Towards a Definition of 'Implementing Measures' under Article 263, Paragraph 4, TFEU

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Case C-456/13 P, T&L Sugars Ltd and Sidul Açúcares v Commission, Judgment of the Court (Grand Chamber) of 28 April 2015, ECLI:EU:C:2015:284

Article 263 TFEU allows applicants to challenge regulatory acts which are of direct concern to them and do not entail implementing measures. In this judgment the Court confirmed that the degree of discretion afforded to implementing authorities is irrelevant when determining the existence of implementing measures. This note explores some of the consequences of that finding on the structure of the system of remedies under the Treaties.

I. Introduction

The case law on the rules of standing to challenge a regulatory act has reached a new milestone. The third limb of Article 263, paragraph 4 TFEU, introduced by the Lisbon Treaty relaxed the conditions for admissibility, in so far as applicants need only establish direct concern and not also individual concern when challenging a regulatory act that does not entail implementing measures.[1]

The new concept of regulatory act was not defined in the Treaty and had given rise to much debate.[2] It was finally defined by the Court in *Inuit Tapiriit Kanatami*[3] and the first concrete example to come before the Court was in the context of food contact materials.[4] More broadly there has been discussion on the objective underlying the amendment of the admissibility conditions for direct actions before the General Court.[5] Until recently, however, the missing element was a definition of "*implementing measures*".

In the case discussed in this note, the Court of Justice confirmed that the existence of implementing measures in the context of Article 263 TFEU does not depend on the level of discretion afforded to the implementing authority. After a summary of the outcome at both instances, this note discusses the impact and significance of the case for the system of remedies under the Treaties.

II. Facts

T&L Sugars and Sidul Açúcares are two refiners of imported cane sugar, established in the United Kingdom and in Portugal respectively. On 30 May 2011 they brought an action for annulment and damages before the General Court challenging a series of measures by which the Commission had addressed a shortage of sugar on the EU market in the marketing year 2010/2011.[6]

Regulation (EU) No 222/2011[7] allowed operators to market a limited quantity of sugar in excess of the domestic production quota, whilst Implementing

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1 That provision reads: *"Any natural or legal person may … institute proceedings against … a regulatory act which is of direct concern to them and does not entail implementing measures"*.

2 See P. Van Malleghem, *Before the law stands a gatekeeper, or, what is a "regulatory act" in Article 263(4) TFEU?*, 2014 CMLR 51(4), p. 1187-1216.

3 Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625.

4 Case T-262/10, *Microban International Ltd and Microban (Europe) Ltd v Commission,* ECLI:EU:T:2011:623. See also C. Buchanan, *Long Awaited Guidance on the Meaning of "Regulatory Act" for Locus Standi Under the Lisbon Treaty,* 2012 EJRR 3(1) p. 115-122.

5 For example Case C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, para. 27-31.

6 The same applicants also lodged several similar cases, which are still pending before the General Court: T-103/12, T-335/12, T-225/13 and T-411/13.

7 Commission Regulation (EU) No 222/2011 of 3 March 2011 laying down exceptional measures as regards the release of out-of-quota sugar and isoglucose on the Union market at reduced surplus levy during marketing year 2010/2011, OJ L 60/6, 05.03.2011, p. 7 ("Regulation No 222/2011").

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Regulation (EU) No 302/2011[8] suspended import tariffs for certain quantities of sugar.

With regard to out-of-quota quantities produced in the EU, the Commission subsequently adopted Implementing Regulation (EU) 293/2011[9], closing the application period and fixing the coefficient by which the Member States were to calculate the quantities to be allocated to operators who had applied in time. Similarly, regarding imports, the Commission closed the application period and fixed a coefficient by Implementing Regulation (EU) No 393/2011[10].

The applicants challenged the above four Regulations, arguing mainly that they amounted to discrimination against refiners of imported cane sugar. The Commission, supported by France, lodged an objection of inadmissibility.

