DuPont Teijin Films Luxembourg SA and Others v Commission
Case T-113/00 [2002] ECJ CELEX 3127

How should the EU System of Generalised Tariff Preferences (`GSP') Regime on Withdrawals be applied?

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How should the EU System of Generalised Tariff Preferences ('GSP') Regime on Withdrawals be applied?
The GSP Regulation provides that the scheme may be temporarily withdrawn in the following circumstances:

- Practice of any form of slavery or forced labour;
- Export of goods made by prison labour;
- Manifest shortcomings in customs controls on export or transit of drugs;
- Failure to comply with international money laundering rules;
- Fraud;
- Manifest cases of unfair trading practices by the beneficiary country.

In this case, the Commission was requested by a number of traders to withdraw the GSP scheme in relation to certain Indian traders. The Commission responded in writing declining to do so. The ECJ held that the letter from the Commission was a 'Decision' subject to judicial review and ruled that the Commission was incorrect in its assessment of the circumstances for withdrawing the scheme. The Commission had, in particular, failed to provide adequate reasons for its decision not to withdraw the scheme from the Indian traders concerned.

Geha Naftiliaki EPE & Others v NPDD Limeniko Tamio Dodekanisou, Elliniko Dimosio
Case C-435/00, ECJ, 14 November 2002

Freedom to Provide Shipping Services and Regulation 4055/86
Article 1 of Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries precludes the application in a Member State of different harbour dues for domestic or intra-Community traffic and traffic between a Member State and a third country if that difference is not objectively justified. The imposition on passenger vessels that call at, or whose final destination is, a port in a third country of different harbour dues from those imposed on passengers of vessels whose destination is domestic or in another Member State, without there being any correlation between that difference and the cost of the harbour services enjoyed by those categories of passengers, amounts to a restriction on the freedom to provide services contrary to Article 1 of Regulation No. 4055/86.

Inspecteur van de Belastingdienst Douane, Rotterdam v Sea-Land Service Inc and Nedlloyd Lijnen BV
Case C-430/431/99 [2002] ECJ, CELEX 3085

Validity of vessel traffic system charges under EU law
Under Dutch law (the Sheepvaartverkeerswet or Shipping Act) which came into force in 1995, a new Vessel Traffic Services system ('VTS') was introduced. A tariff was imposed on sea-going vessels. Before 1995, the costs of such services were covered by dues for pilotage. The tariff, however, does not apply to inland waterway vessels or sea going vessels not exceeding 41 metres. The Dutch authorities issued invoices to Sea-Land, a US-registered company and Nedlloyd, a Dutch company. The two companies and the European Commission contended that the imposition of the tariff was unlawful as:

- The VTS tariff constituted an obstacle to the freedom to provide services enshrined in Council Regulation (EEC) No. 4055/86 of 22 December 1986 applying the principle of freedom to provide

services to maritime transport between Member States and between Member States and third countries (OJ 1986 L378), and Article 49 EC; and

- the tariff was a form of unlawful state aid, contrary to Article 87 EC.

The matter was brought before the European Court of Justice by means of the preliminary ruling procedure (Article 234 EC).

Ruling

Regulation 4055/86 applied to a situation where the Member State had applied a measure which was discriminatory to the non-national service provider. In the present case, there was no evidence of direct discrimination because the VTS regime clearly applied indistinctly to all sea-going vessels, regardless of their flag. As for whether there was a case of disguised discrimination, *de facto* discrimination is only satisfied if it could be shown that there are no objective differences between the nature of the services concerned, those offered by national operators and those by foreign operators. The fact that the majority of inland waterway vessels are operated by Dutch firms while sea-going traffic using those same waterways are normally not Dutch-owned did not necessarily imply discrimination because their markets and the circumstances surrounding their businesses were clearly not comparable.

The law however goes further. ECJ case law (Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949; Joined Cases C-369/96 and 376/96 *Arblade and Others* [1999] ECR I-8453) states that a restriction may be unlawful even though it applies without distinction to national providers of services and to those of other Member States, if it is liable to prohibit, impede or render less attractive the activities of a provider of services established in another Member State where he lawfully provides similar services. On this point, the ECJ held that the impediment was justifiable on the grounds of public security (Article 46 EC). The court stated that vessel traffic services supplied within the VTS framework was 'a nautical service essential to the maintenance of public security in coastal waters as well as in ports'. The court also found that VTS system, as a service to operators, not to be disproportionate. The tariff was not exorbitant and was calculated based on objective criteria.

