ESTUDOS EM HOMENAGEM AO PROFESSOR DOUTOR PAULO DE PITTA E CUNHA

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Comissão Organizadora

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order. Furthermore, I have argued that the interpretation of EU law is a function of a border community of actors (notably national courts). This imposes requirements on the reasoning of the Court of Justice (which must not simply decide cases but provide normative guidance to national courts as European courts). It also fosters judicial dialogue and a decentralised development of the EU legal order. In this respect, I've tried to suggest some metaprinciples which ought to guide the Court of Justice and national courts in their respective tasks. I concluded by briefly highlighting how instances of external pluralism may also affect the future role of courts and the nature of their legal reasoning.

The Principle of Continuity of Legal Structures in European Law

The missed opportunity in the *reinforcing bars* case (T-27/03 *ET AL*)

MIGUEL SOUSA FERRO[1]

When one body of laws is replaced by another, and therefore ceases to be in force, the legislator must foresee the necessary provisions that will ensure a smooth transition from the old regime to the new one. It is necessary to tackle not only the transition between substantive provisions, but also the one that occurs at the procedural level. A specific concern derives from the principle of conferral of powers: if a body or an institution may only act when the power to do so has been assigned to it by law, then it becomes fundamental to ensure that the conferring provisions in the new law encompass the power to apply the provisions of the old law to facts occurred while that law was in force.

The transitional provisions adopted (and omitted) in relation to the expiry of the Paris Treaty, which established the European Coal and Steel Community, provide a good example of this problem.

As is known, the ECSC Treaty expired on 23 July 2002, 50 years after its entry into force. In the words of the ECJ, *"the ECSC Treaty constitute*[d] *a* lex specialis *in derogation from the* lex generalis *represented by the EC Treaty"*[2]. Thus, in accordance with the principles of succession of laws, once the *lex specialis* disappeared from the community legal order, the EC Treaty's scope was extended to encompass the areas previously covered by the ECSC Treaty[3].

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O presente trabalho é uma versão alargada e traduzida do artigo *"Committing to Commitment Decisions — Unanswered questions on Article 9 Decisions"*, que será publicado na edição de Agosto de 2005 da "European Competition Law Review" (Editora Sweet & Maxwell).
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[2] Case T-6/99 *ESF Elbe-StahlwerkeFeralpi* v *Commission* [2001] ECR II-1523, para. 102.
[3] As stated by the Member States themselves: *"The subject matter covered by the ECSC Treaty will, upon its expiry, be covered by the Treaty establishing the European Community"* (Decision of the Representatives of the Governments of the Member States, meeting within the Council, of 19 July 2002 [2002/595/EC] on

As this automatic effect was insufficient to ensure the smooth transition from one Treaty to the other, it was necessary to adopt several legal provisions to fill in the gaps[4]. However, amidst the concerns with financial provisions, international agreements, statistics systems and state aid and anti-dumping law, it apparently slipped the legislator's mind to provide for the Commission's competence to continue to apply the ECSC Treaty's competition rules to facts which occurred while that Treaty was in force.

Indeed, the Commission's competence to apply ECSC Competition Law derived directly from Article 65(4) and (5) of the ECSC Treaty. Once that Treaty expired, there was no longer any written rule in the Community legal order that allowed the Commission (or any one else, for that matter) to enforce ECSC Competition Law.

And yet, anti-competitive practices or agreements could still surface to which the ECSC rules would have to be applied, presumably by the Commission. This would essentially be the case of: (i) infringements which ended before the expiry of the ECSC, as long as the limitation period had not elapsed; and (ii) infringements which continued after the expiry of the ECSC, therefore being governed successively by the ECSC and EC Treaties.

