THE COURT OF JUSTICE OF THE EU: THE CASE LAW FOR COMPANIES AND INDIVIDUALS FROM RUSSIA

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Introductory remarks

The Court of Justice of the European Union is a non-political institution of the EU. Its function is to ensure that the rights of all citizens and non-citizens are protected and respected during the interpretation and application of the EU Treaties. In accordance with the Lisbon Treaty (Article 19 TEU) the Court of Justice of the European Union is made up of the European Court of Justice (ECJ); the General Court or former Court of First Instance (CFI); and specialised courts.

The Court of Justice of the European Union examines

- Cases brought by Member States, EU Institutions, private individuals and legal entities (direct jurisdiction);
- in pre-judicial order, at the request of the national courts of Member States concerning the interpretation of EU law and the validity of EU laws (indirect jurisdiction);
- Other instances, envisaged by the Treaties.

Article 263 (4) of the Treaty on the Functioning of the European Union (TFEU) endows any individual or legal entity with the right to appeal against the actions and rulings of EU Institutions to the Court of Justice the European Union. This enables not only private individuals in the Member States to gain its protection, but also citizens of third countries, including Russia as well as other countries of the Commonwealth of Independent States (C.I.S.). Here we consider the experience of such appeals and complaints to the Court of Justice by individuals and legal entities from Russia countries and the practice of the Court of Justice in examining, in pre-judicial order, applications made by the national courts of Member States.

The ECJ and Soviet Companies

The first attempted recourse by Soviet applicants to the judicial procedures of the European Community was made many years ago. In 1983 the Court of Justice of the European Communities (as it was then entitled) in Luxembourg agreed to examine the action brought by Raznoimport, a Soviet foreign trade organisation, against the European Commission[1]. Raznoimport

[1] Case 120/83R V/O Raznoimport v. Commission [1983] ECR 02573.

disputed the temporary anti-dumping duties that the Commission had imposed on imports of nickel from the USSR. The action was accepted for consideration but not examined: the parties managed reached a compromise agreement out of court.

The first full lawsuit to come before the ECJ was the *Technointorg* case [2], examined in 1988. Technointorg brought two actions, one against the Commission in 1986, another against the Council in 1987, disputing the introduction, of temporary and final anti-dumping duties on certain deep-freezers manufactured in the Soviet Union. After seeking and obtaining the opinion of its Advocate General Sir Gordon Slynn, the ECJ ruled that the plaintiff's demand for the abolition of anti-dumping sanctions should not be upheld[3]. Fundamental differences in the operation of market and State-run economies influenced the examination of this application. Soviet trade organisations lacked experience in fighting cases before the ECJ, and this also worked against the plaintiff. Finally, the closed nature of the Soviet economy made it impossible to submit all of the information required by European institutions – the deep-freezers were being produced in the same factories as weapons for the defence industry.

It may seem appropriately symbolic that this was the case that the ECJ chose to examine during the "Cold War". There is also a certain paradox in the situation. As well-known the History of the relations between the Soviet Union and the European Communities began with adoption of the Joint declaration on establishing the official relations between the CMEA and the Communities of 25 June 1988. The Soviet Union did not officially recognised the European Community until June 1988, yet five years earlier Soviet trade organisations had already begun applying to the Court of Justice to defend their rights. At the end of the 1980s Soviet organisations wanting to challenge the EC's anti-dumping sanctions on imports from the USSR tried another tactic, they submitted actions through the joint ventures that were popular at the time. All of the cases were accepted for consideration but not one led to a positive outcome[4].

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[2] Joined cases 284/86 and 77/87 Technointorg v. Commission and Council [1988] ECR 06077.

[3] For more detail, see E. Vermulst, "Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 July 1988-30 June 1989", *European Journal of International Law*, 1990 (Vol.1), No. 1, p. 350; P. Eeckhout, "The Technointorg Judgment of the European Court of Justice and the Issue of Non-Market Economy Dumping", *World Competition*, 1989 (Vol. 13), Issue 4, pp. 39-54.