While the action for annulment was dismissed as inadmissible, and the appeal upholding that dismissal forms the subject of this note, the action for damages is still pending.

III. Judgment of the General Court (Fifth Chamber)

At the outset of its reasoning the General Court found that the four contested Regulations were regulatory acts.[11] It then went on to consider whether they entailed implementing measures. It noted that all four required interested operators to apply to the national authorities, which would then issue certificates or licences in accordance with the coefficients established by the Commission. Therefore, the Court considered that all four contested Regulations required implementing measures because none could produce legal effects on individuals without the intermediary step of national measures.

In reaching that conclusion, the General Court rejected the applicants' argument that the national authorities had a "*purely mechanical*" role in the process and that, in the absence of discretion, the national measures in question were not genuine implementing measures. The General Court instead followed its existing approach, holding that the extent of discretion is irrelevant when determining the existence of implementing measures.[12]

That finding was not called into question by the argument that, at least with regard to the grant of out-of-quota certificates to other operators, the applicants would have no judicial remedy. In Portugal, they claimed, such certificates could not be challenged because "*mere implementing acts*" cannot be reviewed on the basis of the alleged illegality of the underlying basic act. Moreover, neither applicant could know of such certificates because they remain unpublished.[13]

The Court however held that it falls to the Member States to ensure effective legal protection in fields covered by Union law, adding that the application of the condition relating to implementing measures cannot depend on the existence of an effective remedy at the national level. Such an interpretation would require the Union Courts to examine and interpret national procedural law, which would go beyond their jurisdiction.[14] Finally, the argument that a national remedy is manifestly ineffective cannot succeed, since the Union Courts can never interpret the admissibility conditions in the Treaty so as to set them aside.[15]

Having found that all four contested Regulations required implementing measures, the General Court went on to hold that the Regulations were not of individual concern to the applicants in so far as they produced legal effects with regard to certain categories of persons envisaged in a general and abstract

8 Commission Implementing Regulation (EU) No 302/2011 of 28 March 2011 opening an exceptional import tariff quota for certain quantities of sugar in the 2010/11 marketing year, OJ L 81, 29.3.2011, p. 8–9 ("Regulation No 302/2011").

9 Commission Implementing Regulation (EU) No 293/2011 of 23 March 2011 fixing allocation coefficient, rejecting further applications and closing the period for submitting applications for available quantities of out-of-quota sugar to be sold on the Union market at reduced surplus levy, OJ L 79, 25.3.2011, p. 8 ("Regulation No 293/2011").

10 Commission Implementing Regulation (EU) No 393/2011 of 19 April 2011 fixing the allocation coefficient for the issuing of import licences applied for from 1 to 7 April 2011 for sugar products under certain tariff quotas and suspending submission of applications for such licences, OJ L 104, 20.4.2011, p. 39–40 ("Regulation No 393/2011").

11 Judgment of the General Court of 6 June 2013 in Case T-279/11, *T&L Sugars Ltd and Sidul Açúcares v Commission*, ECLI:EU:T:2013:299, para. 36.

12 *Ibidem*, at para. 52-53, citing Cases T-379/11, *Hüttenwerke Krupp and Others v Commission*, ECLI:EU:T:2012:272, para. 51, and T-381/11, *Eurofer v Commission*, ECLI:EU:T:2012:273, para. 59.

13 *Ibidem*, para. 61-62.

14 *Ibidem*, para. 69-70, citing Cases C-263/02 P, *Commission v Jégo-Quéré*, ECLI:EU:C:2004:210, para. 33, and C-50/00 P, *Unión de Pequenos Agricultores v Council*, ECLI:EU:C:2002:462, para. 43.

15 *Ibidem*, para. 71 and 72, citing *Jégo-Quéré*, *supra*, note 14, para. 36, and *Unión de Pequeños Agricultores*, *supra*, note 14, para. 44.

