Kluwer International Tax Blog

Judicial Infringements at the Court of Justice – A Brief Comment on the Phenomenal Commission/France (C-416/17)

Daniel Sarmiento (Universidad Complutense de Madrid/Uria Menendez) · Thursday, October 11th, 2018

One of the fascinating features of EU law is that no matter how well-established its classics may be, they are revisited over and over again. If you thought you had seen it all about preliminary references, think twice. Always think twice, because you can never be fully sure until the Court's next judgment.

Last week, many of us saw something that could have happened years ago, but which has taken more than six decades to occur. For the very first time, the Court of Justice has ruled that a Member State failed to fulfil its obligations under Article 267 TFEU in an infringement action, as a result of the decision of a national Supreme Court to refuse to make a preliminary reference. It's a first that could become a ground-breaking development for the future. It's also a first that could alter the way in which Supreme Courts cooperate with the Court of Justice and their executives. The complex repercussions of this judgment are still early to envisage, but it is clear that the decision is a tremendous step forward in the development of a coherent system of remedies in Europe.

But first, the facts and the background of the case.

In the year 2011, in the judgment in the case of Accor (C-310/09), the Court ruled that France had breached the Treaties due to the difference in tax treatment of dividends according to the Member State of residence of subsidiaries. The Court also ruled on the conditions in which the evidence required by the tax authorities could be established. Shortly after, the Conseil d'État followed the Court's decision, but it ruled on a point that had not been addressed in Accor: the tax treatment applicable for the case of sub-subsidiaries. Even though the Court rendered a decision after Accor on this point, the Conseil d'État considered that the precedent was distinguishable. As a result, and with no prior preliminary reference to the Court, the Conseil d'État ruled that the tax paid by a sub-subsidiary did not have to be taken into account in determining advance payments to the parent company. The Conseil d'État also established certain conditions on the evidence that must be provided by the company to the tax authorities, in terms not fully coincidental with the ones enunciated by the Court in Accor.

Following the judgments of the Conseil d'État, the Commission received several complaints from undertakings unable to request reimbursements of advance payments made by French companies which had received dividends of foreign origin. The Commission sent a letter of formal notice to

the French authorities and eventually sent a reasoned opinion which, finally, ensued in an action of infringement on the grounds of Article 258 TFEU. Among the grounds of review, the Commission introduced a novelty. For the first time, a Member State was brought before the Court of Justice due to a failure of its supreme court to make a preliminary reference pursuant to the third paragraph of Article 267 TFEU.

In a ground-breaking judgment rendered on 4 October 2018, the Court sided with the Commission and declared that the Conseil d'État had erred in law when refusing reimbursements of the advance payments of sub-subsidiaries in another Member State. However, the Court rejected the Commission's concerns on the grounds based on the evidentiary requirements imposed by the Conseil d'État. But having declared one of the three alleged breaches on the substance of the case, the Court went on to determine whether the Conseil d'État should have made a preliminary reference in the case at hand.

According to the Court, the Conseil d'État faced a legal framework in which the judgment in Accor made no specific reference to sub-subsidiaries. Therefore, despite the fact that the Court had later rendered a ruling on the matter, it had not done so on the specific point in question before the French court. In addition, the Conseil d'État decided to depart from the case-law of the Court following Accor, with the argument that the said case-law concerned UK law, which differed from French law. The Court rejected this approach and stated that, precisely because the Conseil d'État had confirmation that the Court's case-law was developing in a different direction to the one that the Conseil had in mind, it was under a particularly imperative duty to make a preliminary reference. As a result, the French Republic (i.e., the Conseil d'État) failed to fulfil its obligations under the third paragraph of Article 267 TFEU.

This might sound like a rather obscure and technical judgment, but it hides a revolutionary development for the EU's judiciary.

First, the Court has sent a powerful message to national supreme courts, a message that complements its decision in Ferreira da Silva (C-160/14), a case in which, for the first time, it declared a breach of the Cilfit doctrine of acte claire. Now the Court takes a step forward and goes as far as declaring a breach by a Member State, in the context of an infringement action, when the Cilfit doctrine is breached by a supreme court. Therefore, Cilfit has fully sharpened its teeth and the Court is willing to bite with it.

Second, the Court has come full circle in a process that has taken almost fifteen year to develop. In Commission/Italy (C-129/00), the Court dealt for the first time with the tricky question of whether a national judiciary's decisions can trigger a Member State's breach of EU law in the context of an infringement procedure. The case was deliberated at the same time as Köbler, but the ruling tried to strike a balance: the Court stated that indeed, a case-law of the national judiciary could entail a breach of EU law subject to infringement proceedings, but not as a result of isolated judgments, but as the outcome of a consolidated case-law, or a principled single decision. In the case at hand, Italy was declared in breach of EU law, but not due to the judgments of the judiciary, but to the legislature's ambiguous rules (which led the judiciary to a set of decisions in breach of EU law).

A few years later, in Commission/Spain (C-154/08) the Court declared a breach of EU law as a result of a single judgment of a national supreme court. That was the first time that the Court took such a step, but the breach only concerned the substance of the case. Although the Commission has raised the fact that the Spanish Supreme Court made no reference to the Court, the judgment

argued that the Commission had not raised this ground of review until the action was filed. Thus, the new ground of review was declared inadmissible.

And now, at last, almost fifteen years later, we have the final piece of the puzzle. The Court is clear when it states that the French Republic is in breach of the Treaties for having failed to comply with the duty imposed on the third paragraph of Article 267 TFEU.

Third, the Court has sent the Commission a very clear signal: if national supreme courts misbehave, and they do so without making a reference, the last chance for the losing party will be an infringement action, a remedy that is in the sole hands of the Commission (as well as a Member State, but we all know the use of that). Unfortunately, it is not uncommon to find judgments of national supreme courts that openly depart from the Court's case-law. It is very frustrating to see that the only alternative to that outcome is an action for damages against the Member State for breach of EU law, particularly when the action has to be brought against the judiciary itself. In such cases, the helping hand of the Commission can be a very valuable tool in overcoming arbitrary or simply erroneous judicial decisions of supreme courts (which every now and then, unfortunately, do happen).

This last point leads me to a final observation, which raises a more conceptual issue. If the Commission is entitled to bring an action before the Court as a result of a supreme court's failure to interpret EU law correctly and to make a preliminary reference, the infringement procedure thus becomes a pseudo-direct appeal against national court decisions before the Court of Justice. It is exactly the kind of remedy that the Treaties avoided for decades: direct actions against national judgments. A system of the kind would fully integrate national judiciaries with the EU court system, and the Member States, when drafting the Treaties, were well aware of the impact of such development and had the caution to not step so far. But after Commission/France, with the help of the Commission and motivated litigants, we are on the road towards a system in which national judicial decisions can be subject to review, in a direct and transparent way, by the Court. The EU judicial system is certainly more federal as of 4 October 2018. And in genuine EU method, the decision was hardly noted, it did not make the news, it was rendered by a chamber of five judges and, nevertheless, its effects will be felt for years and years to come. That's a classic methodology, the methodology of discrete disruption, that will never die at the Court.

This post was first published on https://despiteourdifferencesblog.wordpress.com/

---

content and practical tools to provide answers. You can easily access the tool from every preferred location. Are you, as a Tax professional, ready for the future?

Learn how **Kluwer International Tax Law** can support you.

This entry was posted on Thursday, October 11th, 2018 at 9:35 am and is filed under International Tax Law, Tax Treaties, Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.