

**Milchwerke Heinz Wöhrmann & Sohn KG and Alfons Lütticke GmbH
v Commission of the European [Union]**

Joined Cases 31 and 33/62

Summary

1. *Procedure - Preliminary objection of illegality - Proceedings before a national court or tribunal - Direct application to the Court by the parties to those proceedings - Inadmissibility* ([Articles 263 and 277 TFEU])
2. *Procedure - Preliminary objection of illegality - [Article 277 TFEU] - Object*
3. *Procedure - Preliminary ruling - Proceedings before a national court or tribunal - Request addressed directly to the Court by the parties to those proceedings - Inadmissibility* ([Article 267 TFEU])

1. It is clear from the wording and the general scheme of [Article 277 TFEU], and in particular from the reference to the time limit laid down in [Article 263 TFEU], that a declaration of the inapplicability of a regulation is only contemplated in proceedings brought before the Court of Justice itself under some other provision of the Treaty, and then only incidentally and with limited effect, and that [Article 277 TFEU] does not permit the said time limit to be avoided.

2. [Article 277 TFEU] does not provide a method of recourse running concurrently with that under [Article 263 TFEU]. Its sole object is to protect an interested party against the application of an illegal regulation without thereby in any way calling in issue the regulation itself, which can no longer be challenged because of the expiry

of the time limit laid down in [Article 263 TFEU].

3. The parties to an action pending before a national court or tribunal are not entitled to make a direct request to the Court of Justice for a preliminary ruling. Neither the Treaty nor the Protocol imposes such a limitation on the powers of the national court, since a question may only be referred to the Court of Justice for a preliminary ruling under the procedure laid down by [Article 267 TFEU].

In Joined Cases

31/62-MILCHWERKE HEINZ WÖHRMANN & SOHN KG, Wesel/Rhein,

33/62- ALFONS LÜTTICKE GMBH, Germinghausen/Westphalia,

represented by Fritz Modest, Artur Heemann, Renate Menssen, Jürgen Gündisch, Heinz Binder, advocates of the Hamburg Bar, with an address for service in Luxembourg at the office of Felicien Jansen, huissier, 21 rue Aldringer,

applicants,

v

COMMISSION OF THE EUROPEAN [UNION], represented by Hubert Ehring, Legal Adviser to the European Executives, acting as Agent, assisted by Professor Ernst Steindorff of Tübingen, with an address for service in Luxembourg at the office of Henri Manzanares, Secretary of the Legal Service of the European Executives, 2 Place de Metz,

defendant,

Applications for the annulment of:

- (a) Article 3 of the Decision of the Commission of the European [Union] of 15 March 1961 concerning the fixing of a countervailing charge on imports of whole powdered milk into the Federal Republic of Germany made pursuant to [Article 44 TFEU] (Official Journal of the European [Union] No 26 of 13 April 1961, p. 505) ; and
- (b) the Decision of the Commission of 13 December 1961 extending the Decision of 15 March 1961 concerning the fixing of a countervailing charge on imports of whole powdered milk into the Federal Republic of Germany made pursuant to [Article 44 TFEU] (Official Journal of the European [Union] No 7 of 27 January 1962, p. 137) ;

or alternatively for a declaration that the said Decisions do not apply to the applicants ;

THE COURT

composed of :A. M. Donner, President, L. Delyvaux and R. Rossi (Presidents of Chambers) , O. Riese, Ch. L. Hammes (Rapporteur), A. Trabucchi and R. Lecourt, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Route

gives the following

JUDGMENT

Grounds of judgment

The applications are made in the prescribed form; they are not contested on this ground and there are no reasons for the Court to raise the matter of its own motion. The applicants base their proceedings on [Article 277 TFEU] from which they infer the existence of a right, so far as jurisdiction is concerned, to refer to the Court, for the purpose of having them declared void or inapplicable, Article 3 of the Decision of the Commission of 15 March 1961 and the whole of the Decision of the Commission of 13 December 1961.

Before examining the question whether the contested measures are of their nature decisions or regulations, it is necessary to examine whether [Article 277 TFEU] empowers the Court to adjudicate upon the inapplicability of a regulation when this is invoked in proceedings as in the present case-before a national court or tribunal.

