Defending Restricted Standing for Individuals to Bring Direct Actions against 'Legislative' Measures

Court of Justice of the European Union, Decision of 3 October 2013 in Case C-583/11 P, *Inuit Tapiriit Kanatami and Others* v. *European Parliament and Council*

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Introduction

The judgment in Case C-583/11 P concerns, most obviously, the interpretation of the fourth paragraph of Article 263 TFEU and the significance of the long-standing condition of 'individual concern' for natural and legal persons who seek to bring an action for annulment before the Court of Justice against a EU legal act which is not specifically addressed to them.

The traditionally restrictive approach taken by the Court in its interpretation of that condition has been one of the most contentious issues in EU law, and following a reform introduced by the Lisbon Treaty, a new possibility was introduced for natural and legal persons to bring such an action without any condition of individual concern against 'a regulatory act which is of direct concern to them and does not entail implementing measures' (third limb of fourth paragraph of Article 263 TFEU). The main concern of the appellants in this case was to secure an interpretation of the fourth paragraph of Article 263 TFEU which, one way or another, would allow them standing to challenge the validity of a legal act adopted by the European Parliament and the Council subject to a legislative procedure. The judgment confirms that the concept of 'regulatory act' does not extend to such a 'legislative act' and that the Court's interpretation of the pre-existing condition of individual concern, which the appellants had to satisfy, has not changed. Obviously, this judgment does not answer all questions which may be asked with respect to the interpretation of the fourth paragraph of Article 263

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TFEU after the reform introduced by the Lisbon Treaty. At the same time, the significance of the judgment stretches far beyond the interpretation of the fourth paragraph of Article 263 TFEU, into questions about the new system of legal acts, the appropriate level of judicial protection and, indeed, the methods of interpretation.

Background

Shortly before the entry into force of the Lisbon Treaty, the European Parliament and the Council adopted Regulation (EC) No. 1007/2009 on trade in seal products (the Regulation on Trade in Seal Products).[1] The Regulation was adopted subject to the co-decision procedure – now 'ordinary legislative procedure' – with an overwhelming political support in both legislative institutions.[2] Essentially, the Regulation prohibits the placing on the market of all seal products with the exception of those which 'result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence'.[3] The underlying objectives of the Regulation focus on the differences between national provisions adopted in response to citizens' concerns about the animal welfare aspects of the killing of seals and a resulting need for harmonised rules to prevent disturbance of the internal market.[4] The objectives emphasise also that the hunting of seals is an integral part of the culture and identity of the members of the Inuit society, and, therefore, that the placing on the market of products which result from their hunts should be allowed.[5]

The subject matter dealt with in the Regulation on Trade in Seal Products is well known within EU environmental policy and there are several pre-existing

[1] *See* European Parliament and Council Reg. (EC) No. 1007/2009 of 16 Sept. 2009 on trade in seal products, *OJ* [2009] L 286/36 (*entry into force on* 20 Nov. 2009; *see* Art. 8).

[2] The regulation was formally adopted by the Council following agreement reached with the European Parliament already in first reading. The European Parliament adopted its legislative resolution by 550 votes to 49, with 41 abstentions and the decision in Council was unanimous, with 3 abstentions (from Danish, Romanian and Austrian delegations). *See* the Procedure File at the European Parliament Legislative Observatory (available at <www.europarl.europa.eu/oeil>).

[3] *See* Art. 3.1 of the Regulation. It contains also exceptions for goods derived from seals for personal and non-commercial use and for goods derived from seals hunted for the sole purpose of the sustainable management of marine resources on a not-for profit basis and for non-commercial reasons.

[4] *See* in particular the Explanatory Memorandum of Commission proposal of 23 July 2007 for a regulation of the European Parliament and of the Council concerning trade in seal products, COM(2008)469 final.

[5] *See* Recital 14 of the Regulation.

legal acts which touch upon similar concerns.[6] In a more immediate sense, the work leading up to the Regulation was started after the European Parliament had adopted a declaration requesting the Commission to draft a regulation to ban the import, export and sale of seal products.[7] In its response to that declaration, the Commission undertook to make a full objective assessment and to report back to the European Parliament. The assessment was carried out on the basis of several elements, among which, an independent scientific opinion of the European Food Safety Authority on the animal welfare aspects of seal hunting and an external expert study of national regulatory frameworks (to support the normal impact assessment).[8] Throughout the process leading up to a proposal interest organisations and other stakeholders were consulted.[9]

Even if the Regulation on Trade in Seal Products does not make any provision as regards the actual hunting of seals, it has been considered highly effective in reducing the number of seals killed for commercial reasons. According to Terry Audla, president of Inuit Tapiriit Kanatami, an organisation representing Canadian Inuit, the ban has been devastating for small communities that rely on the sale of seal furs to survive and the exemption is meaningless because they depend on a broader seal industry with a commercial interest to place their products on the European market.[10]

Unsurprisingly, the Regulation on Trade in Seal Products immediately led the Canadian government to mount a challenge at the WTO, arguing that the ban of the placing on the European market of seal products constituted an illegal restriction to international trade. The challenge was rejected in the reports of a panel

[6] *See* for example Council Directive 83/129/EEC of 28 March 1983 concerning the importation into member states of skins of certain seal pups and products derived therefrom, *OJ* [1983] L 91/30.

[7] *See* Declaration of the European Parliament on 26 Sept. 2006 on banning seal products in the European Union, P6_TA(2006)0369.