To be fair, the Commission was not entirely oblivious to the problem. It adopted a Communication where it explicitly tackled the issue of transition from ECSC Competition Law to EC Competition Law, stating:

> *"If the Commission, when applying the Community competition rules to agreements, identifies an infringement in a field covered by the ECSC Treaty, the substantive law applicable will be, irrespective of when such application takes place, the law in force at the time when the facts constituting the infringement occurred. In any event, as regards procedure, the law applicable after the expiry of the ECSC Treaty will be the EC law"*[5]

the consequences of the expiry of the European Coal and Steel Community [ECSC] Treaty on international agreements concluded by the ECSC, OJ 2002 L 194/33, Preamble §4). See also Joined Cases T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03 *SP SpA et al v. Commission* [2007] ECR Not yet published, para. 106: *"the sectors which previously came under the ECSC Treaty came, as from 24 July 2002, within the scope of application of the EC Treaty"*.

[4] The following acts were adopted to govern the transition:
- Protocol on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel, annexed to the Nice Treaty;
- Decision of the Representatives of the Governments of the Member States, meeting within the Council, of 27 February 2002 (2002/234/ECSC) on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel, OJ 2002 L 79/42;
- Decision 2002/595/EC, cited above in footnote 3;
- Council Regulation (EC) no. 963/2002 of 3 June 2002 laying down transitional provisions concerning anti-dumping and anti-subsidy measures adopted pursuant to Commission Decisions no. 2277/96/ECSC and no. 1889/98/ECSC as well as pending anti-dumping and anti-subsidy investigations, complaints and applications pursuant to those Decisions, OJ 2002 L 149/3;
- Council Regulation (EC) no. 1407/2002 of 23 July 2002 on State aid to the coal industry, OJ 2002 L 205/1;
- Regulation (EC) no. 1840/2002 of the European Parliament and of the Council of 30 September 2002 on the prolongation of the ECSC steel statistics system after the expiry of the ECSC Treaty, OJ 2002 L 279/1;
- Council Regulation (EC) no. 405/2003 of 27 February 2003 concerning Community monitoring of imports of hard coal originating in third countries, OJ 2003 L 62/1.

The Commission's observation translates general principles of succession of laws, common to both the Community legal order and to the legal order of the Member States[6]. However, even if one accepts that a conferring provision fits within the procedural box, that statement does not address the need for the existence of a procedural provision granting the Commission the power to apply ECSC Competition Law, at the time of the adoption of each Decision. In any case, for the Court of First Instance, *"the question of the competence of an institution precedes the question of the applicable substantive and procedural rules"*[7].

On 17 December 2002, the Commission adopted a Decision[8] fining several Italian undertakings for operating a cartel in the reinforcing bars market. The cartel had been in place between the years 1989 and 2000, and fell within the scope of the substantive provisions of ECSC Competition Law. Accordingly, the Commission found that there had been an infringement of Article 65(1) of the ECSC Treaty.

Even though the undertakings raised the issue of *lex mitior* in their defense, the Commission concluded that, for the purposes of this specific case, there was no relevant difference between the substantive provisions of ECSC Competition Law and those of EC Competition Law[9].

The Decision was adopted *"having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 65 thereof"*[10], no reference being made to the EC Treaty in the Decision's Preamble[11]. In other words, as was determined by the CFI, the Decision *"ha*[d] *Article 65(4)* [ECSC] *as its legal basis with regard to the finding of the infringement and Article 65(5)* [ECSC] *with regard to the imposition of the fine"*[12].

[5] Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty, OJ 2002 C 152/5, para. 31 (our underlining)

[6] *"[I]t follows from the case-law that substantive rules of Community law must be interpreted, in order to ensure observance of the principle of legal certainty and of legitimate expectations, as not applying, in principle, to situations existing before their entry into force, whereas procedural rules are of direct application"* – Para. 116 of the *Reinforcing Bars* Judgment, cited above in footnote 3.

[7] Para. 117 of the *Reinforcing Bars* Judgment, cited above in footnote 3.

[8] Decision C(2002)5087 final relating to a proceeding under Article 65 CS (Case COMP/37.956 – *Reinforcing bars*).

