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Unavailable Judicial Remedies and the Rule of Law

From the Board

One of the favourite mantras of the ECJ (and the CFI) is that Community law provides for 'a complete system of legal remedies'. This is because the EC is based on the rule of law, which implies that all Community acts must be reviewable by the ECJ/CFI. Moreover, the jurisprudence of the European Court of Human Rights (ECrtHR) makes it clear that all governmental and administrative acts that directly affect individuals must be open to review by an independent judicial body and court decisions should be open to an appeal. That is how it should be, and in most cases the ECJ/CFI ensure that the rule of law and effective judicial remedies are available to individuals affected by Community law.

However, recent and not so recent jurisprudence of the ECJ/CFI illustrates that, in the area of external trade encompassing common commercial policy (Article 133 EC) and economic and financial sanctions (Article 301, 60, 308 EC), the European courts seem to be less inclined to provide for effective judicial remedies. With the *Van Parys* and *Chiquita* rulings of the ECJ/CFI, both European courts have reiterated their long-standing jurisprudence that WTO law, including final and legally binding WTO dispute settlement reports, cannot be relied upon – neither by Member States nor by individuals – in order to challenge the validity or legality of Community law. Indeed, the ECJ/CFI do not consider WTO law as part of the norms that they can use for review, except in the very limited cases of the so-called *Nakajima/Fediol* exceptions. In other words, while the Community has failed repeatedly and continues to fail to implement legally binding WTO dispute settlement reports by refusing to modify EC law that has been judged incompatible with WTO law, this situation cannot be successfully challenged by anyone.

A similar state of affairs exists for EC measures that implement sanctions imposed by the UN Security Council. Although the CFI explicitly stated in its *Yusuf/Kadi* rulings that the affected individuals had no judicial remedies available on the international law level, the CFI did not consider itself competent to fill this lacuna by reviewing the compatibility of the EC Regulation that implemented the UN sanction with primary EC law, i.e. EC Treaty and fundamental rights as protected by the European Convention of Human Rights. The only exception to that would be if UN Security Council measures violated *jus cogens*.

These examples illustrate that in the area of external trade a special regime has been created by the jurisprudence of the ECJ/CFI, which practically excludes the availability of effective judicial remedies. The reasons for that are

quite obvious: WTO law involves huge economic interests of the EC and its Member States vis-à-vis its major trading partner the US, whereas UN sanctions concern sensitive political and diplomatic relations with the US, Russia and China. Clearly, courts prefer not to be mixed up in such sensitive cases unless absolutely necessary. While this prudent approach is understandable from the ECJ/CFI point of view and also supported by the Commission, Council and most Member States, it comes with a high price that is paid by affected individuals who are unable to exercise effectively their fundamental right to obtain judicial review. That situation is exacerbated further by the recent judgment of the ECrtHR in the *Bosphorus* case. In that case the ECrtHR stated that – in principle – it will not review national measures implementing EC law unless the fundamental rights protection within the EC is 'manifestly deficient'. Whereas the ECrtHR did not define what 'manifestly deficient' means, it concluded that the way UN sanctions are implemented by the EC and its Member States is not 'manifestly deficient'. Consequently, individuals affected by national acts implementing UN sanctions have no judicial remedies available on the European level. Presumably, the ECrtHR would come to the same conclusion regarding the non-implementation of WTO law and WTO dispute settlement reports.

Undoubtedly, the ECJ (and CFI) must feel uncomfortable with this situation, but at the same time they apparently consider it to be the sole task of the Member States to repair these shortcomings by adopting the appropriate measures in the Council and in the UN Security Council. It remains to be seen whether this approach will eventually persuade the Member States to actually improve the procedures for obtaining judicial remedies.

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