[8] *See* respectively, Scientific Opinion of the Panel on Animal Health and Welfare adopted on 6 Dec. 2007, EFSA Journal (2007) 610 (available at <www.efsa.europa.eu/en/efsajournal/pub/610.htm>), and Assessment of the potential impact of a ban of products derived from seal species, COWI 2008 (available at <ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/study_implementing_measures.pdf>). *See* in general the Explanatory Memorandum of Commission proposal of 23 July 2007 for a regulation of the European Parliament and of the Council concerning trade in seal products, COM(2008)469 final.

[9] Perhaps most notably, the European Food Safety Agency held a so-called stakeholders consultation meeting with experts from sealing countries, animal welfare nongovernmental organisations as well as fur trade and hunters associations with the objective to receive feed-back on factual information (4 Oct. 2007). *See* in general the Explanatory Memorandum (*supra* n. 4). Cf. also Judgment of the General Court of 25 April 2013 in Case T-526/10, *Inuit Tapiriit Kanatami et al.* v. *European Commission*, para. 114.

[10] *See Ottawa Citizen*, 16 March 2014 (available at <www.ottawacitizen.com/news/Canada+tries+sale+seal+products/9624235/story.html>).

and then an appellate body, which both found the ban acceptable on grounds of public morals. These reports where finally adopted by the WTO's Dispute Settlement Body on 18 June 2014.[11]

Parallel to the challenge at the WTO, a series of actions was initiated before the Court of Justice of the EU, by a multi-national group of legal and natural persons represented by the Brussels-based law firm Stibbe. The core of that group consisted of a number of Inuit hunters and trappers and their interest organisations (such as Inuit Tapiriit Kanatami), some companies active in the processing and marketing of seal products, and an umbrella organisation for the fur industry. Like most seal products also most of these parties did not come from within the EU but from third countries, most notably Canada.

In a first application, lodged at the General Court on 11 January 2010, an action was brought for the annulment of the Regulation on Trade in Seal Products pursuant to the fourth paragraph of Article 263 TFEU (Case T-18/10). Three pleas in law were put forward in support of the claim: that the Regulation had been adopted on the wrong legal basis (current Article 114 TFEU), that the Regulation was in breach of the principles of subsidiarity and proportionality, and that the Regulation impaired the applicants' fundamental rights to property and to be heard. By an order of 6 September 2011, the General Court declared that action inadmissible.[12] The General Court held that the Regulation, since it was adopted subject to the ordinary legislative procedure, was to be classified as a 'legislative act' and therefore could only form the subject matter of an action for annulment brought by natural or legal persons if it was of both direct and individual concern to them. Even if some of the applicants were considered to satisfy the condition of direct concern, none of those were also considered to satisfy the condition of individual concern. According to the General Court, the new possibility for natural and legal persons to challenge a 'regulatory act' without any condition of individual concern was not applicable since it 'must be understood as covering all acts of general application *apart from legislative acts*' (emphasis added).[13]

In response to this order of the General Court, Inuit Tapiriit Kanatami and most other parties brought an appeal to the Court of Justice on 21 November 2011, relating to the question of admissibility of their action. That is the central case for this commentary (Case C-583/11 P). But before taking a closer look at

[11] *See* <wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm>.

[12] *See also* ECJ 30 April 2010, Case T-18/10 R, Inuit Tapiriit Kanatami and Others v. *Parliament and Council* and ECJ 25 Oct. 2010, Case T-18/10 R II, *Inuit Tapiriit Kanatami and Others* v. *Parliament and Council.*

[13] *See* ECJ 6 Sept. 2011, Case T-18/10, *Inuit Tapiriit Kanatami and Others* v. *Parliament and Council*, para. 56.

that case a few words should be said about the parallel action by Inuit Tapiriit Kanatami et al. in another case.

Only a few months after the first application had been lodged with the General Court (Case T-18/10) a new regulation was adopted, by the Commission, in which more detailed rules were established for the placing on the market of seal products. The legal basis for that regulation – which in accordance with old terminology has been referred to as the 'implementing regulation' – was found in a specific provision of the Regulation on Trade in Seal Products (thus constituting the 'basic regulation').[14]

On 9 November 2010 Inuit Tapiriit Kanatami and most other parties involved in the first application brought a new action pursuant to the fourth paragraph of Article 263 TFEU against the implementing regulation, in which they argued that it should be annulled for being deprived of a correct legal basis (Case T-526/10).[15] This meant that they could plead again the illegality of the Regulation on Trade in Seal Products on the same grounds underlying their first application, but this time indirectly, in accordance with Article 277 TFEU. In its judgment of 25 April 2013 the General Court – without making any assessment of the admissibility – rejected the second action for annulment, having found that the Regulation on Trade in Seal Products was adopted on a correct legal basis, in compliance with the principles of subsidiarity and proportionality, and did not violate fundamental rights. The judgment of the General Court was subject to an appeal brought on 12 July 2013, which is still pending (Case C-398/13 P). Shortly after this second appeal, the judgment was delivered by the Court in Grand Chamber in the first appeal (Case C-583/11 P).[16] In line with the Opinion of Advocate-General Juliane Kokott, the Court confirmed the order of the General Court and dismissed the appeal.

Judgment

By their appeal in Case C-583/11 P, *Inuit Tapiriit Kanatami et al.* requested that the Court should set aside the order of the General Court in Case T-18/10 and

[14] Commission Reg. (EU) No. 737/2010 of 10 Aug. 2010 laying down detailed rules for the implementation of Reg. (EC) No. 1007/2009 (*OJ* [2010] L 216/1). Cf. Art. 3.4 of Reg. 1007/2009, which envisages that the Commission shall adopt measures for 'implementation' which are 'designed to amend' non-essential elements of the basic regulation 'by supplementing it' (and, then, in accordance with a comitology procedure). This provision does not fit well with the distinction between 'delegated' and 'implementing acts' which was (later) introduced by the Lisbon Treaty. *See* now Arts. 290 and 291 TFEU.