[9] *"... the application of the EC [Treaty] would not in the particular case under consideration be more favourable"* – Recital 334 of the *Reinforcing Bars* Decision, cited above in footnote 8.

[10] Preamble of the *Reinforcing Bars* Decision, cited above in footnote 8.

[11] As was highlighted by the CFI, *"Community measures refer in their preamble to the legal basis which enables the institution concerned to act in the field in question"* – para. 71 of the *Reinforcing Bars* Judgment, cited above in footnote 3.

[12] Para. 76 of the *Reinforcing Bars* Judgment, cited above in footnote 3.

The Commission's choice of legal basis wasn't actually justified. Recitals 348 to 352 of the Decision did discuss the issue of succession of laws, but they appeared to do so solely from the perspective that had already been explored in the above mentioned Communication. The sole arguments put forward by the Commission which could assist us in our quest for the basis for its competence were that: *"the EC Treaty and the ECSC belong to the same legal order"*[13], which is indivisible, and that there is a *"single institutional framework"* and, specifically, a single Commission[14].

At the hearing before the CFI, however, the Commission argued that the Decision had "also" been adopted on the basis of Regulation no. 17. This was surprising for two reasons. First, because *"neither the preamble nor the grounds of the contested decision contain*[ed] *a reference to Article 3 or Article 15(2) of Regulation no. 17* [i.e. the conferring provisions for EC Competition Law] *as a legal basis"*[15]. Second, because those conferring provisions only grant the Commission the power to apply EC Competition Law, not ECSC Competition Law.

In any case, after an exhaustive analysis, the CFI concluded that *"the contested decision was based on Article 65(4) and 65(5)* [ECSC] *alone"*[16]. Once that finding was in, the conclusion was seemingly inevitable: the Commission could not adopt a Decision on the basis of provisions which were no longer in force at the time the measure was adopted[17].

In reaching that conclusion, the Court pointed out that the *"indivisibility of the Community legal order"* and the *"single institutional framework (...) is not such as to confer on the Commission a competence* [to apply ECSC Competition Law] *(...) following expiry of the ECSC Treaty"*, and that *"within each treaty framework, the institutions are competent to exercise only those powers which that treaty conferred upon them"*[18].

The arguable evolution of the Commission's position in mid hearing might have had something to do with the Court's questions concerning a little known judgment from 1969.

Back in the year of Woodstock, the ECJ replied to a referral from a national court on the interpretation of a provision of the Protocol on the Privileges and Immunities of the ECSC[19].

Specifics of the national case aside, the issue of the Court's jurisdiction was raised. Under the said Protocol, the Court had jurisdiction to answer referrals

[13] Recital 348 of the *Reinforcing Bars* Decision, cited above in footnote 8.
[14] Recital 349 of the *Reinforcing Bars* Decision, cited above in footnote 8; Para. 108 of the *Reinforcing Bars* Judgment, cited above in footnote 3.
[15] Para. 79 of the *Reinforcing Bars* Judgment, cited above in footnote 3.
[16] Para. 101 of the *Reinforcing Bars* Judgment, cited above in footnote 3.
[17] Para. 120 of the *Reinforcing Bars* Judgment, cited above in footnote 3.
[18] Para. 115 of the *Reinforcing Bars* Judgment, cited above in footnote 3, quoting Case C-176/03 *Commission v Council* [2005] ECR I-7879, paras. 38 to 53.
[19] Case 23/68 *Klomp v Inspektie der Belastingen* [1969] ECR 43.

on the interpretation of the respective provisions. However, this Protocol was no longer in force by the time the national court submitted the referral. It had been substituted by a new Protocol on Privileges and Immunities, under the terms of the Merger Treaty of 8 April 1965. In substance, the two Protocols were identical. Furthermore, the Court was again given jurisdiction to answer interpretation referrals relating to the new Protocol[20]. However, since the old Protocol had disappeared from the Community legal order, there was no longer a provision granting the Court jurisdiction over that Protocol.

