

## **EUROPEAN COURT OF JUSTICE AS AN ADMINISTRATIVE COURT**

VLADIMÍR TÝČ -- RADIM CHARVÁT

Právnická fakulta, Masarykova univerzita, Česká republika

### **Abstract**

Court of Justice of the European Union fulfills three basic functions: 1. acts on disputes, mainly those concerning infringements of the Union law, 2. acts as the constitutional or administrative court of the Union and 3. safeguards the uniform interpretation of the Union law in member states. We shall concentrate on its second function: European court acting as an administrative court. In any democratic state respecting the rule of law decisions of administrative bodies must be subject to judicial review by independent courts. The same principle exists in the European Union on the Union level. Administrative bodies of the Union are the European Commission and other specialized bodies with a decision-making capacity. The present contribution deals with the judicial review of the Commission and the Office for Harmonization in the Internal Market, which administers the procedures for the registration of Union trademarks and designs. Administrative decisions of the Commission relating to individuals concern essentially sanctions for individual infringements of competition rules. The object of our attention is among others a special method of the review (Art. 261 TFEU) that provides to the Court the possibility to modify the amount of the fine imposed by the Commission (an element of the appeal principle). Other proceedings fall under Art. 263 TFEU. We mention briefly also Art. 265 concerning the failure to act of a Union institution. For the purpose of administration of procedures for registering Union trademarks and designs and maintaining the Register of Union Trademarks and registered designs, the Office for Harmonization in the Internal Market (Trademarks and Designs) (OHIM) has been established. It also issues decisions regarding the aforementioned subject-matters, for instance, refusal of a Union trademark application on absolute or relative grounds, invalidity of registered Union design etc. A similar system of protection within the European Union has also been created for Plant variety rights. The Community Plant Variety Office (CPVO) decides, among other things, on nullity or cancellation of Community (now Union) plant variety rights. The objective of this part of the presentation is to describe remedies against OHIM's and CPVO's administrative decisions through the European Court of Justice.

### **Key words**

Judicial review; administrative decisions; European Court of Justice.

The European Court of Justice accomplishes three basic functions: It acts on disputes mainly concerning infringements of EU law, acts as the constitutional or administrative court and unifies the interpretation of Union law. The present contribution concentrates on the second aspect of its second function, which is a little bit neglected: its activities in the quality of an **administrative court**.

In a democratic state respecting the rule of law administrative decisions and other administrative acts including normative ones must be reviewable by independent courts. The same exists in the European Union at its own level. "Administrative organs" of the Union are particularly the European Commission and some others specialized bodies having the decisive power. In the present contribution we shall examine the judicial review of the Commission decisions, certain Council regulations and decisions of the Office for harmonization of Internal Market, which are addressed to individuals or which influence directly individuals.

The European Court of Justice is competent to review both normative and individual acts.

**1. Administrative acts of the Commission addressed to individuals** concern essentially the competition law in a broader sense. Those acts are among others decisions permitting or prohibiting something (permit of a state subsidy, companies merger or, formerly, an exception from the prohibition of cartel agreements), or normative acts of the Commission (executive regulations issued on the basis of the empowering by the Council and European Parliament in many areas). Those acts are non-legislative acts (Art. 290 of the Treaty on the Functioning of the EU - TFEU).<sup>1</sup>

Such an act can be reviewed by the Court of Justice according to Art. 263 TFEU. Its paragraph 4 is devoted to actions by individuals. This stipulation is subject of another contribution in the present publication.

The subject of our attention is a special type of the Commission decisions: those that punish infringements of EU competition law by enterprises (competitors).<sup>2</sup> The legal basis for those decisions can be found both in primary and secondary law.

In the primary law it is Art. 261 TFEU providing that "regulations adopted jointly by the European Parliament and the Council, and by the Council,

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1 In this connection TFEU makes difference between legislative acts (adopted in the legislative procedure - Art. 289 para. 3) and other acts adopted by the Commission (Art. 290 para. 1).

2 See Sauron, J.-L., *Droit et pratique du contentieux communautaire*, 3e édition, La documentation française, Paris, 2004, p. 53.

pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations. regulations." That jurisdiction has been in fact given to the Court through several regulations relating to competition law. The Court of Justice has no competence to decide on imposing a fine, but it can examine the Commission decision on the basis of such regulations.

Let us specify the two most frequently applied regulations:

- a. Regulation 1/2003 on the implementation of the rules concerning competition (Art. 101 and 102 TFEU) provides in its Art. 31: "The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed. "
- b. An identical stipulation is contained in Art. 16 of the Merger regulation (139/2004).

A special procedure for the revision of the Commission decisions is the procedure under Art. 261 TFEU, which differs from the general procedure for review of Union secondary law acts (Art. 263). This procedure is based on the appellation principle together with the cassation principle. According to Art. 263 the Court of Justice can just confirm or annul the act, the Commission decision on the fine can be either confirmed or modified. The imposed fine can be confirmed, reduced or increased.

