty, in the proceeding before the Tariff Commission.

As to its jurisdiction the Court brushed aside the objections that: (a) it had no authority under Article 177 since the question was one of constitutional law of the Netherlands concerning its Treaty¹⁴ obligations; and that (b) in the event of violation of a provision of the EEC Treaty by a Member State, only the Commission or another Member State could complain under Articles 169 or 170. The Court held the sole requirement for its jurisdiction is that the question concerns the interpretation of the Treaty.

As to the merits, the court reasoned that the purpose of the EEC Treaty, to institute a common market, must affect the subjects of the Community directly, and this implies that the Treaty is more than an agreement creating obligations only between Member States. Accordingly the Community law, independent of the legislation of the Member States, creates not only obligations but also rights; these rights do not only originate from explicit grants thereof by the Treaty, but also from obligations which the Treaty imposes on other individuals and on Member States and Institutions of the Community.

The decision affords a striking example of the role of the Court of Justice in the creation of a European legal order.

Remedies Under Regulation 17

Under Regulation 17 the Commission has exclusive jurisdiction, subject to control by the Court, to exempt certain otherwise restrictive agreements or practices from the prohibitions of the Treaty. An adverse decision is subject to an action for annulment under Article 173 of the Treaty or, if no decision is made, for failure to give a decision under Article 175, and claims for damages may be made under Article 176 and Article 215. Fines and penalties levied by the Commission may be objected to under Article 17 of Regulation 17 and Article 172, at which

¹⁴ The tariff in question was agreed upon by a protocol entered into between Belgium, the Netherlands and Luxembourg, ratified by the Netherlands in 1959 which by raising a duty on a certain chemical was in clear violation of Article 12 of the EEC Treaty providing that Member States shall refrain from introducing between themselves any new custom duties.

time the inapplicability of the regulation may be raised under Article 184.

Under Article 185 of the Treaty, an appeal to the Court from a decision denying such exemption will not stay the effects thereof, and the restrictive agreement or practice will be illegal until the decision of the Commission is voided by the Court. A long time may elapse between the time of the decision and the time of the annulment. Considerable damage to the parties involved could result therefrom. This may induce the Court to consider carefully the effects of an annulment of a decision of the Commission.

Under Article 3 of Regulation 17, affected private parties may demand that the Commission investigate a violation of Article 85 or Article 86 of the Treaty. Should such violation be found, the Commission may order the enterprises involved to cease and desist.

Many complaints have been filed with the Commission under this provision, alleging the illegality of restrictive agreements, particularly exclusive export and distribution agreements. Two recent decisions of courts in Paris, the Cour de Cassation and the Tribunal de Commerce de la Seine¹⁵ held that the national judge had to suspend proceedings pending a decision of the Commission. Both involved complaints by parties to an exclusive export and distribution agreement against a third party who had imported the same goods in violation of such agreement. The defense in both cases was that the third party had filed a demand under Article 3 of Regulation 17 and that the Commission had commenced proceedings thereunder. The Cour de Cassation, held that proceedings ought to be suspended because the Commission had commenced proceedings and thereby ousted the national court from jurisdiction. However it refused to give effect to the restrictive agreement, pending the decision of the Commission. The Tribunal de Commerce, although also suspending the proceeding in the lower court, held that the agreement was not invalid until the Commission had so decided, and therefore it prohibited any violation of the agreement pending such decision.

Relief available to private parties under Article 3 of Regulation 17 has developed into an important and unique means of

¹⁵ Cour de Cassation March 12, 1963; Tribunal de Commerce de la Seine van March 5, 1963; REcueil Dalloz van May 29, 1963.

bringing a violation of the rules of competition before the Commission with recourse to the Court of Justice; a relief not based on any express provision of the Treaty.

Conclusion

The decisions of the Court under the Rome Treaty cover only a period of two years and any conclusions must therefore be cautious. One can discern, however, a tendency, continuing the trend under the ECCS Treaty, to strengthen the legal structure of the European Community by forcefully sustaining the applicable Treaty provisions and the measures of its Institutions both as to the duties created thereunder and the personal rights that may be derived therefrom. On the other hand, the Court has not hesitated to use its powers for the protection of the subjects of the Community against illegal conduct of its Institutions and of Member States in violation of the Treaty.