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Case study

Litigating European Union Law

BASIC TRAINING FOR LAWYERS IN PRIVATE PRACTICE

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The company Lever, established in Düsseldorf as a company under German law, is active in the fruit import business. The apples it imported from Chile were subject to a countervailing duty imposed by a European Commission regulation published in the Official Journal of the European Union on 2 July 2019.

The company Lever seeks on the one hand the **annulment of** the Commission's regulation and, on the other hand, **compensation for** the damage caused by the regulation due to several mistakes made by the Commission.

It argues that the conclusion, prior to the adoption of the Regulation, of a cooperation agreement between the Community and Chile had created a climate of confidence which made the adoption of unilateral restrictive measures by the EU institutions unlikely.

It also considers that the Commission's regulation did not respect the objectives set out in Article 39 TFEU, such as the respect of "reasonable prices" in supplies to consumers and the general principle of proportionality.

Finally, it argues that it is in a more unfavourable situation than importers of apples which are of the same quality but originate in other countries.

As a lawyer registered at the Milan Bar, you are required to advise the company on the following issues:

Questions:

1. Before which court should these two legal claims, i.e., the claim for annulment and the claim for compensation, be brought?
2. Is the assistance of a lawyer compulsory? Will you be entitled to bring the actions(s) and to plead before the competent court?
3. Will there be two separate actions for each of the claims or one action including both claims?
4. What will be the language of proceedings?
5. What is the deadline for lodging an action or actions?
6. Under what conditions will you be entitled to request the annulment of the Commission's Regulation?
7. What grounds of European Union law can you invoke?
8. What will be the conditions for obtaining compensation for the damage caused by the adoption of the European Commission's regulation?
9. If the court does not grant your claims, under what conditions can you challenge its decision?
10. Will you be able to request the suspension of the operation of the Commission’s Regulation?

Method:

Identify relevant legal issues.

Identify the provisions of the Treaties, the Protocol on the Statute of the Court of Justice of the European Union, and the Rules of Procedure of the competent court which are applicable to the legal issues raised.

Identify the relevant case law of the Court of Justice and the General Court of the European Union.

Propose legally sound and realistic solutions.

Model answers:

1. Insofar as the actions seek to challenge an act of an institution of the European Union, namely a regulation issued by the European Commission, it is the Court of Justice of the European Union which has jurisdiction by virtue of Article 19 TEU and, more specifically, Articles 263 and 268 TFEU, which refer respectively to actions for annulment of acts of the Commission and actions for damages caused by the institutions of the European Union.

   As the Court of Justice of the European Union is composed of several courts under Article 19 TEU, it is necessary to determine precisely which court has jurisdiction to hear these actions. The jurisdiction of the General Court is defined in Article 256 TFEU. The latter has jurisdiction to examine actions brought under Articles 263 and 268 TFEU, except for those actions which the Statute of the Court of Justice of the European Union reserves for the Court of Justice.

   Reference should be made to Article 51 of the Statute, which does not apply to actions under Article 268 TFEU, which means that only the General Court has jurisdiction at first instance for actions for damages. Article 51 of the Statute reserves to the Court of Justice jurisdiction over certain actions for annulment brought by the institutions of the Union and, in certain cases, by the Member States. Actions brought by companies, considered legal persons within the meaning of the TFEU, are never reserved for the Court of Justice, which means that they fall within the jurisdiction of the General Court at first instance. It follows that both actions for annulment and actions for damages fall within the jurisdiction of the General Court of the European Union.

2. The assistance of a lawyer is compulsory for all actions brought before the General Court and the Court of Justice by virtue of Article 19 of the Statute of the Court of Justice of the European Union. The third paragraph of that Article provides that "only a lawyer authorised to practise before a court of a Member State or of another State party to the Agreement on the European Economic Area may represent or assist a party before the Court of Justice", a provision which also applies to the General Court under Article 53 of the Statute. It is not necessary to be a member of the Luxembourg Bar. As a lawyer registered at the Milan Bar, you are in principle, unless you are disbarred because of an ethics violation, entitled to plead before a court of a Member State and therefore entitled to bring the actions envisaged and to plead before the General Court of the European Union.

3. Since the action for annulment and the action for damages have different purposes, two separate actions should be brought. However, it is not impossible to make certain references in the action for damages to the action for annulment insofar as one of the substantive conditions imposed in the action for damages relates to the unlawfulness of the act which caused the damage. However, such a reference cannot fill a gap in the presentation of the pleas in law and arguments in the action for damages, otherwise the latter would be inadmissible.

