Funded by the European Union's Justice Programme (2014-2020).
The content of this publication represents the views of the author only and is his sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Case study

Litigating European Union Law

ADVANCED TRAINING FOR LAWYERS IN PRIVATE PRACTICE

By
Fabrice Picod
Professor at the University of Paris 2 Panthéon-Assas
Jean Monnet Chair
Director of the European Law Centre

As a lawyer registered at the Paris Bar, you are invited to advise and, if necessary, represent in court the company Carton Rouge SA established in Melun (Seine-et-Marne, France).

By virtue of a Commission decision of 15 July 2021, notified to Carton Rouge on 20 July 2021, Carton Rouge was ordered to pay a fine of EUR 16 200 000 for an infringement of Article 101 of the TFEU found in the following terms:

"*Carton Rouge SA* (together with eighteen other cardboard-producing companies) *have infringed Article 101(1) TFEU by participating from mid-2017 until at least April 2020 in*

an agreement and concerted practice dating back to mid-2010, under which cardboard suppliers in the European Union:
- have met regularly to negotiate a joint sectoral plan to restrict competition,
- have agreed on regular price increases for each product quality in each national currency,
- have agreed to keep the market shares of the main manufacturers at constant levels.

The decision was taken following a procedure initiated in 2020 after complaints from several UK trade organisations. Commission officials carried out simultaneous inspections without prior warning at the premises of several companies in the cardboard industry.

Several companies fined have already challenged the European Commission's decision.

Questions:

1. The company Carton Rouge would like to know if it should also challenge this decision and, if so, by what actions and procedure.

2. Should the company use a specialist lawyer registered at the Luxembourg, Strasbourg or Brussels Bar?

3. Can it bring an application for interim measures? If so, what is the procedure?

4. Insofar as the company also considers that the Commission, with the assistance of the French authorities, has infringed its right to respect for its home to an extent contrary to Article 7 of the Charter of Fundamental Rights of the European Union, can such complaints be raised, and if so, before which court and in what form?

5. The company Carton Rouge would like to obtain the annulment of the fine. What type of pleas could it invoke?

6. Can the company obtain a reduction of the fine through litigation?

7. Can the illegality of the Commission's decision be invoked before a national court?

Method:

Identify the 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 solutions that are legally sound and realistic.

Model answers:

1. The fact that several other companies have already challenged the Commission's decision, adopted on 15 July 2021, and that this has been notified to Carton Rouge does not prevent this company from appealing against this decision insofar as the decision has been notified to it and is prejudicial to it.

   It is even advised to the company Carton Rouge that it should bring an action itself in order to protect its interests insofar as, on the one hand, the appeals formed by the other companies will not necessarily lead the competent court to give a ruling that protects the interests of Carton Rouge and, on the other hand, it is not excluded that the companies that have already brought the corresponding actions will withdraw their actions, for example after obtained a settlement.

   The company Carton Rouge can thus bring an action for the annulment of the Commission's decision on the basis of Article 263, paragraph 4, of the TFEU.

   It will also be able to bring a full-blown action for a reduction in the fine imposed on it, pursuant to Article 31 of Regulation (EC) No 1/2003, adopted on 16 December 2002 on the basis of Article 103 TFEU.

   It is the regulations adopted by the Parliament and the Council which may, by virtue of Article 261 TFEU, confer on the Court of Justice of the European Union full jurisdiction over the penalties provided for in these regulations. Such a jurisdiction empowers the judge, beyond the mere control of the legality of the sanctions, to substitute his assessment for that of the Commission and thus, "to cancel, reduce or increase the fine or penalty payment imposed" (General Court, 27 February 2014, Case T-91/11, *InnoLux v Commission*, para. 156, confirmed by CJEU, 9 July 2015, Case C-231/14, *InnoLux v Commission*).

   Indeed, it is known that in case of violation of Articles 101 and 102 TFEU applicable to anti-competitive behaviour of companies, the Commission is empowered to impose fines on offending companies under Article 23 of Regulation (EC) No 1/2003 of 16 December 2002, which will often be challenged before the General Court.

   The General Court is then empowered, beyond the mere review of the legality of these fines, to substitute its assessment of the amount of the fines imposed for that of the Commission on grounds of equity (ECJ, 8 February 2007, Case C-3/06 P, *Groupe Danone v Commission*, ECR 2007, p. I-1331, para. 61). The exercise of unlimited jurisdiction does not amount to an ex officio review (EU General Court, 23 May 2019, Case T-222/17, *Recylex et al. v. Commission*, para.161).