[15] *See* ECJ 25 April 2013, Case T-526/10, *Inuit Tapiriit Kanatami and Others* v. *European Commission.*

[16] *See* ECJ 3 Oct. 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others* v. *European Parliament and Council.*

declare their action for annulment of the Regulation on Trade in Seal Products admissible (or, in the alternative, set aside the order under appeal and refer the case back to the General Court).[17] Four grounds were put forward in support of the appeal:

1. that the General Court had been erroneous in its interpretation and application of the fourth paragraph of Article 263 TFEU;
2. that the General Court had been in breach of its obligation to state reasons;
3. that the General Court had disregarded the applicants' fundamental right to an effective judicial protection; and
4. that the General Court had not correctly understood their arguments and, therefore, distorted the clear sense of the evidence

The first ground of appeal

Clearly, the first ground of appeal formed the main focus of the case and the Court dealt with it divided into two parts; one concerning the new possibility for natural or legal persons to institute an annulment action against 'a regulatory act which is of direct concern to them and does not entail implementing measures' (third limb of the fourth paragraph of Article 263 TFEU) and another concerning the pre-existing possibility for natural or legal persons to institute such action 'against an act […] which is of direct and individual concern to them' (second limb of fourth paragraph of Article 263 TFEU).

With respect to the first part of their first ground of appeal, the appellants were complaining, in essence, that the General Court had been erroneous in holding that the new concept of 'regulatory act' did not encompass an act, such as the Regulation on Trade in Seal Products, which in treaty text was qualified as a 'legislative act' (*see* e.g. Article 289(3) TFEU according to which '[l]egal acts adopted by legislative procedure shall constitute legislative acts').[18]

Having confirmed that the first part of the first ground of appeal was admissible,[19] the Court turned to the merits and observed that 'the interpretation of a provision of European Union law requires that account be taken not only of its wording and the objectives it pursues, but also its context and the provisions of European Union law as a whole'.[20] To this an addition was made, with reference to its recent judgment in Case C-370/12 *Pringle*, that also '[t]he origins of a provision of Euro-

[17] *See* Case C-583/11 P, para. 25.
[18] *See* Case T-18/10, para. 56.
[19] *See* Case C-583/11 P, paras. 48-49.
[20] *See* Case C-583/11 P, para. 50. Reference to Case 283/81, *Cilfit and Others*, para. 20.

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pean Union law' may provide information relevant to its interpretation.[21] The significance of that method of interpretation will be returned to in the comments.

In its examination the Court took a starting point in a literal interpretation of the fourth paragraph of Article 263 TFEU and observed that the new third limb 'relaxed the conditions of admissibility of actions for annulment brought by natural and legal persons' with the effect that the admissibility is not subject to any condition of individual concern, if the act for which annulment is sought qualifies as 'a regulatory act which […] does not entail implementing measures' (and, like before, satisfies a condition of direct concern).[22] Focusing, then, on the concept of 'regulatory acts', the Court concluded that it is apparent from the third limb that this concept is more restricted than the concept of 'acts' used in the second limb (and also the first limb) which, in accordance with established case-law,[23] covers acts of general application, legislative or otherwise, and individual acts.[24] To adopt an interpretation to the contrary, the Court said, would amount to nullifying the distinction made between the term 'acts' and 'regulatory acts' by the fourth paragraph of Article 263 TFEU.

The Court found additional support for its conclusion in a historical interpretation, based on the origins of the fourth paragraph of Article 263 TFEU. As observed by the Court, the provision reproduced in identical terms the content of Article III-365(4) in the proposed treaty establishing a Constitution for Europe. This, in turn, opened up for a possibility to look at the *travaux préparatoires* relating to that provision which had been produced within the so-called European Convention. According to the Court:

> It is clear from the *travaux préparatoires* relating to that provision that while the alteration of the fourth paragraph of Article 230 EC was intended to extend the conditions of admissibility of actions for annulment in respect of natural and legal persons, the conditions of admissibility laid down in the fourth paragraph of Article 230 EC relating to legislative acts were not however to be altered. Accordingly, the use of the term 'regulatory act' in the draft amendment of that provision made it possible to identify the category of acts which might thereafter be the subject of an action for annulment under conditions less stringent than previously, while maintaining 'a restrictive approach in relation to actions by individuals against legislative acts (for which the "of direct and individual concern" condition remains applicable)'.[25]

[21] *See* Case C-583/11 P, para. 50. *See* ECJ 27 Nov. 2012, Case C-370/12, Pringle, para. 135.

[22] *See* Case C-583/11 P, para. 57.

[23] Reference *inter alia* to Case 60/81, *IBM* v. *Commission*, para. 9; and Joined Cases C-463/10 P and C-475/10 P, *Deutsche Post* v. *Commission*, paras. 36 to 38.

[24] *See* Case C-583/11 P, paras. 55-58.

[25] *See* Case C-583/11 P, para. 59. Reference to Secretariat of the European Convention, Final Report of the Discussion Circle on the Court of Justice of 25 March 2003, CONV 636/03, para. 22, and Cover note from the Praesidium to the Convention of 12 May 2003, CONV 734/03, p. 20.