4. The language of the case is defined by Articles 44 to 49 of the Rules of Procedure of the General Court. In direct actions, including actions for annulment and for damages, the language of the case shall, save where specifically defined and not applicable in the present case, be chosen by the applicant pursuant to Article 45 of the Rules of Procedure. The list of languages which may be chosen is set out in Article 44 of the Rules of Procedure. A lawyer registered at the Milan Bar may choose Italian, which is in principle his usual language, or German, which may be used as the firm was established in Düsseldorf, or any other language referred to in Article 44 of the Rules of Procedure.

5. Actions for annulment and actions for damages have distinct purposes and are subject to different conditions.

   Under Article 263(6) TFEU, actions for annulment must be brought within two months of the publication of the act, of its notification to the applicant or, failing that, of the day on which it came to the applicant's knowledge. As the Regulation in question was published in the OJEU, it is the publication which is decisive for the calculation of the time limit. Reference should be made to Articles 58 to 62 of the Rules of Procedure. Article 59 provides that where the contested act has been published in the OJEU, the time limit is to be calculated from the end of the fourteenth day following the date of that publication. Since the date of publication is 2 July 2019, the period runs from the end of 16 July. To the period of two months must be added a flat-rate period for distance provided for in Article 60 of the Rules of Procedure, which makes a period of two months and ten days from 16 July. The end of the time limit for appeal, according to the method prescribed by Article 58 of the Rules of Procedure, is 26 September 2019. As this is not a Saturday, Sunday or public holiday, the expiry of the period will not be postponed to the end of the following day.

   Actions for damages are not subject to such time limits. Articles 268 and 340(2) TFEU make no mention of time limits for actions. Reference should be made to Article 46 of the Statute of the Court of Justice of the European Union, which provides that actions against

the European Union in matters of non-contractual liability shall be barred after five years from the occurrence of the event giving rise to them. It will then be necessary to determine precisely the event giving rise to the damage which could, in the case of damage attributable to a regulation, be the entry into force of the regulation. The limitation period may be interrupted either by the application made to the General Court or by an application that the victim may make to the competent institution, in this case the European Commission, in which case the application must be made within the two-month period provided for in Article 263 TFEU, plus the ten-day time limit for distance.

6. The conditions for admissibility of an action for annulment are laid down in Article 263 TFEU, the Statute of the Court of Justice of the European Union and the relevant articles of the Rules of Procedure of the General Court.

   In the case of an action brought by a company, the conditions laid down in the fourth paragraph of Article 263 TFEU must be complied with. Since the contested act is not addressed to the company, the company will have to establish a priori that it is directly and individually concerned by the regulation, unless the latter does not contain implementing measures, in which case it would be sufficient for it to establish that it is directly concerned by the regulation. A regulatory act is defined as any act of general application except for legislative acts (CJEU, Grand Chamber, 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and a. v European Parliament and Council*, para. 60).

   To assess whether a regulatory act contains implementing measures, it is necessary to focus on the situation of the person invoking the right to bring an action under Article 263 TFEU *(*CJEU, Grand Chamber, 19 December 2013, Case C-274/12 P, *Telefónica v Commission*, para. 30*)*. It is therefore irrelevant to argue that the contested act involves enforcement measures in respect of other litigants *(*CJEU, Grand Chamber, 28 April 2015, Case C-456/13 P, *T & L Sugars and Sidul Açúcares v Commission*, para. 32). Furthermore, in the event of an application for partial annulment, only the implementing measures contained in the parts of the contested act must be taken into consideration (CJEU, 10 December 2015, Case C-553/14 P, *Kyocera Mita Europe v Commission*, para. 45).

   It will thus be necessary to know whether the contested regulation contains implementing measures, which is decisive for the fulfilment of the admissibility requirements imposed, it being noted that the requirement of individuality is very difficult to meet.

   It will also be necessary to ensure compliance with the conditions relating to the representation of a lawyer (see point 2 above), the time limit for bringing an action (see point 5 above), and the conditions relating to the content and form of the application

(Articles 72 to 76 of the Rules of Procedure of the General Court), failing which the action may be declared inadmissible by the General Court by way of an order or a judgment.

7. The legal grounds are not listed in Article 263 TFEU, which merely refers in its second paragraph to lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to their application and misuse of powers.

   The failure to comply with the objectives set out in Article 39 TFEU, such as the observance of "reasonable prices" in supplies to consumers, relates to a breach of the Treaties which can be invoked as such, insofar as regulations issued by the institutions of the European Union must comply with the obligations imposed by the EU and TFEU Treaties applicable to them. This is the case of a regulation concerning the import of apples, which, according to Annex I to the TFEU, which sets out the products that are subject to the provisions of Articles 39 to 44 of the TFEU relating to agriculture and fisheries, are referred to as 'fruit'.

   Failure to comply with the general principle of proportionality is also a legal ground of appeal in an action for annulment insofar as the Union institutions, and in particular the Commission, are bound by this principle by virtue of established case law.