The jurisdiction of the General Court is defined in Article 256 TFEU. The General Court has jurisdiction to hear and determine actions brought under Article 263 TFEU, with the exception of those actions which the Statute of the Court of Justice of the European Union reserves to the Court of Justice. Reference should be made to Article 51 of the Statute which reserves to the Court of Justice 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. It follows that an action for annulment against the Commission's decision falls within the jurisdiction of the General Court of the European Union.

The same applies to unlimited jurisdiction with regard to actions under Article 261 TFEU.

The action(s) will be brought in accordance with the ordinary litigation procedure, which is described in detail in the Rules of Procedure of the General Court. This procedure consists of two phases, the first being written and the second being oral.

2. The assistance of a lawyer is compulsory for all actions brought before the General Court 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". It is not necessary to be a member of the Luxembourg, Strasbourg or Brussels Bars. As a lawyer registered at the Paris Bar, you are in principle, except in the case of an indictment of your good reputation which would have led to your disbarment, entitled to plead before a court of a Member State and consequently entitled to bring the envisaged actions and to plead the case of Carton Rouge before the General Court of the European Union.

3. At the same time as bringing actions against the Commission's decision, which are not suspensive, the company Carton Rouge may lodge an application for interim measures seeking the suspension of the operation of the contested decision on the basis of Article 278 TFEU or any other measure on the basis of Article 279 TFEU.

   The granting of an application of interim measures is in principle a matter for the president of the court handling the case, in this case the President of the General Court, and the procedure is more summary because of the urgency that characterises this type of application.

The application for interim measures is subject to the usual conditions of admissibility relating to the content and form of the application and the provision of legal representation. An application for the suspension of the operation under Article 278 TFEU is only admissible if the applicant has challenged the regulation they are seeking to stay before the General Court of the European Union, whereas an application for another interim measure under Article 279 TFEU is only admissible if it is made by a party to a case before the Court (Art. 156 of the EU Court Regulation). The requesting party cannot, as a general rule, formulate submissions in a broader manner than that in which it formulates submissions in the main case (General Court, Order, 31 January 2020, Case T-627/19 R, Schindler et al. v. Commission, para. 25). 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 provisional measures: *fumus boni juris*; urgency and, where appropriate, the balance of interests in favour of the applicant. The court hearing the application for interim measures has a broad discretion and remains free to determine, in the light of the particularities of the case, the manner in which these various conditions must 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 (General Court, 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). A purely pecuniary loss cannot, in principle, be considered 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). Sometimes companies succeed in

demonstrating the existence of such damage which has been caused by their cessation of activity.

In the context of disputes between companies and the institutions of the European Union, the court hearing the application for interim measures has considered that urgency could only be established in the case where the contested obligation would jeopardise the existence of the companies concerned (CJEU, order, 7 March 2013, case C-551/12 P (R), *EDF v Commission*, para. 55. - CFI, Order, 8 October 1996, Case T-84/96 R, *Cipeke v Commission*, ECR 1996, II, p. 1313). When the applicant claims a loss of market share, it must show that "obstacles of a structural or legal nature prevent it from regaining a significant proportion of that market share" (CJEU, Order, 15 December 2009, Case C-391/08 P (R), *Dow AgroSciences et al. v Commission*, para. 75) - See also CFI, Order, 22 July 2004, Case T-148/04 R, *TQ3 Travel Solutions Belgium v Commission*, paras. 50 and 51. - See also CFI, Order, 10 November 2004, Case T-303/04 R, *European Dynamics v Commission*, para. 81). This could occur in the case of measures which force undertakings to cease trading altogether (CFI, Order, 30 April 1999, Case T-44/98 R II, *Emesa Sugar v Commission*, ECR 1999, II, p. 1427).

