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Case study

Litigating European Union Law

BASIC TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By
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On 1 February 2022, the Official Journal published a new Regulation, enacted by the European Parliament and the Council, on tobacco manufacture, promoting greater transparency in the production process of tobacco products and higher quality standards to ensure consumer safety. Regulation 100/2022 provides, in Article 99, a delegation empowering the European Commission to enact a Delegated Regulation detailing the necessary information that tobacco labelling must include in retail packages. Regulation 100/2022 enumerates a series of general criteria, but it delegates on the European Commission the details that shall apply to different categories of tobacco products sold in the retail market. Article 99 provides that the European Commission shall enact the Delegated Regulation by 1 September 2022 at the latest.

The European Commission ("EC") launched a public consultation immediately after the entry into force of Regulation 100/2022, following which it received sixty submissions from different industry stakeholders. During the EC's meetings with experts from the Member States, it was obvious that the positions diverged very significantly and it would be difficult to come with a Delegated Regulation satisfying the requests of the industry, consumer associations and Member States. To make things more complicated, the European Parliament announced that it would revoke the delegation granted in Article 99 of Regulation 100/2022 if the EC did not provide strict conditions ensuring the highest levels of consumer protection. The European Parliament's position was in contrast with the aggressive position of the industry, which was threatening with legal action against any initiative that introduced disproportionate regulatory burdens in an already complex, costly and time-consuming production process.

The EC realized that it was not in a position to reach a consensus between all the stakeholders concerned and it decided to postpone the enactment of the Delegated Regulation for an indefinite period of time. In the meantime, the EC issued Guidelines with basic recommendations as to the minimum requirements to be included in all

tobacco labelling in the retail market. However, these Guidelines are not binding and, according to their final provision, full compliance with them does not exempt a producer from incurring in liability in case of breach of binding EU provisions.

Colonial Tobacco is a multinational company with its European headquarters in Portugal. It's production plants are located in three EU Member States and it is directly affected by Regulation 100/2022. As a result of the EC's delays in introducing a Delegated Regulation on labelling information, it has suspended production while awaiting a legal analysis of the Guidelines from its lawyers. After several days of internal discussions, Colonial Tobacco has decided to resume production with new labelling requirements which exclude information on the amounts of certain components per ounce which, in light of the Guidelines, should not necessarily be included. Regulation 100/2022 refers vaguely to the need to indicate "sufficient information so that the consumer can balance the health risks involved". These vague references, together with the Guidelines' explicit exemption to specify specific amounts, have led Colonial Tobacco to resume the production process.

Shortly after the news of Colonial Tobacco's new policy were made public, Health International, an NGO focused on the protection of human health, announced a campaign denouncing Colonial's new labelling policy. The NGO stated that it would be filing complaints immediately in all Member States, as well as in the European Commission and the World Health Organization. As part of Health International's campaign, several renowned experts made statements decrying Colonial Tobacco's policy, arguing that the ambiguity in the legislation should not justify such a questionable labelling policy. Shortly after, Health International, together with a law firm advising on a pro-bono basis, launched an action in Portuguese courts to stop Colonial Tobacco from enforcing its new policy.

While the company was deciding on its policy under the new legal framework, the Kingdom of Sweden filed an action for failure to act against the EC in the General Court. The Swedish government had pressured the EC to enact a robust Delegated Regulation, in line with the European Parliament's demands, but the EC's decision to delay the measures and use extra time to find a consensus has alarmed many health organizations in the country. As a means to exert additional pressure on the EC, the Swedish government requested action prior to the expiration of the deadline, to which the EC replied by referring to the Guidelines and its efforts to find a consensus among all stakeholders. As a result, on 20 September 2022 the Kingdom of Sweden brought an action for failure to act, requesting the General Court that it orders the EC to enact immediately a Delegated Regulation in compliance with Article 99 of Regulation 100/2022.

In light of this development, Colonial Tobacco has decided to change its strategy. Under strong pressure from public opinion as well as shareholders, the company has now announced that it will not pursue any further production until the EC enacts a Delegated Regulation. Only then will the company be in a position to comply, in terms that satisfy its customers, with the regulatory framework. According to the company, the only way to ensure safe and secure production in the EU, is by awaiting the final binding text of

the Delegated Regulation. As a result, as of 1 October 2022 Colonial Tobacco has suspended all production in the EU, a decision with an estimated impact of 150 million EUR per month.

On 15 June 2023, the General Court ruled in the case of Kingdom of Sweden/Commission and upheld all of the applicant's claims. As a result, the General Court ordered the EC to immediately enact a Delegated Regulation pursuant to Article 99 of Regulation 100/2022. Until that time, the EC was still in negotiations with stakeholders, but as a result of the judgment it was compelled to immediately issue the measures. Thus, on 30 June 2023 the EC enacted a Delegated Regulation pursuant to Article 99 of Regulation 100/2022, including labelling conditions which reflected a middle-ground between the interests of all stakeholders, as reflected during the long negotiations.

Immediately after the publication of the Delegated Regulation, Colonial Tobacco announces that, having now, at last, full clarity on the binding legal criteria that it must comply with, it is in a position to resume production and return to the market. However, the halt in production during a period of nine months has created severe harm to Colonial Tobacco's business. In the course of that period of time, losses have amounted to an estimated total of 1350 million EUR.

Questions

1. Is Colonial Tobacco in a position to bring an action for damages?
2. What are the substantive conditions that Colonial Tobacco must comply with to make its application a success?
3. Is there a relationship between the action for failure to act and the breach that is at the base of the damages action?

