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CASE CARD | 4 October 2021

Bulk Oil (174/84)

Destination clauses non-member countries

1. CASE SUMMARY

A. Summary of facts

This case deals mainly with other aspects of EU law. Its relevance from an EU competition law perspective relates to the argumentation and findings regarding a 'destination clause under national policy'.

Ever since January 1979 it has been UK policy to authorize the exportation of oil of UK origin only to Member States of the Community, Member States of the International Energy Agency and countries with which there was before 1979 an 'existing pattern of trade' (specifically, Finland). This policy had never been incorporated into legislation or into any other kind of legal measure. It had, however, been made public on several occasions via government statements.

According to a contract concluded in 1981, the company Sun had agreed to sell a large quantity of crude oil to another company, Bulk, under the condition that this crude oil was not to be sold to countries other than those approved according to UK policy. As Sun discovered that Bulk, despite the destination clause of the contract, intended to sell the crude oil to Israel, Sun refused to deliver the product.

Bulk argued in its defence that the UK policy authorizes and even requires undertakings to infringe Article 101(1) TFEU.

B. Legal analysis

B.1 - Article 101(1) TFEU – effect on interstate trade

The ECJ held that a destination clause which obliges to sell within the EU, but not to certain third countries has no effect on interstate trade. Therefore, such a destination clause does not fall within the prohibition as set out by Article 101 TFEU.

2. QUOTES

"*As has just been stated, a measure such as that in question which is specifically directed at exports of oil to a non-member country is not in itself likely to restrict or distort competition within the common market. It cannot therefore affect trade within the Community and infringe Articles 3 (f), [4(3) TEU] and [101 TFEU].*" (§44)

"*The Agreement of 20 May 1975 between the European Economic Community and the State of Israel does not prohibit the imposition of new quantitative restrictions or measures having equivalent effect on exports from a Member State to Israel.*" (§1 of the operative part)

"*Regulation No 2603/69 of the Council of 20 December 1969 establishing common rules for exports does not prohibit a Member State from imposing new quantitative restrictions or measures having equivalent effect on its exports of oil to non-member countries.*" (§2 of the operative part)

"*Articles [35 and 101 TFEU], upon their true construction, do not prevent a Member State from adopting a policy restricting or prohibiting exports of oil to a non-member country, on the basis of Article 10 of Regulation No 2603/69.*" (§3 of the operative part)

"*Article 4 of the Council Decision of 9 October 1961, in conjunction with the Council Decision of 25 September 1962 and Article 15 of the Council Decision of 16 September 1969, requires a Member State contemplating a change in the state of liberalization of its exports to non-member countries to give prior notice to the other Member States and the Commission. A Member State which fails to give prior notice, delays in doing so or does so in an inadequate manner fails to fulfil its obligations under the Council decisions referred to; that failure does not, however, create individual rights which national courts must protect.*" (§4 of the operative part)

"*The fact that no Community institution challenges the legality of a policy adopted by a Member State cannot in itself have any effect on the compatibility with Community law of a policy imposing quantitative restrictions on exports of oil to non-member countries or, consequently, on the reply to be given to the questions raised by the national court.*" (§5 of the operative part)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Article 8 of Regulation 2015/479 on common rules for export

4. RELEVANT LITERATURE

On the inapplicability of Article 101 TFEU to vertical agreements on exports outside the EU, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §3.123 – 3.145.

5. PRACTICAL SIGNIFICANCE

This case is relevant for practitioners as it provides that a destination clause in supply agreements restricting sales outside the EEA is not in itself distorting competition inside the EEA and hence not caught by Article 101 TFEU.