The subject of the procedure can be not only the lump sum for sanction purposes (fine), but also the penalty payment relating to the lack of cooperation of the undertaking during the Commission investigation.

The action is brought by the undertaking that has been fined. The functional competence belongs thus to Tribunal. An appeal is possible to the Court of Justice.

The result of the procedure can be

- confirmation of the decision on fine imposed by the Commission, which is considered correct and justified,
- annulment of the Commission decision on fine as not founded,
- modification of the amount of the fine (reducing or increasing it) since the degree of infringement is evaluated differently or there are other circumstances justifying the change of the amount of the fine.

The Tribunal may increase the fine as well. It may happen that the Commission propose the increasing of the fine having been imposed by itself, if the undertaking uses new arguments not raised in the proceedings before the Commission.<sup>3</sup> We may find such a conclusion of the Tribunal in its judgment *Schunk v. Commission* (T-69/04), para. 244 and 245:

"244. Accordingly, although the exercise of unlimited jurisdiction is most often requested by applicants in the sense of a reduction of the fine, there is nothing preventing the Commission from also referring to the Community judicature the question of the amount of the fine and from applying to have that fine increased.

245. Moreover, such a possibility is expressly provided for in Section E, fourth paragraph, of the Leniency Notice which states that 'should an [undertaking] which has benefited from a reduction in a fine for not substantially contesting the facts then contest them for the first time in proceedings for annulment before the Court ..., the Commission will normally ask that court to increase the fine imposed on that [undertaking]'. The application made by the Commission in the present case is based precisely on that provision."

The reason of the dispute may be not only the objective legality of the Commission decision, but also subjective factors, namely the cooperation of the undertaking during the Commission investigation.

**Examples:**

- a. T-305/94 - T-335/94 (PVC producers): 12 undertakings - illegal cartel - for three of them the fine reduced was reduced:
- b. reason: shorter period of infringement - SAV: EUR 400 000 to 135 000, different volume and value of goods - ELF: EUR 3 200 000 to 2 600 000, ICI: EUR 2 500 000 to 1 550 000
- c. T-9/99 to T-31/99 (European District Heating Market) - ABB Asea Brown: 70 mil. to 65 mil. Reason: confirmation of the participation in the cartel, cooperation with the Commission
- d. Citric acid cartel - ADM fine reduced: 39 690 000 to 29 400 000 - reason: less important role in the cartel (ADM was not a leader)
- e. T-450/05 Peugeot - obstruction of exports from the Netherlands: 49 500 000 to 44 550 000 (taking into account price differentials)

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<sup>3</sup> For details see Molinier, J., Lotarski, J., *Droit du contentieux de l'Union européenne*, Paris, LGDJ, 2010, p. 232.

f. e) T-325/01 Daimler Chrysler ("grey market"): 71 825 000 to 9 800 000, 86 mil. to 11 mil. (!), because only Belgian market was relevant.

Those decisions of the Commission can be subject of the action to the Court of Justice in any delay (there is no time limitation).

**2. Other secondary law acts subject to the Court review concern imports from third countries.** The antidumping or compensatory customs duties on imports are imposed by the way of regulations of the Council. The action for annulment of such regulation may be brought by the importer in the EU or the exporter of the third country. The form of regulation is necessary because of the need of the general scope of application of the imposed duty in the whole European Union. In fact such regulation is a disguised decision.

Typical for the decision practice of the Court in the past was the refusal of the capacity to institute proceedings by importers through a direct action. The sole possibility how to get before the Court of Justice was through an action against the competent custom administration before national court and the subsequent preliminary reference of that court to the Court of Justice. A partial change of this attitude of the Court of Justice was the judgment *Extramet (C-358/89)*, where the Court acknowledged that the refusal of a direct action would mean the denial of justice.<sup>4</sup> Let us remind here that the way of the preliminary reference is for the exporter from a third country rather difficult, complicated and uncertain, since he must first institute proceedings before a national court of the member state of importation and then to try to convince that court of the preliminary reference concerning the validity of the regulation. Direct action according to Art. 263 is much more suitable.

### **3. Intellectual property Matters**

The first two subject-matters of industrial property that may be valid throughout the whole territory of the European Union (EU), are trademarks and (industrial) designs.<sup>5</sup> The legal framework for the establishment and protection of those subject-matters stems from Regulation (EC) No. 207/2009 of 26 February 2009 on the Community trade mark (codified

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<sup>4</sup> This policy of the Court is described in detail by Sionaidh Douglas-Scott, *Constitutional Law of the European Union*, Pearson Education, Longman, Essex, 2002, p. 361-362.

<sup>5</sup> Under international treaties, especially Hague Agreement Concerning the International Deposit of Industrial Designs and Acts to this Agreement, and in law of the Czech Republic, the term „industrial design“ is used for this type of incorporeal chattel. But in EU legislation, only the expression „design“ appears and therefore, it will be used in further text.

version), which replaced the original Council Regulation (EC) No. 40/94, and Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs.