In short, in the *Klomp* case:

(i) there was a substitution of a material provision by another one, of identical content;
(ii) the power to interpret/apply the old and the new provisions was awarded to the same institution; and
(iii) the legislator forgot to award that institution, in the new provisions, the power to continue to interpret/apply the old provisions to facts occurred while they were still in force.

Every one of those characteristics is also true of the *Reinforcing Bars* case:

(i) ECSC Competition Law was replaced by EC Competition Law, identical for the purposes of this case;
(ii) the Commission was given the power to apply both;
(iii) the legislator overlooked awarding the Commission the power to continue to apply the ECSC rules to infringements which occurred while the latter were in force.

In the *Reinforcing Bars* case, the Commission's Decision was annulled because it was based exclusively on a legal provision which no longer existed in the Community legal order.

Differently, in *Klomp* the ECJ found that it had jurisdiction to rule on the request for interpretation, based on the following assertions:

"The procedure provided for by [the conferring provision of the old Protocol], *which was applicable at the time when the dispute arose, and the provisions on preliminary rulings for interpretation of the* [EC and EAEC Treaties] *have an identical objective, namely to ensure a uniform interpretation and application of the provisions of the Protocol in the six Member States.*

"In accordance with a principle common to the legal systems of the Member States, the origins of which may be traced back to Roman Law, when legislation is amended, unless the legislature expresses a contrary intention, continuity of legal structures must be ensured."[21]

[20] Under Article 30 of the Merger Treaty.
[21] Paras. 12-13 of the *Klomp* Judgment, cited above in footnote 19 [our underlining]. The official English version of this judgment has been amended here, at the end of the quote, to take into account the original French version of the judgment: *"... assurer (...) la continuité des structures juridiques"*.

In other words, according to the ECJ, in the specific case of succession of laws described above (the material provisions being identical in content and objective), the institution which was granted the power to interpret/apply both the old and the new provisions continues to hold that authority, even in the absence of a conferring provision relating to the old provisions. This was a requirement of the general principle of the "continuity of legal structures".

Accordingly, it could be argued that the Commission could have validly adopted the Decision in the *Reinforcing Bars* case under both the old and the new conferring provisions, invoking the principle of the continuity of legal structures as used by the ECJ in *Klomp* (or other general principles that are at the basis of this idea)[22].

It would certainly be a convenient way out of an embarrassing conundrum. Clearly, it seems excessively formal to argue that, in a situation such as the one described above, the institution in question has lost the power to apply the old provisions, due to an oversight from the legislator.

There is no legitimate expectation of individuals to be protected by the Court. To choose the formal approach to conferral of powers in such a case would result in granting amnesty to undertakings that infringed Community Law. Such an obvious dilapidation of the effectiveness of Community Law would sit at odds with the case-law of the Court, which has not hesitated to derive conferrals of powers from the necessity of such powers to guarantee the *effet utile* of Community Law[23].

That being said, the ECJ's justification for the principle of the continuity of legal structures left much to be desired. The Court merely claimed that this was a general principle common to the Member States, and that its origins could be traced back to Roman Law. As to the latter point, the Court referred to two

[22] Although AG Gand had suggested that the Court base its competence on the new conferral provision alone, this solution was apparently not followed by the ECJ, which preferred to consider all the provisions in question and to quote the principle of the continuity of legal structures.

[23] Thus, in one of the most famous judgments of the ECJ, the Court ordered the referring national court to deem itself competent to set aside a national rule incompatible with Community Law, even though that court was subject to the principle of conferral of powers and the national law forbade it from doing so without a prior referral to the Constitutional Court. According to the ECJ, a different interpretation *"would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community"* (Case C-106/77 *Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para. 18, our underlining).

Furthermore, the principle of effectiveness has been used as grounds not only to expand the powers of an institution, but also the competences of the Community itself. Until Case C-176/03 *Commission v Council* [2005] ECR I-7879, most assumed that the Community did not have competences within the criminal sphere, and that these were to be found only within the 3rd Pillar of the EU Treaty. In this judgment, however, the ECJ concluded the following: *"while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective"* (paras. 47-48, our underlining).

passages of the Justinian Code which do not actually appear to imply what the Court read in them[24]. A.G. Gand had urged an interpretation of the law guided by the intention of the legislator, who clearly had not foreseen the problem.