[4] Joined cases C-304/86 and C-185/87 Enital SpA v. Commission and Council [1990] ECR I-02939; Joined cases 305/86 and 160/87 Neotype Techmashexport GmbH v. Commission and Council [1990] ECR I-02945; Joined cases C-320/86 and C-188/87 Stanko France v. Commission and Council [1990] ECR I-03013.

Legal background for the relations between the USSR and the Communities was created at December 1989 with signing of the Agreement between the USSR and the EEC / Euratom on trade and commercial and economic cooperation[5]. This Agreement was completely dedicated to the development of the economic relations between the USSR and the Communities, granting the most-favored nation treatment to each Party, gradual prohibition for «special quantitative restrictions» on import from the USSR, diversification of mutual trade, encouragement of the business relations between individuals and the other trade, commercial and economic matters. However, the implementation of this Agreement was failed because of the withdrawal of the USSR in 1991.

Post-Soviet Era for companies from Russia

Collapse of the entire Communist block in 1989 and consequent dismemberment of the USSR has led to comprehensive political and economical reforms in the newly born post Soviet countries. The former Soviet Republics found a new form of cooperation between them. The Commonwealth of Independent States was founded by an agreement signed by Russia, Ukraine and Belarus in December 1991[6]. This regional organisation comprised all the former Soviet republic, with the exception of the three Baltic States[7]. However, the EU and the C.I.S. have not established the official relations yet.

In 1991-1992, the new governments in the post-Soviet area began market reforms. Yet the EC continued to classify these countries as having a managed, State-run economy. Partnership and Cooperation Agreements with the EU signed in 1994-1997[8] did not preclude a harsher policy towards exports from the C.I.S countries on anti-dumping rules than those enforced against countries with a market economy. The Partnership and Cooperation Agreements were concluded by the European Union with all C.I.S. countries[9]. Contents and texts of such agreements coincide, so Partnership and Cooperation Agreement may be regarded as "a pattern agreement". The PCA with Russia became a "prototype" for all the rest Partnership and Cooperation Agreements. The PCAs with other C.I.S. countries were based on the experience of the PCA with Russia.

After the USSR ceased to exist and the Soviet system collapsed, little changed for companies from Russia working in the Community's domestic

[5] OJ L 68, 15.3.1990, P. 1.
[6] See 31 ILM (1992) 143.
[7] Now it includes 11 post-Soviet countries; Georgia withdrew from the C.I.S. in 2008.
[8] EU-Tajikistan PCA signed in 2003.
[9] However, PCAs with Belarus and Turkmenistan have not entered in force.

market with regard to anti-dumping procedures. During the 1990s there were several unsuccessful attempts by Russian companies to appeal to the Community's judicial institutions against such anti-dumping duties. In the case of the *International Potash Company v. Council of the European Union*, the plaintiff, a Russian company, applied directly to the Court of First Instance[10]. In the *Perestroika Potash Import* case, on the other hand, the action was submitted in the name of an EC-registered subsidiary of the Russian parent company[11]. And it was at this time that Euromin as a European company with subsidiaries in Russia made an interesting application to the CFI against Council[12].

Companies from Russia before the EU Court of Justice in 21st century

Changes began only in 21st century when Russia was given the status of countries with a market economy. These were reflected in the terms of the EU's Basic Anti-Dumping Regulation[13].

Russia was given this status in 2002. The change in status, and the development of the Russian economy as a whole, led to the growth in the number of attempts by Russian companies to defend their rights at the level of the European Union. At the beginning of the 21st century the appeals remained unsuccessful. In 2007, the Swiss subsidiary of the Russian company SUAL brought the first ever successful appeal against EU anti-dumping sanctions in the *Aluminium Silicon* case [14]. The true breakthrough, however, only came a year later. On 10 September 2008, the CFI issued a ruling in the *Kombinat* case, recognising the fairness of the objections raised by the Kirovo-Chepetsky Chemical Kombinat (Kirovo-Chepetsk, Kirov Region) regarding EU anti-dumping measures being applied to its ammonium nitrate output[15]. This was an unprecedented decision.