The Office for Harmonization in the Internal Market (Trademarks and Designs) (OHIM), that has been established on the basis of Article 2 of Regulation No. 40/94, administers the procedures for registering Community trademarks and designs, and maintains the Register of Community Trademarks and registered designs. OHIM also issues decisions regarding the aforementioned subject-matters. For instance, it decides on the refusal of Community trademark applications either on absolute grounds, such as, descriptiveness of a mark or lack of its distinctiveness etc. (in *ex parte* proceedings), or on relative grounds based on filed opposition due to earlier rights with which the Community trademark application is in conflict (in *in partes* proceedings). In the circumstances of the case, OHIM may refuse that application either in its entirety or only partly (for certain goods or services). The Office has two instances, thus the party adversely affected by the decision of the first instance may appeal against that decision to the Board of Appeal. A similar system of protection within the European Union has also been created for Plant variety rights on the basis of Council Regulation No. 2100/94 of 27 July 1994 on Community plant variety rights. For the purpose of the implementation of that Regulation, Community the Plant Variety Office (CPVO) has been established. This Office decides, among other things, on nullity or cancellation of Community plant variety rights.

For those, who are not satisfied with the outcome of the Board of Appeal's decision of either of the offices, another legal remedy is available, court proceedings before the Court of Justice of the European Union. Article 65 of Regulation No. 207/2009, Article 61 of Regulation No. 6/2002 and Article 73 of Regulation No. 2100/94 allows bringing an action before the European Court of Justice (today, the Court of Justice) against decisions of the Boards of Appeal on appeals within two months of the date of notification of the decision of the Board of Appeal. However, it does not mean that the party may file an action to that court directly. By virtue of Article 256 of the Treaty on the Functioning of the European Union (hereinafter the "EU Treaty") (ex Article 225 of the Treaty Establishing the European Community) (hereinafter the "EC Treaty") in conjunction with Article 263 of the EU Treaty (ex Article 230 of the EC Treaty), together with Article 53 of Statute of the Court of Justice of the European Union and Article 130-136 of Rules of Procedure of the General Court (formerly, the Court of First Instance), these appeals are to be filed to the General Court.

The appeal must rest on one of the allowable grounds, i.e., lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of the pertinent Regulation (either 207/2009 or

6/2002 or 2100/94) or of any rule of law relating to their application or misuse of power.

Based on Article 56 of the Statute of the Court of Justice of the European Union, any party which has been unsuccessful, in whole or in part, in its submissions may bring an appeal to the Court of Justice within two months of the notification of the decision of the General Court. Pursuant to Article 58 of that Statute, an appeal to the Court of Justice shall be limited to points of law and shall lie 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 the infringement of Union law by the General Court.<sup>6</sup>

An interesting legal question arises with regard to powers of the General Court or Court of Justice. Pursuant to paragraph 3 of Article 65 of Regulation No. 207/2009, Article 61 of Regulation No. 6/2002 and Article 73 of Regulation No. 2100/94, the Court shall have jurisdiction to annul or alter the contested decision. However, Article 264 of the EU Treaty (ex Article 231 of the EC Treaty) provides that the Court of Justice of the European Union is entitled only to declare the decision void. Thus, the aforementioned regulations allow alteration of the decision in addition to its mere annulment, unlike Article 264 of the EU Treaty which restricts jurisdiction of the Court of Justice of the European Union only to the second option. Bearing in mind the legal nature of the EU Treaty, which is a crucial part of primary EU legislation, unlike the regulations which form secondary legislation, the Court of Justice of the European Union should not be entitled to alter the decisions of the given offices. In stead it could only remit the cases back to them if it finds the appeals well-founded.

There are three other subject-matters that may gain protection within the EU, namely geographical indications, designations of origin and traditional specialties guaranteed for agricultural products and foodstuffs.<sup>7</sup> Unlike the previously mentioned Community trademarks, designs and plant variety rights, the registration and related proceedings are performed by the Commission. Decisions of the Commission may be subject to actions brought to the Court of Justice of the European Union as well.

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6 With regard to assesment whether a matter constitutes a point of law, the Fourth Chamber of the former European Court of Justice rejected appeals based on similarity of trade marks for the reason of their factual and not legal nature, for instance, C-3/03 P *Matratzen Concord v OHIM*, or C-513/04 P *Vitakraft-Werke Wührman & Sohn GmbH & Co. KG v OHIM*.

7 The legal framework is given by Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, and Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed

**4.** To complete the list of "administrative" actions before the Court of Justice we should mention **the action for failure to act (Art. 265 TFEU)**. This action may be brought also by an individual in the case when an EU institution has failed to address to that person any binding act. In practice a "binding act addressed to a person" may be only the decision.

**Contact – email**

*vtyc@stcomp.cz -- charvat@law.muni.cz*