Poorly justified as it might have been, the principle applied by the ECJ in *Klomp* is a reasonable solution, which can be supported with many different legal arguments. More importantly, this was, until very recently, the only ruling of the ECJ on this matter, and should thus have been complied with.

The CFI could not revisit this issue in the *Reinforcing Bars* case, since the Commission had based its decision exclusively on the conferring provision which was no longer in force. It was, thus, a missed opportunity.

Incidentally, it should be noted that the Commission has adopted at least one more Decision on the basis of conferring provisions of the expired Treaty, with apparently no significant change in relation to the position it put forward in the *Reinforcing Bars* Decision[25].

It should also be considered that the Court has continued to interpret/apply the provisions of the ECSC Treaty and of the ECSC Statute of the ECJ after 23 July 2002[26], even though there are no provisions in force allowing it do so

[24] §1.3.26: *"non est novum, ut priores leges ad posteriores trahantur"*; §1.3.28: *"Sed et posteriores leges ad priores pertinent, nisi contrariae sunt, idque multis argumentis probatur"*.

[25] Commission Decision of 20 December 2006 (2007/486/EC) relating to a proceeding under Article 65 of the Treaty establishing the ECSC (Case no. COMP/F/39.234 – *Alloy surcharge – readoption*), O.J. L 182/31, 12/07/2007.

[26] See the following cases:
- Joined Cases C-74/00 P and C-75/00 P *Falck SpA et al v Commission* [2002] ECR I-7869;
- Case C-334/99 *Germany v Commission* [2003] ECR I-1139;
- Case C-197/99 P *Belgium v Commission* [2003] ECR I-8461;
- Case C-176/99 P *ARBED v Commission* [2003] ECR I-10687;
- Case C-179/99 P *Eurofer v Commission* [2003] ECR I-10725;
- Case C-182/99 P *Salzgitter v Commission* [2003] ECR I-10761;
- Case C-194/99 P *Thyssen Stahl AG v Commission* [2003] ECR I-10821;
- Case C-195/99 P *Krupp Hoesch Stahl AG v Commission* [2003] ECR I-10937;
- Case C-196/99 P *Siderúrgica Aristrain Madrid SL v Commission* [2003] ECR I-11005;
- Case C-198/99 P *Ensidesa v Commission* [2003] ECR I-11111;
- Case C-199/99 P *Corus UK Ltd v Commission* [2003] ECR I-11177;
- Joined cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power et al v Commission* [2003] ECR I-11421;
- Case C-224/03 *Italy v Commission* [2003] ECR I-14751;
  (The ECJ dismissed Italy's application concerning the interpretation of the ECSC Treaty on the grounds that it required a declaratory judgment and, therefore, did *"not fall within any of the categories of action which the Court has jurisdiction to hear"*, apparently taking for granted that the Court continued to have jurisdiction to hear any applications concerning the ECSC);
- Case T-79/03 R *IRO v Commission* [2003] ECR II-3027;
  (The President of the CFI applied the provisions of the EC Treaty in relation to the Court's competence to order interim measures in a case relating to the application of the ECSC Treaty – the interim measures had been requested by one of the applicants in the *Reinforcing Bars* case);
- Case T-308/00 *Salzgitter AG v Commission* [2004] ECR II-1933;
- Case T-156/94 *Siderúrgica Aristrain Madrid v Commission* [2004] ECR;
- Joined Cases T-107/01 and T-175/01 *Sacilor v Commission* [2004] ECR II-2125;
- Case C-501/00 *Spain v Commission* [2004] ECR I-6717;
- Case C-57/02 P *Acerinox v Commission* [2005] ECR I-6689;

after the expiry of that Treaty, and, in all but one case, with no discussion of whether it is still competent to do so[27].