Taken together, this led the Court to the finding that the purpose of the alteration to the right of natural and legal persons to institute legal proceedings, now laid down in the third limb of the fourth paragraph of Article 263 TFEU, was to enable those persons to bring, under less stringent conditions than before, actions for annulment of acts of general application *other than legislative acts*. The General Court had therefore been correct and the first part of the first ground of appeal was rejected as unfounded.[26]

The reasoning of the Court followed closely that of Advocate General Kokott. But in her opinion, more attention was given to the fact that the Lisbon Treaty did not establish a system of legal acts identical to that of the Constitutional Treaty and that there were several differences. Because of these differences, she said, it was conceivable in theory to understand the concept of 'regulatory act' in the fourth paragraph of Article 263 TFEU more broadly than intended by the authors of the Constitutional Treaty, with the result that also legislative acts could be regulatory acts.[27] Nevertheless, in her view such a broad interpretation of the concept of 'regulatory act' was difficult to reconcile with the mandate of the Intergovernmental Conference which negotiated the Lisbon Treaty; that it should 'abandon the constitutional concept' underlying the Constitutional Treaty but otherwise not call into question the result which had been achieved. [28] In particular, the mandate said that 'the distinction between what is legislative and what is not and its consequences' should be maintained.[29] Therefore, Advocate General Kokott found that 'it is highly unlikely, and there is absolutely no concrete evidence in this regard, that the Intergovernmental Conference wished to go further than the Constitutional Treaty specifically with the fourth paragraph of Article 263 TFEU'.[30]

The consequence of the Court's conclusion with respect to the first part of the first ground of appeal was that a 'legislative act' – such as the Regulation on Trade in Seal Products – could only form the subject matter of an action for annulment brought by a natural or legal person if it was considered to be of both direct and individual concern to them (cf. the pre-existing second limb of the fourth paragraph of Article 263 TFEU). This was covered in the second part of the first ground of appeal. Here the appellants were complaining, in essence, that the General Court had been erroneous in its examination whether the contested regulation was of direct and individual concern to them. As reasoned by them, the inspiration for

[26] *See* Case C-583/11 P, paras. 60-62.

[27] *See* the Opinion in Case C-583/11 P, point 43.

[28] *See* the Mandate for the 2007 Intergovernmental Conference, based on the stipulations of the European Council of 21 and 22 June 2007 and reproduced in full in Council Document No. 11218/07 of 26 June 2007.

[29] *See* para. 19(v) of the Mandate for the 2007 Intergovernmental Conference (*supra* n. 28).

[30] *See* the Opinion in Case C-583/11 P, point 46.

the authors of the Lisbon Treaty to change the conditions of admissibility followed from the judgments in Case C 50/00 P, *Unión de Pequeños Agricultores* and Case C-263/02 P, *Jégo-Quéré*, where the Court had emphasised the fact that the system for judicial review was possible to reform, by *treaty amendments*.[31] Therefore, it was argued, the time had now come for the Court to review its old restrictive interpretation of the condition of *individual concern* and replace the assessment criteria deriving from settled case-law – the so called *Plaumann* formula – with a more generous test (of 'substantial adverse effect').[32]

Starting off, again, with a literal interpretation of the fourth paragraph of Article 263 TFEU, the Court reached the conclusion, first, that the wording of the second limb had not been altered by the Lisbon Treaty and that there was nothing to suggest that there had been any such intention.[33] And again, supplementary support for that conclusion was found in a historical interpretation, based on the origins of the fourth paragraph of Article 263 TFEU. According to the Court, 'it is clear from the *travaux préparatoires* relating to Article III-365(4) of the proposed treaty establishing a Constitution for Europe that the scope of those conditions was not to be altered'.[34]

Having thus confirmed that the content of the condition of individual concern had not been altered by the Lisbon Treaty, the Court turned to its classic *Plaumann* formula, according to which 'natural or legal persons satisfy the condition of individual concern only if the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[35] This led to the finding that the prohibition in the Regulation on Trade in Seal Products 'was worded in general terms and applied indiscriminately to any trader falling within its scope'

[31] *See* in particular Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, paras. 44-45. Cf. Case C-263/02 P, *Commission* v. *Jégo-Quéré*, para. 36.

[32] *See* Case C-583/11 P, paras. 65 and 69. This was the 'revolutionary step' attempted to take by the General Court in Case T-177/01 *Jégo-Quéré* v. *Commission*, para. 50. The new test was first proposed by A-G Jacobs in his Opinion in Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council* (point 60): '*a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests*'.

[33] *See* Case C-583/11 P, paras. 70 (and 55).

[34] *See* Case C-583/11 P, para. 70. Reference, again, to Secretariat of the European Convention, Final Report of the Discussion Circle on the Court of Justice of 25 March 2003, CONV 636/03, para. 23. Cf. the Opinion of A-G Kokott, point 90.

[35] *See* Case C-583/11 P, para. 72. Reference to Case 25/62, *Plaumann* v. *Commission*, at p. 238 and *inter alia* Joined Cases C-71/09 P, C-73/09 P and C-76/09 P, *Comitato 'Venezia vuole vivere'* v. *Commission*, para. 52.

and, therefore, that none of the appellants could be considered to satisfy the condition of individual concern.[36]

According to the Court, since the condition of direct concern and the condition of individual concern are cumulative,[37] there was no need, in the present case, to proceed with an examination if the act was of direct concern to any of the applicants.[38] As a consequence the second part of the first ground of appeal was also rejected as being unfounded.