   The principle of non-discrimination can also be invoked in an action for annulment insofar as the institutions of the Union must not treat identical or comparable situations differently.

   The argument that the conclusion, prior to the adoption of the Regulation, of a cooperation agreement between the Community and Chile gave rise to a climate of confidence which made it unlikely that the institutions of the European Union would adopt unilateral restrictive measures relates to another general principle of law which protects the legitimate expectations of individuals. Such a general principle of law is, however, not likely to succeed in an action for annulment, which is an action of an objective nature. It may be invoked in an action of a subjective nature, such as an action for damages.

8. An action for damages caused by an EU institution is subject to a set of conditions defined by the case law of the Court of Justice of the European Union.

   In addition to the conditions of admissibility relating to the content and form of the application (Articles 72 to 76 of the Rules of Procedure of the General Court), the provision of legal representation (see No. 2 above) and the time-limit for lodging an appeal (see No. 5 above), the substantive conditions are very demanding.

The substantive conditions correspond to the serious breach of Union law, the damage and the causal link, these three conditions being cumulative (CJEU, 18 April 2013, Case C-103/11 P, *Commission v Systran and Systran Luxembourg*, para. 60). If one of these conditions is missing, the action must be dismissed as a whole (Trib. EU, 18 September 2014, Case T-317/12, *Holcim (Romania) v Commission*, para. 86, confirmed by CJEU, 7 April 2016, Case C-556/14, *Holcim (Romania) v Commission*).

Thus, it must be established that there has been a serious breach of a rule of law intended to confer rights on individuals (see e.g., CJEU, 19 April 2012, Case C-221/10 P, *Artegodan v. Commission*, para. 80). The principle of proportionality and the principle of legitimate expectations meet these requirements according to established case law. The same applies to the principle of non-discrimination, which has been recognised as such in case law.

If the institution in question has only a considerably reduced or even non-existent margin of appreciation, the mere infringement of EU law may be sufficient to establish a sufficiently serious breach of EU law (ECJ, 4 July 2000, Case C-352/98 P, *Bergaderm and Goupil v. Commission*). If, on the other hand, it appears that the institution had a wide margin of discretion, it will be necessary to establish a clear and serious breach of the limits on its discretion *(ibid.)*, which can be established in certain cases (see e.g., General Court, 16 September 2013, Case T-333/10, *ATC et a. v Commission*, paras. 64-133). It would therefore be appropriate to study precisely the text of the adopted regulation and the texts on which its adoption was based in order to decide this question relating to the margin of appreciation within which the institution was operating.

The damage must be real and certain as well as assessable. It is up to the claimant to prove both the existence and the extent of the damage he invokes (ECJ, 16 July 2009, Case C-481/07 P, *SELEX Sistemi Integrati v Commission*, ECR 2009, p. I-127, para. 36).

Another condition for the Union to be liable is that the causal link between the harmful act and the damage claimed must be direct (ECJ, Grand Chamber, 16 July 2009, Case C-440/07 P, *Commission v Schneider Electric*, ECR 2009, p. I-6413, paras. 192 and 205). Where the institutions' contribution to the injury is too remote, the link must be considered insufficient (Trib. EU, 26 September 2014, Case T-91/12 and T-280/12, *Flying Holding and a. v Commission*, para. 118). It is up to the applicant to prove the existence of such a causal link *(*Trib. EU, 25 November 2014, Case T-384/11, *Safa Nicu Sepahan v Council*, para. 71, confirmed by CJEU, 30 May 2017, Case C-45/15, *Safa Nicu Sepahan v Council*).

The claimant must therefore satisfy these three conditions to succeed in his claim for compensation.

9. If the General Court does not grant your claims, a challenge to the judgments or orders of the General Court in both the action for annulment and the action for damages may be considered in the form of an appeal to the Court of Justice, pursuant to the second subparagraph of Article 266(1) TFEU.

   Article 56 of the Statute of the Court of Justice of the European Union provides that an appeal may be brought against decisions of the General Court which bring proceedings to an end, as well as against decisions disposing of the substance of the case in part and decisions disposing of a procedural issue concerning a plea of lack of competence or inadmissibility. Such an appeal may be brought by any party which has been unsuccessful in whole or in part in its submissions, but also by interveners other than Member States and the institutions of the Union, provided that the decision directly affects them, it being noted that Member States and the institutions of the Union are not subject to this condition, which means that they may bring an appeal without restriction. Such an appeal may even be lodged, except for civil service cases, by Member States and institutions of the European Union which have not intervened in the dispute before the General Court, which in the latter case corresponds as it were to an appeal in the interests of the law.