On 18 July 2007, In *Ministero dell'Industria v Lucchini* [28], wherein a national court had referred to the ECJ a question on the interpretation of the ECSC Treaty, the ECJ's Grand Chamber briefly addressed the issue of whether it was competent to reply to that referral:

> *"... it should be noted that the Court retains jurisdiction to deliver preliminary rulings on questions referred to it concerning the interpretation and application of the ECSC Treaty and on measures adopted under that Treaty, even if those questions are referred to it after the expiry of the ECSC Treaty. Although Article 41 of the ECSC Treaty may no longer be applied in those circumstances to confer jurisdiction on the Court, it would be contrary to the objectives and the coherence of the Treaties and irreconcilable with the continuity of the Community legal order if the Court did not have jurisdiction to ensure uniform interpretation of the rules deriving from the ECSC Treaty, which continue to produce effects even after the expiry of that Treaty (see, to that effect, Case C-221/88 Busseni [1990] ECR I-495, paragraph 16). None of the parties which submitted observations has, moreover, disputed the Court's jurisdiction in that regard"*[29].

As it had stated back in 1969, the Court once again highlighted the idea of "continuity" of the legal order, and invoked the principle of the effectiveness of Community Law.

In conclusion, it should be stressed that the principle of the continuity of legal structures, as presented in this paper, constitutes an apparent exception to the principle of conferral of powers. But it is an extremely limited exception, applicable only in the rarest of circumstances, dependent on a clear intention of the legislator (despite the oversight), and justified by the principle of the effectiveness of Community Law and by the absence of any legitimate

– Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp Stainless et al v Commission* [2005] ECR I-6773;
– Case T-166/01 *Lucchini v Commission* [2006] ECR II-2875;
– Case C-263/06 *Carboni e derivati Srl v Ministero dell'Economia e delle Finanze* [2008] ECR not yet published;
– Case C-408/04 *Commission v Salzgitter AG* [2008] ECR not yet published.

[27] Indeed, the EC and Euratom Treaties' conferring provisions relating to the Court all refer exclusively to the interpretation of the respective Treaty. An apparent exception is Article 230 EC, which refers simply to acts adopted (*inter alia*) by the Commission, but this provision must be interpreted in light of Article 220 and in the spirit of the remaining provisions of this Section, as well as under the general principles of law, all indicating that the provisions for judicial mechanisms established by the EC Treaty, unless explicitly stated otherwise, related exclusively to the provisions of this Treaty and to the acts adopted under it (and not to acts adopted under another Treaty).

[28] Case C-119/05 *Ministero dell'Industria v Lucchini* [2007] ECR I-6199.

[29] Para. 41 of the *Ministero dell'Industria v Lucchini* Judgment, cited above in footnote 28 (our underlining). The *Busseni* case, quoted by Court, is similar but not precisely identical to the situation under analysis in this judgment and in this paper. In that case, the question raised was whether the ECJ had jurisdiction to answer questions on the interpretation of the ECSC Treaty, whereas Article 41 ECSC only foresaw referrals from national courts relating to issues of validity. The Court's answer was based on a joint interpretation of the 3 founding Treaties, based on the idea of the single legal order and of the shared objective of ensuring uniformity in the application of Community Law.

expectations of private individuals to be protected by the Court. In that sense, it is not important whether one considers this an autonomous principle, or whether one retains only the content of the principle of the continuity of legal structures and considers it a natural consequence of other general principles.

While the Court has continued to apply this principle in practice, it has done so mostly tacitly and without discussion. There will certainly be opportunities in the future for further clarification (e.g. when establishing competence to rule on cases which still relate to the application of the ECSC Treaty). An explicit and more detailed clarification of this issue, in general terms, would go a long way to reducing legal uncertainty in this regard, and also to avoiding the appearance of a double standard in the application of the principle of conferral of powers to the acts of the Court and of the remaining institutions.