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way, given that they applied to all EU sugar producers and importers without distinguishing the appellants. As regards Implementing Regulation No 393/2011, the General Court held that membership of the limited class of persons who had applied for an import licence resulted from the very nature of the legislation and therefore could not distinguish the applicants individually.

As the challenged regulatory acts had been found to entail implementing measures, the General Court dismissed the action for annulment due to lack of individual concern without discussing direct concern.[16]

IV. Appeal

On appeal before the Court of Justice, the appellants alleged an error of law in the General Court's interpretation of the concept of implementing measures. They argued essentially that the General Court failed to recognise that a distinction should be made between "*genuine*" and other implementing measures, having regard to the specific nature of those measures, the level of discretion enjoyed by the implementing authority and the objective of effective judicial protection. They also challenged the finding that they were not individually concerned by Implementing Regulation No 393/2011.

1. Opinion of Advocate General Cruz Villalón

The Advocate General started from the premise that the new provision regarding standing to challenge a regulatory act relaxes the conditions for challenging such an act by removing the requirement to show individual concern.[17]

On that basis, he argued against the view that any minimal requirement to fulfil certain duties on the part of a national authority means that an act entails implementing measures. In his opinion, implementing measures require the exercise of "*power*" and account must be taken of the "*form and intensity*" of a required measure. To hold otherwise would frustrate the objective of relaxing the admissibility conditions.[18]

He then noted that it was the Commission who essentially defined the exceptional measures for the sugar market in their entirety (subject matter, to whom they applied and their applicability in time)[19] as well as the admissibility and eligibility conditions. The national authorities were merely responsible for carrying out administrative tasks. In the Advocate General's view, such activities did not amount to "*implementing measures*" but rather "*management measures*".[20] He also noted that the appellants, being refiners of imported sugar, were directly concerned by Regulations No 302 and 393/2011 (on import), but that it was "*much more difficult*" to consider them so by Regulations No 222/2011 and 293/2011, which concern domestic sugar producers.[21]

Applying his interpretation of implementing measures, the Advocate General went on to illustrate that Regulation No 293/2011 is itself the implementing measure for Regulation No 222/2011, and Regulation No 393/2011 is the implementing measure for Regulation No 302/2011. Put differently, the Regulations fixing coefficients and closing the application periods, not the "*management measures*" taken the national authorities, constituted the "*moment of implementation*".[22]

He therefore concluded that the judgment of the General Court should be set aside in so far as it held that Regulations No 302/2011 and 393/2011 entailed implementing measures, and that the case should be referred back to the General Court on the substance regarding those two acts.

2. Judgment of the Court of Justice (Grand Chamber)

In addressing the first ground of appeal, namely an alleged error in law regarding the definition of implementing measures, the Court first recalled its ear-

16 *Ibidem*, para. 95. In consequence of the dismissal of the action for annulment any incidental pleas of illegality raised by the applicants were also dismissed.

17 Opinion of Advocate General Cruz Villalón, delivered on 14 October 2014 in Case C-456/13 P, *T&L Sugars Ltd and Sidul Açúcares v Commission,* ECLI:EU:C:2015:284, para. 19, citing Case C-583/11 P, *Inuit Tapiriit Kanatami v Parliament and Council, supra,* note 3, para. 57.

18 *Ibidem*, para. 30-31.

19 *Ibidem*, para. 42: "*Ratione materiae, ratione personae* and *ratione temporis*".

20 *Ibidem*, para. 42-46; "*actes administratifs de gestion*" in French.

21 *Ibidem*, para. 43.

22 *Ibidem*, para. 47.