On the issue of whether the tariff was a form of state aid, the ECJ held that it could not give a preliminary ruling on the issue. It stated the question was irrelevant to the action at hand because whether the tariff constituted unlawful state aid or not, the two companies will still have to pay the levy. They had no standing to refuse to pay on the basis that the levy was contrary to EU state aid rules (Case C-390/98 *Banks* [2001] ECR I-6117). The most they could hope for was for the Commission to bring an enforcement action against the Member State concerned.

Comment

This case is interesting for a number of reasons. First, it validates the imposition of inland waterway and other navigation charges in a manner which favour inland waterway vessels. That issue has been hotly debated in recent times. The ECJ's judgment, while patently reasoned in law, is at the same time undeniably influenced by the current measures taken by the EU (and Member States) to promote and enhance the use of inland waterways.

Regulation 4055/86 has very rarely been litigated. Questions as to its application and the ECJ's approach to it in the instant case should thus be of particular interest to maritime lawyers. The Regulation provides in Article 1 that:

> (1) Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.
>
> (2) The . . . Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

In the context of the freedom of establishment and services, generally nationals are only permitted to

bring an action for breach of that freedom against his home state where there exists a 'Community element or dimension' in the case (Case C-41/90 *Höfner & Elser v Macroton GmbH* [1991] ECR I-1979; Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, Case C-61/89 *Bouchoucha* [1990] ECR I-3551). Without the presence of a 'Community element', the matter will be deemed to be a wholly internal situation, that is to say, one solely between the national and his own Member State. Such a matter should be resolved only by national law, not EU law. In the present case, it is conceivable that the Dutch company might have satisfied the 'Community element' requirement by having registered its vessels in a Member State other than the Netherlands but the facts are not clear.

The question of interest is this: does the Regulation by-pass this 'wholly internal' principle and allow the national to bring an action for breach of his freedom to offer shipping services against his own home Member State? The ECJ did not deal with the question directly. The provisions of the Regulation do not make it clear that the wholly internal situation exception is removed but there is tacit acceptance by the ECJ in the present case (and, it would appear, see above, in the recently published decision of the court in Case C-435/00 *Geha Naftiliaki EPE & Others v NPDD Limeniko Tamio Dodekanisou, Elliniko Dimosio*, 14 November 2002) that under the Regulation, nationals may bring an action against their home state.

The thrust of the ECJ's judgment lies in its finding that the VTS system was justifiable on the grounds of public security. The public security defence is an exception to the free movement rules which has very rarely been applied successfully (Case 231/83 *Culletv v Centre Leclerc* [1985] ECR 305; Case C-367/89 *Richardt* [1991] ECR I-4621 ; Case 72/83 *Campus Oil* [1984] ECR 2727). It is thus quite significant for the ECJ to link maritime navigation systems and procedures with interests of public security. However, it is disappointing that the ECJ did not explain or indeed, state, its criteria for its somewhat peremptory finding that the VTS system was to the 'general interest of public security in those waters'.

An issue which the ECJ dismissed as being out of the remit of an application under Article 234 was that of state aid. The court was obviously technically correct to say that the issue was not relevant to the present case. However, it should be said that given the lack of judicial guidance on the subject and the state of play in competition law in shipping services, it was a little disappointing that the issue of state aid was not given any judicial airing.

Article 87 provides:

> Any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain gods shall, in so far as it affects trade between Member States, be incompatible with the common market.

The problem is with whether such an imposition distorts or threatens to distort competition. In order to answer that question, it is vital to assess whether the interested parties compete in the same or a related market. A recent case of the ECJ found that the natural competitors to inland waterway operators are not seagoing vessels operating inland transit but road and rail hauliers (Case T-86/95 *Compagnie Générale Maritime etc*, reported in www.curia.eu.int/juris 28 February 2002, paras 119 to 120). The Dutch government appeared, thus, to be right to argue that any advantage conferred by the VTS system on inland waterway vessels was so minor that it was no more than *de minimis* aid, at least as regards the complaints by the two companies.

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