If the President of the General Court grants a suspension of the operation of the decision imposing a substantial fine on one or more companies, they may require them to provide a financial guarantee. Indeed, when the court hearing the application for interim measures grants the suspension of the operation of Commission's decision imposing a fine on an undertaking, it may prescribe the maintenance of the security imposed by the Commission (ECJ, Order, 6 May 1982, Case 107/82 R, *AEG v Commission*, ECR 1982, p. 1549; ECJ, Order, 7 May 1982, Case 86/82 R, *Hasselblad v. Commission*, ECR 1982, p. 1555), or even prescribe the provision of a security itself, as the Rules of Procedure allow. The court hearing the application for interim measures emphasises that the possibility of requiring a bank guarantee "is a general and reasonable way for the Commission to act" (CFI, Order, 21 January 2004, Case T-245/03 R, *FNSEA and others v Commission*, ECR 2004, II, p. 271, para. 77; General Court, Order, 13 April 2011, Case T-393/10 R, *Westfälische Drahindustrie et a. v Commission*, para. 22). An application for a waiver of the obligation to provide the guarantee could only be granted in exceptional circumstances, either where it is objectively impossible to provide the guarantee or where its provision would jeopardise its existence (CFI, Order, 20 October 2003, Case T-46/03 R, *Leali v Commission*, ECR 2003, II, p. 4473, para. 33).

All in all, the chances of obtaining interim measures related to the challenge of this type of decision are very low.

4. Since the company Carton Rouge considers that the Commission has infringed, in particular during an investigation having taken the form of a raid on the premises, if necessary with the assistance of national authorities, the right to respect of its home – which now includes, according to consistent case law, the professional home – guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, it is possible for it to invoke this article, which enshrines a real right and not a principle, in order to ask for the annulment of the Commission's decision or the reduction of the fine.

   Under Article 6 of the Treaty on European Union, the Charter of Fundamental Rights of the European Union has, since the entry into force of the Treaty of Lisbon on 1 December 2009, had the same value as the EU and TFEU Treaties. It has thus acquired a binding force which, by virtue of Article 51 of the Charter, is binding on the institutions of the European Union and on the Member States when they implement European Union law.

   The General Court is able to annul a decision adopted by the European Commission for failure to comply with a provision of the Charter that creates a right. A reduction of the fine could be considered if it is found that the Commission has infringed the right enshrined in Article 7 of the Charter in a disproportionate manner.

   Possible justifications for infringements of the right to protection of the home on the basis of Article 52(1) to (3) of the Charter should be taken into account in order to protect a general interest objective recognised by the Union, such as the protection of healthy competition, in compliance with the principle of proportionality.

5. The application for annulment of the decision imposing a fine on the company Carton Rouge is subject to the conditions imposed by Article 263, paragraph 2, of the TFEU. It will be necessary to rely on pleas relating 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 plea of lack of competence, a matter of public policy, is not very appropriate in such a case, as the Commission takes care, before adopting this type of decision, to verify precisely that it has jurisdiction in all respects, jurisdiction being understood *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*. In the AKZO case, the applicants challenged the power of the Commissioner for Competition to order investigations under an empowerment granted by the College of Commissioners (ECJ, 9 September 1986, Case 5/85, *AKZO Chemie BV and AKZO Chemie UK*, ECR 1986, p. 2585), but this type of case remained exceptional.

The plea of infringement of essential procedural requirements is also a matter of public policy (ECJ, 7 May 1991, Case C-304/89, *Oliveira v Commission*, ECR 1991, p. I-2283, para. 18. - ECJ, 6 April 2000, Case C-286/95 P, *Commission v. ICI*, ECR 2000, p. I-2341, paras. 40 to 45 and 51). Such a plea must therefore be raised by the court of its own motion (ECJ, Grand Chamber, 10 July 2008, Case C-413/06 P, *Bertelsmann and Sony Corporation of America v Impala*, ECR 2008, p. I-4951, para. 174).

Guaranteed by the Charter of Fundamental Rights of the European Union, by the general principles of law and by several acts of secondary legislation, the rights of defence constitute fundamental rights which relate to substantial forms. They are frequently invoked in business law disputes (ECJ, 13 February 1979, Case C-85/76, *Hoffmann-La Roche v Commission*, ECR 1979, p. 461. - ECJ, 27 June 1991, Case C-49/88, Al-*Jubail Fertilizer Company et al. v. EU Council*, ECR 1991, p. I-3187, para. 15). The same applies to the adversarial principle, which is often linked to the principle of respect for the rights of the defence.