[Article 277 TFEU] enables any party, notwithstanding the expiry of the period laid down in [the sixth paragraph of Article 263 TFEU], to invoke before the Court of Justice, for the purpose of making an application for annulment, the inapplicability of a regulation in proceedings in which it is at issue and to plead the grounds specified in [the first and second paragraphs of Article 263 TFEU].

Because [Article 277 TFEU] does not specify before which court or tribunal the proceedings in which the regulation is at issue must be brought, the applicants conclude that the inapplicability of that regulation may in any event be invoked before the Court of Justice. This would mean that there would exist a method of recourse running concurrently with that available under [Article 263 TFEU].

This is however not the meaning of [Article 277 TFEU]. It is clear from the

wording and the general scheme of this Article that a declaration of the inapplicability of a regulation is only contemplated in proceedings brought before the Court of Justice itself under some other provision of the Treaty, and then only incidentally and with limited effect.

More particularly, it is clear from the reference to the time limit laid down in [Article 263 TFEU] that [Article 277 TFEU] is applicable only in the context of proceedings brought before the Court of Justice and that it does not permit the said time limit to *be* avoided.

The sole object of [Article 277 TFEU] is thus to protect an interested party against the application of an illegal regulation, without thereby in any way calling in issue the regulation itself, which can no longer be challenged because of the expiry of the time limit laid down in [Article 263 TFEU].

It must be stressed that the Treaty clearly defines the respective jurisdictions of the Court of Justice and of national courts or tribunals. In fact, by virtue of both [Article 267 TFEU] and Article 20 of the Protocol on the Statute of the Court of Justice of the European [Union], the decision to suspend proceedings and to refer a case to this Court is one for the national court or tribunal.

If the parties to an action pending before a national court or tribunal were entitled to make a direct request to this Court for a preliminary ruling, they could compel the national court to suspend proceedings pending a decision of the Court of Justice. Neither the Treaty nor the Protocol, however, imposes such a limitation on the powers of the national court.

Although, therefore, [Article 277 TFEU] does not provide sufficient grounds to enable the Court of Justice to give a decision at the present stage, [Article 267 TFEU] does empower the Court to give a ruling if a national court or tribunal were to refer proceedings instituted before it to the Court.

In the light of all these considerations, the Court must declare that it has no jurisdiction to consider the present applications, both insofar as they seek the annulment of the contested measures and insofar as they seek to have them declared inapplicable. It is unnecessary therefore to decide upon the question of the Court's jurisdiction with regard to the exact nature of the measures of the Commission which are challenged by the applicants.

During the oral procedure the applicants alternatively pleaded [Article 263 TFEU] as ground for their applications. With regard to this it does not appear necessary to examine the admissibility of this change in the legal basis of the requests or the question whether the contested measures are decisions under

[the fourth paragraph of Article 263 TFEU], since the applicants did not in fact commence their action within the period laid down by [the sixth paragraph of Article 263 TFEU].

This period must be regarded as having commenced, at the latest, with the publication in the Bundesgesetzblatt of the Federal Republic of Germany on 1 July 1961, of the Ninth Order amending the German Customs Tariff of 1961, or if not then with the publication on 30 December 1961 of the Second Order amending the German Customs Tariff of 1962. It was then at the very latest that the contested measures must have come to the knowledge of the applicants. Their applications, which were made respectively on 4 and 9 October 1962, are therefore inadmissible insofar as they are based on [Article 263 TFEU] since they were made out of time.

The applications are therefore inadmissible in their entirety.

Costs

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

Since the applications are inadmissible, the applicants must bear the costs. On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General:

Having regard to [Article 44 TFEU], [the second sentence of Article 19(1) TEU], [Articles 263, 267, 277 and 288 TFEU];

Having regard to the Protocol on the Statute of the Court of Justice of the European [Union];

Having regard to the Rules of Procedure of the Court of Justice of the European [Union];

THE COURT

Hereby

- 1. Dismisses the applications as being inadmissible;**
- 2. Orders the applicants to pay the costs.**

Donner
Riese

Delvaux
Hammes

Trabucchi

Rossi
Lecourt

Delivered in open court in Luxembourg on 14 December 1962.

A. Van Routte
Registrar

on behalf of the
President

L. Delvaux
President of
Chamber

Robert Schütze European Union Law Lisbonised Cases