For the first time, a Russian company had been able to use the judicial system of the European Union to win the Court's approval in its own right,

[10] Case T-87/98 International Potash Company v. Council [2000] ECR II-03179.
[11] Case T-164/94 Ferchimex SA v. Council [1995] ECR II-02681
[12] Case T-597/97 Euromin SA v. Council [2000] ECR II-02419.
[13] Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ L 343, 22.12.2009, P. 51).
[14] Case T-107/04 Aluminium Silicon Mill Products GmbH v. Council [2007] ECR II-00669.
[15] Case T-348/05 JSC Kirovo-Chepetsky khimicheskij kombinat v. Council [2008] ECR II-00159.

not through an EU-based subsidiary[16]. A Russian legal entity had won a case against the main legislative body of the European Union. This was yet further confirmation of a shift in the attitudes of the EU's judicial system towards Russian companies. Today there is greater confidence and trust in these companies. The Courts act as if they are dealing with equal and full participants in the EU domestic market, whose status is determined by their attachment to a State that is not a member of the Union, and with the right to be defended under EU legislation. The *Kombinat* case reflected positive trends in the evolution of trading and economic ties between Russia and the European Union. Today this has reached the stage of mutual penetration of markets and the creation of systems of guarantees for those who are active there. This is no longer an issue that is confined to Russia's foreign trade and economic organisations in their dealings with the EU: it is a problem that must be resolved by the constituent bodies of the Union itself.

The *Kombinat* case was only one in a series of analogous actions brought before the General Court by Russian commodity producers (exporters). By early 2010, the General Court had officially accepted the following cases for examination: T-80/07 *EuroChem v. Council*; T-190/08 *CHEMK/KF v. Council*; T-234/08 *EuroChem v. Council*; and T-235/08 *Acron/Dorogobuzh v. Council*. The *Kombinat* case also served to stimulate objections to anti-dumping duties from other former Soviet republics in the Commonwealth of Independent States: for example, the Nikopolsky pipe plant and the Nizhnedneprovsky Tube Rolling Plant from Ukraine (case T-249/06)[17], and the Kazakhstan Transnational Company Kazchrome based in Aktyubinsk (case T-192/08)[18], and Rusal Armenal from Armenia (case T-512/09)[19]. The Nikopolsky pipe plant and the Nizhnedneprovsky Tube Rolling Plant have already succeeded in the General court in mentioned case. There is a marked contemporary trend towards defending the lawful interests of producers from the former Soviet Union from the anti-dumping policies of the EU, and such measures are increasingly being disputed through the judicial institutions of the European Union.

Among the series of actions by Russian legal entities already examined by the CFI, the *Alrosa v. Commission* case[20], which came before the CFI in

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[16] See P.A. Kalinichenko, "The Kirovo-Chepetsky chemical combine v. the EU Council, and the defence of Russian business interests against EU anti-dumping policies", *Zakon*, 2009, No 4, pp. 194-202.

[17] Case T-249/06, Interpipe Niko Tube ZAT and Interpipe NTRP VAT v Council // ECR [2009] II-00383.

[18] Case T-192/08: Action brought on 21 May 2008 — Transnational Company Kazchrome and ENRC Marketing v Counci (OJ C 197, 2.8.2008, P. 26).

[19] Case T-512/09: Action brought on 21 December 2009 — Rusal Armenal v Council (OJ C 80, 27.3.2010, P. 28).

[20] Case T–170/06 Alrosa v. Commission [2007] ECR II-02601.