   Under Article 56(1) of the Statute of the Court of Justice of the European Union, an appeal must be lodged within two months of the notification of the contested decision of the General Court, to which must be added a flat-rate period of 10 days for distance.

   The appeal is limited to questions of law (Statute of the Court of Justice, Art. 58(1)) and so excludes disputes concerning the assessment of facts by the General Court. The Court of Justice has no jurisdiction to examine the evidence that the General Court has accepted, except in cases of misrepresentation (ECJ, 19 March 2009, Case C-510/06 P, *Archer Daniels Midland v Commission*, ECR 2009, p. I-1843, para. 105. - CJEU, 4 June 2015, Case C-399/13 P, *Stichting Corporate Europe Observatory v Commission*, para. 26), which would have to be evident from the documents in the file to be examined on appeal (CJEU, 29 October 2015, Case C-78/14 P, *Commission v ANKO*, para. 54).

   It will be necessary to put forward pleas in law which relate to one of the three categories of pleas in law provided for (Statute of the Court of Justice, Art. 58, para. 1), it being observed that the Court of Justice is not very formalistic as regards this classification: lack of jurisdiction of the General Court, procedural irregularities before the General Court which adversely affect the interests of the appellant, which includes the reasoning of the judgments of the General Court (CJEU, 19 Sept. 2019, Case C-358/18 P, *Poland v Commission*, paras. 74-77), and infringements of Union law.

10. Since appeals against acts of the institutions of the European Union do not have suspensive effect, it may be worthwhile for the applicant to request the suspension of the operation, as provided for in Article 278 TFEU. The granting of such a measure, which in principle falls within the competence of the president of the court handling the case, in this case the President of the General Court, is part of an interim procedure which is subject to precise and demanding conditions.

    The application for suspension is subject to the classic conditions of admissibility relating to the content and form of the application and the provision of legal representation. The application is only admissible if the applicant has challenged the regulation whose suspension is sought before the General Court of the European Union (Art. 156 EU Court Regulation). The applicant may not, as a rule, formulate submissions in a broader manner than that in which it formulates submissions in the main case (Trib. EU, Order, 31 January 2020, Case T-627/19 R, *Schindler et a. v Commission*, para. 25). The application for interim measures will be declared inadmissible when it is grafted onto a main action which appears to be manifestly inadmissible (EU General Court, 12 February 2020, Case T-627/19 R, *Schindler et a. v. Commission*, para. 25). EU, Order, 12 February 2020, Case T-326/19 R, *Gerber v European Parliament and Council*, para. 38). The main application must have been lodged beforehand or at the same time, otherwise the application for interim measures, which remains ancillary to the main application, is inadmissible.

    Several cumulative conditions are imposed for the granting of such interim measures. It must be established that there is a prima facie case for granting them in fact and in law (*fumus boni juris*); the measures must be urgent in the sense that it is necessary, to avoid serious and irreparable damage to the applicant's interests, that they be enacted and take effect before the main proceedings are decided. The court hearing the application for interim relief shall also, where appropriate, balance the interests at stake. The court hearing the application for interim relief has a broad discretion and is free to determine, in the light of the particular circumstances of the case, the manner in which these various conditions are to be verified and the order in which this examination is to be carried out (ECJ, order. 3 April 2007, Case C-459/06 P(R), *Vischim v Commission*, para. 25).

    Under the *fumus boni juris,* it *must* be established that the pleas in law are not completely unfounded. This requirement is met if there is a significant legal controversy whose solution is not immediately obvious, so that the action is not prima facie unfounded (Trib. EU, Order, 15 October 2015, Case T-482/15 R, *Ahrend Furniture v Commission*, para. 29), which could be the case here.

For the purposes of urgency, it must be established that there is a risk of serious and irreparable damage to the applicant's interests, irrespective of other factors (ECJ, 13 January 2009, Order C-512/07 P(R) and C-15/08 P(R), *Occhetto and PE v Donnici*, ECR 2009, p. I-1, para. 58). It is up to the party claiming such damage to establish its existence. In the absence of absolute certainty that the damage will occur, the claimant remains obliged to prove the facts which are supposed to give rise to the prospect of such damage (ECJ, judgment of 20 June 2003, case C-156/03 P-R, *Laboratoires Servier v Commission*, ECR 2003, p. I-6575, para. 36). Purely pecuniary damage cannot, in principle, be regarded as irreparable or even difficult to repair, as long as it can be the subject of subsequent financial compensation (ECJ, Order of 24 March 2009, Case C-60/08 P(R), *Cheminova and others v Commission*, ECR 2009, p. I-43, para. 63).

All in all, the chances of obtaining a suspension of the operation of an EU regulation, which by its nature is applicable to multiple economic operators, are very low.