The second and third grounds of appeal

The second ground of appeal – that the General Court had been in breach of its obligation to state reasons – was closely related to the third ground of appeal, that it had disregarded the applicants' fundamental right to an effective judicial protection. Therefore, after concluding that the fact that the General Court did not explicitly deal with all the details of their arguments could not be regarded as constituting a breach of the obligation to state reasons,[39] the Court moved on to its assessment of the relationship between the fourth paragraph of Article 263 TEFU and the fundamental right to an effective judicial protection.

By their third ground of appeal the appellants claimed, in essence, that a strict interpretation of the fourth paragraph of Article 263 TFEU was in breach of Article 47 of the EU Charter of Fundamental Rights (and also Articles 6 and 13 of the ECHR), since it would not enable them to challenge the legality of acts of general application which directly affect their legal situation.[40] An argument against this, emphasised by the European Parliament and the Council, and the Commission, was that the appellants did in fact have an effective judicial protection since they could challenge the 'implementing measure' under Article 263 TFEU and then plead the illegality of the underlying Regulation on Trade in Seal Products, in accordance with Article 277 TFEU (cf. *supra* Case T-526/10 with appeal in Case C-398/13 P).

Quite interestingly, the findings of the Court with respect to the third ground of appeal did not focus, explicitly, on the existence in this case of 'an implementing measure' but followed instead from a summary of well-known case-law and a reasoning on matters of principle. Accordingly, it was recalled, first, that 'the European Union is a union based on the rule of law in which the acts of its institutions are subject to review of their compatibility with, in particular, the treaties, the

[36] *See* Case C-583/11 P, para. 73,

[37] Cf. Case C-583/11 P, paras. 74-76.

[38] Cf. the assessment of direct concern by A-G Kokott, points 66-84 of the Opinion; and the General Court, paras. 68-86 of the Order.

[39] *See* Case C-583/11 P, paras. 81-85.

[40] Cf. ECJ 3 May 2002, Case T-177/01, *Jégo-Quéré* v. *Commission*, paras. 47-51.

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general principles of law and fundamental rights' and that the Treaties have established 'a complete system of legal remedies and procedures designed to ensure judicial review of the legality' of such acts.[41] Then it was observed that Article 47 of the Charter 'is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the European Union' (using that expression as opposed to 'the courts and tribunals of the Member States').[42] Support for this was also found in the Explanations to the Charter.[43] Therefore, the Court said, the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU 'must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty'.[44]

The central question this reasoning leads to – i.e. what individual parties should do in situations where the system of judicial review laid down by the Treaties does not allow for direct actions brought before the Courts of the European Union – was addressed by emphasising their right to challenge the legality of any national measure relative to the application to them of a EU act of general application before the courts and tribunals of the member states (which in turn would be expected to request a preliminary ruling on the validity of that underlying act of general application under Article 267 TFEU).[45]

In its conclusions, the Court referred, first, to its judgments in Case C-50/00 P, *Unión de Pequeños Agricultores* and Case C-263/02 P, *Jégo-Quéré* to clarify that the member states have an obligation to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection.[46] That obligation, the Court added, has now been reaffirmed by Article 19(1) TEU, which states that the member states 'shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law'.[47] Then it referred to its judgment in Case C-432/05, *Unibet* to emphasise the nature of this obligation: that there is no intention in the Treaties 'to create new remedies before the national courts to ensure the observance of Euro-

[41] *See* Case C-583/11 P, paras. 90-92.

[42] *See* Case C-583/11 P, para. 97.

[43] *See* Art. 6(1) TEU and Art. 52(7) of the Charter. Reference to ECJ 22 Jan. 2013, Case C-283/11, *Sky Österreich*, para. 42, and ECJ 18 July 2013, Case C-426/11, *Alemo-Herron and Others*, para. 32.

[44] Reference to Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, para. 44, and Case C-263/02 P, *Commission* v. *Jégo-Quéré*, para. 36.

[45] *See* in particular points 94-96. References to Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, para. 42, and *inter alia* Case C-344/04, *IATA and ELFAA*, paras. 27 and 30.

[46] *See* Case C-583/11 P, para. 100. Reference to Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, para. 41; and Case C-263/02 P, *Commission* v. *Jégo-Quéré*, para. 31.

[47] *See* Case C-583/11 P, para. 101.

pean Union law other than those already laid down by national law' *unless* 'the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from European Union law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully'.[48]

The Court did not give any further indication what that would require in a specific situation. But as noticed by Advocate-General Kokott, the solution had previously been intimated by the Court that an individual should write to the competent authority – in the present case, for example, the competent national import or customs administration – and request confirmation that the requirement or ban in question is not applicable to him.[49] Such a negative decision by that national authority must, on grounds of effective legal protection, be open to review by national courts (which in turn would be expected to request a preliminary ruling on the validity of the underlying EU act under Article 267 TFEU).[50]

In a final part, the Court addressed the appellants' argument that the narrow interpretation of the concept of 'regulatory act' in the fourth paragraph of Article 263 TFEU would mean that any legislative act is virtually immune to judicial review and that there was a resulting gap in judicial protection, which was incompatible with Article 47 of the Charter. This time without reference to any case-law, the Court replied that the protection conferred by Article 47 of the Charter does not require 1) that an individual should have an unconditional entitlement to bring an action for annulment of legislative acts *directly* before the Courts of the European Union, or 2) that an individual should have an entitlement to bring actions against legislative acts as their *primary* subject matter, before the courts or tribunals of the Member States.[51] In those circumstances, the Court said, the third ground of appeal must also be rejected as being unfounded.