2007, stands out from the rest. This did not concern anti-dumping regulations but the policies of the EU regarding competition. The CFI concluded that in regulating the competitive environment in the market for rough diamonds, the Commission had violated the principles of proportionality, and the terms of Article 41 (2) of the EU Charter on fundamental rights that guarantee right to be heard. The Commission thereby infringed the interests of the Alrosa company, registered in the town of Mirny in Russia's north-eastern Sakha (Yakut) republic. The CFI accordingly upheld the claims of the Russian diamond mining company. The Commission appealed against this judgment and the ECJ annulled the decision of the CFI and dismissed the Alrosa's action.

The case represented a completely new category in the experience of Russian business, and was evidence that Russia has established itself on the EU's domestic market. Further confirmation is provided by the action against the Commission brought to the Court of Justice by Norilsk Nickel Harjavalta Oy, a Finnish subsidiary of Russia's Norilsk Nickel company[21]. The action demanded the abolition of the Commission Directive 2008/58/EU (21 August 2008) which, taking into account technical progress, updated the Council's directive on dangerous materials[22]. The interests of Russian business on the EU domestic market today, therefore, are not limited to merely exports.

The same words we can say in relation to companies from other C.I.S. countries. The situation in the field of competition had place in the case *Donbass/ISD Polska*[23]. Industrial Union of Donbass established in Donetsk (Ukraine) and ISD Polska sp. z o.o. established in Warsaw (Poland) brought actions against the Commission in relation state aid in steel industry. The General Court dismissed the actions, but applicants appealed against the judgment to the ECJ.

Cases Brought by Individuals

During this period of development in relations between Russia and the EU, the Court of Justice of the Union has also examined several cases concerning the rights and interests of citizens of Russia.

Two of the cases were examined within the framework of pre-judicial requests from national courts of the Member States. In the case of *Vera Jacquet* (1997), the ECJ did not recognise the grounds for applying an equal treatment of free movement and social benefits of the Union to this Russian

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[21] OJ C 44, 21. 02. 2009, p. 53.
[22] OJ L 246, 15. 09. 2008, pp. 1-191.
[23] Joined cases T-273/06 and T-297/06 ISD Polska sp. z o.o. and Industrial Union of Donbass Corp. v Commission [2009] ECR II-02181.

citizen [24]. In the *Simutenkov* case (2005) important conclusions were drawn in favour of the provision of such opportunities on the basis of the Partnership and Co-operation Agreement between Russia and the EU[25]. Eight years separated the two cases. That of *Jacquet* was heard before the PCA came into force. If examined today, the subsequent development of EU legislation of guarantees for employees from third countries in the 21st century might have permitted the ECJ to reach a different decision.

The *Simutenkov* case proved of the greatest importance in elaborating the legal expression of the treaty obligations in EU-Russia relations. It not only asserted an equal treatment for the labour rights of Russian citizens on EU territory, but also offered the possibility of the direct application of those and other articles of the PCA to the territory of the Member States. The *Simutenkov* case marked yet another contribution by the ECJ to the development of the principle of the direct action of EU provisions, which had taken shape in its case law in the 1960s and 1970s. It is, in all probability, the most widely known "Russian" case that the ECJ has examined[26].

The latest case to concern the interests of a Russian citizen is that of *Goncharov v. OHIM* (2010). It was examined by the General Court in January 2010[27]. Goncharov, an inhabitant of Moscow, disputed the refusal of the Office for Harmonisation in the Internal Market (OHIM) to register a trade mark in the EU. The General Court, however, considered that OHIM's decision was lawful and declined the plaintiff's lawsuit. Analogous situation had place in *SOLVO* case where Russian citizen Grebenshikova supported the position of the OHIM against Volvo Trademark Holding[28].

30 November 2009 the Court of Justice considered the case C-357/09 *Kadzoev (Huchbarov)*[29] at the request of the Bulgarian national court. Kadzoev (in other documents – Huchbarov) was arrested by Bulgarian authorities, as an illegal person in the territory of Bulgaria. Kadzoev was

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[24] Joined cases C-64/96 and C-65/96, Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen [1997] ECR I-03171.

[25] Case C-265/03 Igor Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol [2005] ECR I–5961.