Answers

1. Is Colonial Tobacco in a position to bring an action for damages?

According to settled case-law, any private person having suffered harm derived from EU action is entitled to bring a damages action against the EU in the General Court. The requirements of interest to bringing an action are rather flexible (in comparison with the standing requirements in an action of annulment), but it is obvious that the breach of enacting a Delegated Regulation has had a direct impact on the position of Colonial Tobacco. It is difficult to challenge the applicant's standing in this case, but there is always a chance of proving that the applicant's injury is not personal and that the reparation will effectively remedy the applicant's harm.¹

In terms of challenging a specific conduct, the breach of law is not the absence of a Delegated Regulation, but the breach of a specific time-limit as provided in Art. 99 of Regulation 100/2022. The EC has a legal duty to act within a prescribed time-limit, and the failure to comply with such a duty has caused the violation that lies at the heart of the damages action that Colonial Tobacco could bring against the EU.²

The applicant must bring an action for damages within a time-period of five years since the date in which the harm was caused. In this case, 1 September 2022 should act as the *die a quo* for the purposes of the damages action. This is a time-limitation, not a time-limit, and thus it is subject to interruption (see Article 46 of the Statute of the Court of Justice). However, the Court of Justice has stated that the start of judicial proceedings related to the harm does not constitute a ground for the interruption of the time-limitation. In other words, if the applicants were to argue that the action for failure to act interrupted their time-limitation to bring a damages action, this argument would be bound to fail.³

Another matter is determining who is the defendant in these proceedings. In contrast with actions of annulment, the defendant in an action for damages is the European Union and not an individual institution. In practice, it is the Institution that has presumptively violated the law the one that will assume the representation of the European Union in the proceedings, but the defendant will formally be the European Union.

2. What are the substantive conditions that Colonial Tobacco must comply with to make its application a success?

It is settled case-law in this regard that, in matters relating to the non-contractual liability of the European Union for unlawful conduct on the part of its institutions and

¹ See judgments in Case 353/88 Briantex and Di Domenico v EEC and Commission ([1989] 3623, paragraph 6) and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* ([1995] ECR II-2941, paragraph 76).

² See judgment of 16 December 2015, *Sweden/Commission* (T-521/14, EU:T:2015:976).

³ See Judgment of 19 April 2007, *Holcim (Deutschland)/Commission* (C-282/05 P, EU:C:2007:226, paragraph 36).

agencies, a right to reparation is recognized where three conditions are met: the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious, actual damage must have been shown to have occurred and, lastly, there must be a direct causal link between the breach of the obligation attributable to the European Union and the damage sustained by the injured parties.⁴

The Court of Justice has stated that a sufficiently serious breach of a rule of law intended to confer rights on individuals is established “where the breach is one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion, the factors to be taken into consideration in that connection being, inter alia, the complexity of the situations to be regulated, the degree of clarity and precision of the rule breached and the measure of discretion left by that rule to the EU institution”.⁵

These conditions reflect the need to prove, on the part of the applicant, a certain degree of fault on the part of the EC when it failed to comply with the deadline provided in Art. 99 of Regulation 100/2022. Factors such as “the complexity of the situation”, or the “degree of clarity and precision of the rule”, inter alia, should be taken closely into account. However, in this specific case, Art. 99 is not a complex rule, nor is it subject to different interpretations or a significant degree of administrative discretion. Quite the contrary, Art. 99 is a rather simple and straight-forward rule that imposes on the EC a clear duty to enact a rule by a certain date. The impossibility of achieving the goal of the rule should only be taken into account when there are objective circumstances that effectively impede the EC from taking such a measure (for example, a terrorist attack in the premises of the EC’s office the week in which the deadline expired, thus depriving EC staff of access to essential documents to finish pending work and comply with deadlines).

The real and direct harm must refer to an economic loss that is not hypothetical or based on unfounded criteria. The amount of 1350 EUR must be the result of clear and objective criteria amounting to a genuine patrimonial loss. A suspension of production can be calculated in terms of losses. However, it is for the applicant to prove such amount and provide all the necessary evidence in support of its claim.

Finally, the causal link between the economic harm and the “sufficiently serious breach” must evidence that the breach is at the very core of the harm, the absence of which would have avoided the alleged harm. In this case, it is obvious that having enacted the Delegated Regulation on the expected date would have allowed Colonial Tobacco to proceed and continue with its production.

3. Is there a relationship between the action for failure to act and the breach that is at the base of the damages action?

⁴ Judgment of 4 July 2000, Bergaderm and Goupil/Commission (C-352/98 P, EU:C:2000:361, paragraphs 41 et seq.).

⁵ See, inter alia, judgments of 19 April 2007, *Holcim (Deutschland) v Commission*, C-282/05 P, EU:C:2007:226, paragraph 50, and of 30 May 2017, *Safa Nicu Sepahan v Council*, C-45/15 P, EU:C:2017:402, paragraph 30.

In principle, the action of damages is an independent remedy and the Court will focus only on the compliance of the conditions provided for this remedy. Thus, the preexistence of a judgment in an action for failure to act does not automatically entail the fulfilment of the conditions in an action for damages. The fact that the General Court has already declared a breach in the EC's decision not to enact a Delegated Regulation in the prescribed time-limit should not automatically constitute a "sufficiently serious breach" for the purposes of a damages action.

Therefore, although the ruling in the action for failure to act can certainly reinforce the applicant's argument, the applicant still has the burden of proof and it falls upon him or her to provide persuasive evidence that the EC has incurred in a "sufficiently serious breach".