The fourth ground of appeal

By their fourth ground of appeal, the appellants claimed, in essence, that the finding of the General Court that the concept of 'regulatory act' did not encompass a 'legislative act' could be called into question since the meaning of some of their arguments had been distorted. But according to the Court it was apparent that

[48] *See* Case C-583/11 P, paras. 103-104. Reference to Case C-432/05, *Unibet*, paras. 40-41 and 64.

[49] *See* the Opinion in Case C-583/11 P, point 120. Reference to Case C-263/02, *P Jégo-Quéré*, para. 35.

[50] Cf. the disagreeing Opinion of A-G Wathelet in ECJ 27 Feb. 2014, Case C-132/12 P, *Stichting Woonpunt and Others* v. *European Commission*, point 62.

[51] *See* Case C-583/11 P, paras. 105-106. With respect to 2) it was also said to be excluded as an effect of Art. 19(1) TEU.

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the interpretation of the concept of 'regulatory act' was correct.[52] Therefore, even if the General Court had distorted some of the appellants' arguments, this would not affect the operative part of the order under appeal and could not lead to the setting aside of that order. This meant that also the fourth and final ground was rejected and that the Court dismissed the appeal in its entirety.

Comments

There are two points of particular interest in the ruling in Case 583/11 P. The first and most obvious of these relates to the interpretation of the fourth paragraph of Article 263 TFEU and its relationship to the corresponding paragraph in the old Article 230 EC. The second point relates to the use made of a historical method of interpretation and the relative weight given to the *travaux préparatoires* for a provision of primary law.

The interpretation of the fourth paragraph of Article 263 TFEU

The fourth paragraph of the old Article 230 EC focused on a qualitative distinction between a 'true' regulation and a decision. Arguably, the fact that a regulation – in contrast to a decision – had general application was a reason to consider it an instrument with the characteristics of 'legislation' and legislation, when used properly, was something which individual parties should not be allowed to challenge in direct actions before a court. Against this simplified but essential background, the new system of legal acts introduced by the Lisbon Treaty is forcing the Court, when interpreting the fourth paragraph of the new Article 263 TFEU, to abandon a logic based on the distinction between a 'true' regulation and a decision; since a regulation, now, cannot only be qualified as a 'legislative' act but also as a 'non-legislative' act, and since a decision, now, has general application (unless it 'specifies those to whom it is addressed').[53] This means that there is a lot which needs to be clarified, with respect to content of the fourth paragraph of the new Article 263 TFEU and, indeed, the new system of legal acts to which it relates.

The new knowledge resulting from the judgment in Case C-583/11 P concerns first and foremost the third limb of the fourth paragraph of the new Article 263 TFEU and the conclusion that the concept of 'regulatory act' does not extend to any of those acts which are classified as 'legislative' acts. Since many, in fact most, regulations are now classified as 'non-legislative' acts (as many directives and most decisions) this is a major change, at least with respect to the logic. But this does not necessarily mean that there will now be wider access for natural and legal

[52] *See* Case C-583/11 P, para. 112.
[53] *See*, respectively, Art. 297 and Art. 288 TFEU.

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person to direct actions before the Court. Instead, what will be decisive is if the interpretation of the new condition that a regulatory act 'does not entail implementing measures' is generous in comparison with the old condition of individual concern. This was not something that the Court said anything about in the present case (see instead Case C-247/12 P, *Telefónica*).[54] Other essential components that the Court, on a strict reading, did not say anything about was what its definition is of 'legislative' act (presumably uncontroversial considering the seemingly unambiguous definition in Article 289(3) TFEU) and, indeed, what its definition is of the concept of 'regulatory' act. With respect to the latter, the judgment of the Court is limited to the finding that the concept of 'regulatory' act does not extend to any of those acts which are classified as 'legislative' acts, but it does not say how 'regulatory acts' relate to the different forms of binding non-legislative acts.

It is submitted that the concept of regulatory act should be expected to encompass only non-legislative acts of general application (in comparison with those of individual application). This means all those acts which in accordance with Article 290 TFEU are classified as *delegated acts* (with 'general application' being part of their definition), and, depending on their design, many of those acts which in accordance with Article 291 TFEU are classified as *implementing acts*. But the concept also extends to other types of non-legislative acts of general application, such as those adopted by the Council and the European Council on the basis of treaty provisions which do not explicitly refer to a legislative procedure, or those acts adopted by 'bodies, offices or agencies' which are envisaged in the first paragraph of Article 263 TFEU.[55]

Following the judgment in Case C-583/11 P it seems clear that the second limb of the fourth paragraph of Article 263 TFEU will function as the general rule for direct action by natural and legal persons against a legal act which is not addressed to that person and that the third limb will function as an exception, in respect of a restricted type of act ('a regulatory act which is of direct concern to

[54] *See* ECJ 19 Dec. 2013, Case C-274/12 P, *Telefónica* v. *Commission*, in particular para. 30 where the Court said that 'the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the final limb of the fourth paragraph of Article 263 TFEU'. Cf. Final Report from Discussion Circle (*supra* n. 25), point 21, where it was said that '[t]he addition of the words "without entailing implementing measures" aims to ensure that the extension of a private individual's right to institute proceedings would apply only to those (problematical) cases where the individual concerned must first infringe the law before he can have access to a court.' Cf. also the Opinion of A-G Wathelet in ECJ 27 Feb. 2014, Case C-132/12 P, *Stichting Woonpunt and Others* v. *European Commission* and the ruling of the General Court in ECJ 25 Oct. 2011, Case T-262/10, *Microban v. Commission, with commentary by S. Peers and M. Costa, 8 EuConst (2012) p. 82.*

[55] *See* the Opinion of A-G Kokott in Case C-583/11 P, points 49-56, and the Commission's argument at para. 41. *See also* ECJ 22 Jan. 2014, Case C-270/12, *United Kingdom* v. *European Parliament and Council.*

them and does not entail implementing measures'). In both situations the pre-existing condition of direct concern will continue to apply. This means that an act classified as 'legislative' could only form the subject-matter of an action brought under the general rule, for which also the pre-existing condition of individual concern will continue to apply. It seems clear that both the condition of direct concern and the condition of individual concerns are not only unchanged, as to their wording but also as to the interpretation of their content and, therefore, that well-established case law will continue to apply.[56] Most obviously this confirms the continuous significance of the *Plaumann* formula for assessment of situations falling under the general rule (second limb of fourth paragraph of Article 263 TFEU).