[26] For more on the Simutenkov case see: Case note by C. Hillion, "Case C-265/03 Simutenkov v. Ministerio de Educación y Cultura, Real Federación Española de Fútbol [2005] ECR I-2579", 45 *Common Market Law Review*, 2008 (Vol. 45), pp. 815-833; P.A. Kalinichenko, "Defending the rights of private individuals from Russia in the European Union in the light of the decision taken in the Simutenkov case by the Court of the European Union", *Zakon*, 2008, No 1, pp. 211-220; M.L. Entin, *In search of partnership relations: Russia and the EU, 2004-2005* (in Russian), St Petersburg, 2006, pp. 375-381.

[27] Case T-34/07 Goncharov v. OHIM [2010] ECR 00000 (OJ C 63, 13 March 2010, p. 46–46).

[28] Case T-434/07, Volvo Trademark Holding v OHIM - Grebenshikova (SOLVO) (OJ C 24, 30.1.2010, P. 47).

[29] Case C-357/09 Kadzoev (Huchbarov) [2009] ECR I-11189.

born in Moscow in Soviet Union. He had a passport issued by the separatist government of Chechen Republic of Ichkeria which was liquidated during the operation for restoring the federal constitutional order in Russia. As reflected in the Judgment in the Case, Bulgarian competent authorities had requested the Russian colleagues concerning Kadzoev's nationality. The Russian authorities answered that such documents can not indicate the Russian citizenship of this person. Consequently, it is difficult to say that the case *Kadzoev* is the case concerning citizens from the C.I.S. countries.

Conclusion

Over the last 30 years, the judicial institutions of the European Union have examined almost a quarter of the hundreds of cases brought by legal entities and individuals from Russia and other C.I.S. countries. The number of cases, moreover, is constantly rising. The ECJ have examined cases dealing with interests of legal entitles and individuals from Russia, Ukraine, Armenia and Kazakhstan. Over the last ten years, the EU's judicial bodies have examined one and a half times more "Russian" cases than all complaints and appeals by Soviet applicants and applicants from other C.I.S. countries.

The great majority of such cases have been brought by legal entities disputing the anti-dumping sanctions imposed by the Commission and the Council on products from the C.I.S. At the same time, there is a growing tendency for companies and individuals from the C.I.S. countries to appeal to the Court of Justice of the Union for the protection of their interests where issues of competition, environmental policy and intellectual property are concerned. As a rule, these cases are examined by the Court of First Instance (the General Court), a special sub-division of the Court of Justice, since for the most part these are instances of direct jurisdiction. There have been several cases, however, that were examined by the ECJ, where national courts in Germany and Spain formally applied for a ruling on the application of EU law to actions brought by Russian citizens. The same situation had place in Swedish national court in relation of Armenian and Ukrainian citizens[30]. It is important to recognise that the ECJ case law in such cases

[30] The case *Pertosian* was brought in the ECJ by reference for a preliminary ruling from Swedish court. The reference has been made in the course of proceedings between Mr and Mrs Petrosian and their three children ('the members of the Petrosian family'), who are Armenian nationals (except for Nelli Petrosian, who is a Ukrainian national), and the Migrationsverket (Swedish Immigration Board), which is responsible for matters relating to immigration and for examining their asylum applications, concerning that board's decision ordering their transfer to another Member State, where their initial asylum application had been refused. The ECJ rules that the EU provisions are to be interpreted as meaning that,

encouraged courts of Russia and other C.I.S countries (in particular, Russian and Ukrainian courts) to apply the PCA and EU law as a matter of reciprocity. Moreover, Russia and Ukraine are in the way of negotiating the provisions of New Basic agreements with the EU.

The developing experience of the Court of Justice of the European Union in dealing with cases brought by companies and citizens from the C.I.S countries has confirmed the real possibility of defending one's rights and lawful interests through EU legislation and opens up new horizons for both individuals and companies who are active within the European Union.

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where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation. See: Case C-19/08 Migrationsverket v Edgar Petrosian and Others [2009] ECR I-00495.