Compliance with the obligation to state reasons, imposed by Article 296 TFEU, is one of the essential requirements, the breach of which may result in the unlawfulness of the act. The Court of Justice has consistently held that the statement of reasons, on the one hand, enables the persons concerned to understand the scope of the decision taken in their regard and to ensure the defence of their interests and, on the other hand, enables the court to exercise the review of legality under Article 263 TFEU in favour of the persons to whom this remedy is available (ECJ, 30 March 2000, Case C-265/97 P, *VBA v Florimex et al.*, ECR 2000, p. I-2061. - CFI, 29 September 2000, Case T-55/99, *CETM v Commission*, ECR 2000, p. II-3207). The degree of reasoning required by the court varies according to the nature of the act adopted, its purpose and the context of its adoption. This plea is invoked almost systematically in European competition law litigation.

The plea of misuse of powers is a classic plea of internal legality which is considered in a restrictive way, which explains its lack of success. The applicants must establish that the institution which is the author of the act has used its powers for a purpose other than that for which they were conferred or in order to evade a procedure specifically provided for in the founding treaty to deal with the circumstances of the case (ECJ, 25 June 1997, Case C-285/94, *Italy v. Commission*, ECR 1997, p. I-3519. - CJEU, Gr. ch. 4 December 2013, Case C-111/10, *Commission v. Council of the EU*, para. 80).

The plea alleging infringement of the Treaties and of any rule of law relating to their application refers to infringements that cannot be classified in the preceding categories, in particular infringements of the so-called substantive rules of European Union law. The plea

may relate to an alleged breach of a provision of the EU Treaty, the TFEU or the annexed protocols, the Charter of Fundamental Rights of the European Union, the general principles of law and the case law of the Court of Justice of the European Union. The violation of the right to respect for the home enshrined in Article 7 of the Charter of Fundamental Rights falls within this framework.

6. The company Carton Rouge can obtain a reduction of the fine imposed on it by the European Commission (see above no. 1).

   The General Court is then empowered, beyond the simple control of the legality of these fines, to substitute its assessment for that of the Commission on the amount of the fines imposed (ECJ, 8 February 2007, Case C-3/06 P, *Groupe Danone v Commission*, ECR 2007, p. I-1331, para. 61). The judge thus has the power to modulate the amount of the fine by taking into account multiple elements (see e.g., CFI, 30 April 2009, Case T-13/03, *Nintendo and Nintendo Europe v Commission*, ECR 2009, p. II-975, paras. 213 to 215). While it is for the judge to assess the circumstances of the case and the type of infringement with a view to determining the amount of the fine, the exercise of such a power cannot result in discrimination leading to unequal treatment of the various companies that participated in the cartel (CJEU, 6 December 2012, Case C-441/11 P, *Commission v Verhuizingen Coppens*, para. 80; General Court, 13 September 2013, Case T-566/08, Total *Raffinage Marketing v Commission*, paras. 548-554, confirmed by CJEU, 17 September 2015, Case C-634/13, *Total Raffinage Marketing v Commission*). The Court of Justice, which is frequently seized on appeal against judgments of the General Court, cannot, on grounds of equity, substitute its assessment for that of the General Court ruling, in the exercise of its full jurisdiction, on the amount of the fines imposed (CJEU, 22 November 2012, Case C-89/11 P, *E.ON Energie v. Commission*, para. 125). Only if the amount is disproportionate can the Court find that the General Court erred in law (*ibid.,* para. 126).

7. In an action brought before a national court against a national authority, it is not excluded that a decision taken by the European Commission is unlawful because of a breach of a higher rule of European Union law.

   The Court of Justice has added a general obligation to the obligation of referral in article 267 TFEU, paragraph 3, which is incumbent on all courts, by denying them the power to rule on the invalidity of an act of European Union law (ECJ, 22 October 1987, Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost*, ECR 1987, p. 4199, pp. 15-20. - ECJ, 15 April 1997,

Case C-27/95, *Woodspring District Council v Bakers of Nailsea*, ECR 1997, p. I-1847, para. 20). The theory of the *acte clair* does not apply to such a reference (ECJ, Grand Chamber, 6 December 2005, Case C-461/03, *Gaston Schul Douane-expediteur*, ECR 2005, p. I-10513, para. 19), otherwise the supreme courts would be able to declare acts of the Union invalid on the grounds that such invalidity is obvious to them.

The Court of Justice accepts that the courts may reject grounds of invalidity which they consider unfounded but denies them the power to declare acts of the EU institutions invalid because of the risk of divergences between the courts of the Member States, which could jeopardise the very unity of the EU legal order. However, national courts are entitled to ask a Union institution to clarify an ambiguity regarding the validity of the act at issue (CJEU, 3 July 2019, Case C-644/17, *Eurobolt*, paras. 30-32).