The ruling confirms that the fourth paragraph of Article 263 TFEU provides a new possibility for natural and legal persons to bring a direct action against that category of acts of general application which, before the reform introduced by the Lisbon Treaty, was most likely to be problematic (cf. Case C-263/02 P, *Jégo-Quéré*). At the same time it is clear that situations may still occur in which the only means for them to challenge an act of general application is by indirect action, via some form of implementing measure adopted at EU or national level, and that no such implementing measure has been adopted (cf. Case C-50/00 P, *Unión de Pequeños Agricultores*). These situations have now been isolated to those 'legislative acts' that are not of both direct and individual concern to the person who wishes to challenge them. According to the Court, the lack of a right to direct action in such situations should not be seen as a gap in judicial protection. Even if it is not clear what the exact requirements would be in a specific case (e.g. to avoid that the sole means of access to a court was available to parties who were compelled to act unlawfully), it is clear that the responsibility for upholding the principle of effective judicial protection will rest with the member states and their courts in accordance with Article 19(1) TEU and, underlying that, the fundamental principle of sincere cooperation (Article 4(3) TEU).

There is, seemingly, nothing new about this reasoning, except perhaps a stronger defence for the restriction on the right for natural and legal persons to bring direct actions against acts of general application when these belong to the new category of 'legislative' acts. This could be seen in the Court's firm and final statement 'that the protection conferred by Article 47 of the Charter does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the

[56] *See* Case C-583/11 P, in particular paras. 70-71 and the Opinion of A-G Kokott, points 68 and 89-90. But cf. the same Opinion, points 69-72 which address some 'nuances in the formulation of the criterion of direct concern'.

European Union'.[57] The Court seems to take the chance to say – or at least hint – that there is a deeper, democratic, logic why individual parties should only have a very limited right to challenge legislative acts directly and that the remaining restriction is no longer a flaw which ought to be corrected by the authors of the treaties.[58] The tension underlying the logic can find no better illustration than the current case, where the legislative act under attack had been thoroughly prepared and adopted with overwhelming political support, in compliance with basic principles of both representative and participatory democracy (Articles 10 and 11 TEU). Some support for a reasoning along such lines can be found in the Opinion of Advocate-General Kokott:

> 38. The absence of easier direct legal remedies available to individuals against legislative acts can be explained principally by the particularly high democratic legitimation of parliamentary legislation. Accordingly, the distinction between legislative and non-legislative acts in respect of legal protection cannot be dismissed as merely formalistic; rather, it is attributable to a qualitative difference. In many national legal systems individuals have no direct legal remedies, or only limited remedies, against parliamentary laws.

The historical method of interpretation

Within the work of the European Convention, the plenary discussions had, apparently, revealed a desire to look seriously at the implications that certain proposals might have for the operation of the Court of Justice, and it was considered important that the Court of Justice and the Court of First Instance were given an opportunity to express their views.[59] Therefore, the Praesidium of the European Convention decided to set up a special Discussion Circle on the Court of Justice.[60] The Discussion Circle consisted of twenty members of the European Convention and was chaired by Antonio Vitorino, then Commissioner for Justice and Internal Affairs.

One of the questions which the Discussion Circle was expected to explore was if the conditions for natural and legal persons to bring direct actions to the Court of Justice against legal acts of general application should be opened up. The *travaux préparatoires* referred to by the Court in Case C-583/11 P reveals that the question was debated at length within the Discussion Circle and that its members were divided into two groups; one considering that the existing conditions (fourth

[57] *See* Case C-583/11 P, para. 105.

[58] Cf. the approach in Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*; and Case C-263/02 P, *Commission* v. *Jégo-Quéré.*

[59] *See* Annex of Final report of the Discussion Circle on the Court of Justice of 25 March 2003, CONV 636/03 (available at <http://european-convention.europa.eu>).

[60] *See* Annex of Final report of the Discussion Circle (*supra* n. 25).

paragraph of Article 230 EC) satisfied the essential requirements of effective judicial protection, and another considering that the conditions were too restrictive and, therefore, would have to be amended.[61]

For the first group it was a central argument that the judicial system of the EU was a decentralised one, based on the principle of subsidiarity, where it was mainly national courts which were called upon to defend the rights of individuals and, then, refer questions to the Court of Justice for preliminary rulings. But according to this group it would be appropriate to mention explicitly in the treaty text that national courts are required, in accordance with the principle of sincere cooperation, to interpret and apply national procedural rules in a way that enables natural and legal persons to challenge the legality of legal acts of general application indirectly.[62]

For the second group there was a range of alternative solutions to choose from but a majority of the members of the group was in favour of introducing an additional possibility, which would allow any natural and legal person to bring an action without any condition of individual concern, against 'an *act of general application* which is of direct concern to him without entailing implementing measures' (emphasis added). But some members felt that it would be more appropriate to choose the expression 'regulatory act' since that would enable a restrictive approach to proceedings by private parties against a 'legislative act' (for which the conditions of direct and individual concern would continue to apply) and a more open approach as regards proceedings against a 'regulatory act'.[63] This is the central part of the *travaux préparatoires* referred to by the Court in Case C-583/11 P.

The most obvious reason why this also became the solution finally opted for was that it offered a reasonable compromise between the positions of the two groups of politicians, those against and those in favour of a change. And parallel to the limited amendment with respect to the conditions for natural and legal persons to bring direct actions to the Court of Justice the idea was also picked up, from the first group, to make a supplementary amendment which would clarify that the judicial system was a decentralised one, where 'Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law' (cf. now second subparagraph of Article 19(1) TEU).

Importantly, the solution opted for was not only a reasonable compromise between politicians but also the solution which the Court itself had communicated to the Discussion Circle that it favoured. In accordance with the instructions

[61] *See* Cover note from the Praesidium to the Convention of 12 May 2003 (CONV 734/03), at p. 20 (available at <european-convention.europa.eu>).

[62] *See* Final report of the Discussion Circle (*supra* n. 25), para. 18.

[63] *See* Final report of the Discussion Circle (*supra* n. 25), para. 22.

given to it, the Discussion Circle had given the Court of Justice and the Court of First Instance an opportunity to express their views and presentations were made by the President of the Court of Justice, Gil Carlos Rodriguez Iglesias, and the President of the, then, Court of First Instance, Bo Vesterdorf.[64]

Perhaps most notably, in his presentation of the point of view of the Court of Justice, President Rodriguez Iglesias clarified, first, that the Court considered the existing system for direct actions by individuals against legal acts of general application to satisfy the requirements essential for the effective judicial protection of the rights of individuals.[65] Then, emphasising that an increase of that protection was first and foremost a policy choice, he said that he would nevertheless like to draw the attention of the Discussion Circle to the fact that the question was closely linked to that of the restructuring of the legal acts. If a hierarchy between these acts, such as that contemplated in the European Convention, were to become a reality, 'it would seem appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide for a more open approach with regard to actions against regulatory measures'.[66] The same assessment was made by President Vesterdorf, in his presentation of the point of view of the Court of First Instance.[67]

There is nothing surprising about the point of view presented by the Court to the Discussion Circle, since it reflected its case law, and there is nothing unreasonable about the Court having been asked for its view. At the same time, it is in some way still disturbing that the Court, which in its case law had justified its restrictive approach by reference to the fact that the system for judicial review was possible to reform by treaty amendments,[68] now argued why those responsible for such a reform should continue to take a restrictive approach. This puts the historical method of interpretation used by the Court in Case C-583/11 P in a perspective.

There is nothing unreasonable – or surprising – about the Court applying a historical method of interpretation to provisions of primary law. Quite the contrary, this is a logical consequence of the convention model underlying the Lisbon Treaty and of the importance which has now been given to that model in the constitutional construction of the European Union (cf. Article 48(3) TEU). The

[64] *See* Annex of Final report of the Discussion Circle (*supra* n. 25).

[65] *See* Oral Presentation by the President of the Court of Justice to the Discussion Circle on 17 Feb. 2003, CONV 572/03, point 4 (available at <european-convention.europa.eu>).

[66] Reference to the Final Report of 29 Nov. 2002 from the Working Group IX on Simplification, CONV 424/02 (available at <european-convention.europa.eu>).

[67] *See* Oral presentation by the President of the Court of First Instance to the Discussion Circle on 24 Feb. 2003, CONV 575/03, point 4 (available at <european-convention.europa.eu>).

[68] *See* in particular Case C-50/00 P, *Unión de Pequeños Agricultores*, paras. 44-45; Cf. Case C-263/02 P, *Jégo-Quéré*, para. 36.

reasoning was explained by Advocate-General Kokott in her opinion in Case C-583/11 P. Accordingly,

> [d]rafting history in particular has not played a role thus far in the interpretation of primary law, because the '*travaux préparatoires*' for the founding Treaties were largely not available. However, the practice of using conventions to prepare Treaty amendments, like the practice of publishing the mandates of intergovernmental conferences, has led to a fundamental change in this area. The greater transparency in the preparations for Treaty amendments opens up new possibilities for interpreting the Treaties which should be utilised as supplementary means of interpretation if, as in the present case, the meaning of a provision is still unclear having regard to its wording, the regulatory context and the objectives pursued.[69]

Against that background, the judgment in Case C-583/11 P is particularly interesting because of its explicit statements with regard to the importance of the *travaux préparatoires* underlying the Lisbon Treaty. In the words of one of the judges, Koen Lenaerts (acting as president in Case C-583/11 P), this is therefore one of a few recent judgments which 'suggest a change in the legal culture of the EU Courts which advocates giving more weight to *travaux préparatoires*' and 'it seems that they may well become increasingly important in the years to come'.[70] There are many good reasons to welcome such a change in the legal culture but this will require a lot more, and that the Court will prove its interest also in the *travaux préparatoires* of other Treaty provisions, to which it does not itself have the same close relationship.

[69] *See* Case C-583/11 P, the Opinion of A-G Kokott, point 32.

[70] *See* K. Lenaerts and J.A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', *EUI Working Paper AEL* 2013/9, at p. 19 and 24. *See also* Case C-370/12 Pringle, para. 135, and Case C-274/12 P, *Téléfonica*, para. 27.

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