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lier case law in which it had confirmed that the concept of a regulatory act not entailing implementing measures must be interpreted in light of the objective of ensuring effective judicial protection.[23]

The Court then proceeded to discuss direct concern. Following the Advocate General, it noted that the appellants are not producers of sugar. Regulations No 222 and 293/2011, which relate exclusively to producers, were therefore not of direct concern to them within the meaning of the fourth paragraph of Article 263 TFEU.[24] It therefore held that the General Court had erred in law by not addressing direct concern regarding those two Regulations. That error was however "*not such as to entail the setting aside of the judgment under appeal as regards inadmissibility of the action against those regulations*" (presumably because the outcome would have been the same).[25]

It subsequently went on to examine the nature of the "*intermediary acts*" adopted by the national authorities following the appellants' applications for import licences under Regulation No 302/2011. The Court held that the two Regulations on imports (No 302 and 393/2011) impacted the appellants' legal situation only through those national measures, which applied the coefficients fixed in Regulation No 393/2011 or refused such licences. Accordingly, it held that those national decisions constituted implementing measures for the purpose of Article 263 TFEU. Contrary to the view of the Advocate General, crucially the Court held that such a conclusion "*is not called into question by the allegedly mechanical nature of the measures taken at national level*", an aspect on which it agreed with the General Court, holding discretion to be "*irrelevant in ascertaining whether those regulations entail implementing measures.*"[26]

The Court also rejected the appellants' argument concerning the right to an effective remedy under Article 47 of the Charter and referred to its existing case law concerning the "*complete system of legal remedies*" set out in the Treaties. According to that case law, while the conditions of admissibility must be interpreted in light of that fundamental right, such an interpretation "*cannot have the effect of setting aside* [the admissibility] *conditions which are expressly laid down in* [the Treaty]".[27]

The Court went on to recall the role of national courts within the EU system of remedies, as set out in Article 19(1), TEU in conjunction with Article 267 TFEU. It noted in particular that it falls to the Member States to establish a system of legal remedies sufficient to ensure effective judicial protection. Indeed, when implementing EU law they are obliged to do so.[28]

Thus the first ground of appeal was rejected.

As regards the second ground of appeal, namely that the General Court made an error in law in finding a lack of individual concern in relation to Regulation No 393/2011, the appellants argued that that Regulation did not apply to all operators in general but only to those who had applied for an import licence. The Regulation therefore constituted a bundle of individual decisions in response to individual applications.

Against the background of the *Plaumann* doctrine, the Court upheld the General Court's reasoning in finding a lack of individual concern regarding Regulation No 393/2011, essentially because neither the appellants' applications for import licences nor their situation were taken into account when the Regulation was adopted. The Court therefore rejected the second ground of appeal and went on to dismiss the appeal in its entirety.[29]

V. Comments

It has long been debated whether the system of remedies under the Treaties is complete or, if not, how best to complete it.[30] Hopes were raised when the amendment of the admissibility conditions was proposed in the Constitutional Treaty, and subsequently taken on in the Lisbon Treaty.

23 Judgment of the Court (Grand Chamber) of 28 April 2015 in Case C-456/13 P, *T&L Sugars Ltd and Sidul Açúcares v Commission*, ECLI:EU:C:2015:284, para. 29-32, citing *Telefónica*, *supra*, note 5, para. 27.

24 *Ibidem*, para. 37; see Opinion of the Advocate General, *supra*, note 17, para 43.

25 *Ibidem*, para. 39.

26 *Ibidem*, para. 41-41.

27 *Ibidem*, para. 43-44.

28 *Ibidem*, para 48-50; citing *Inuit Tapiriit Kanatami*, *supra,* note 3, para. 100-101.

29 *Ibidem*, para. 63-67. The Court also rejected a third ground of appeal, that the General Court was wrong to reject an incidental plea of illegality due to the inadmissibility of the action. That aspect, being purely procedural, is not discussed here.

30 The high note was struck by Advocate General Jacobs in his Opinion in *Unión de Pequeños Agricultores*, supra, note 14; see also K. Lenaerts and T. Corthaut, *Judicial Review as a Contribution to the Development of European Constitutionalism*, 2003 YEL p. 1-43;

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In practice we have seen applicants benefitting from the new provision, for example, in cases challenging harmonised classifications under the CLP Regulation[31] and the identification of substances of very high concern under the REACH Regulation.[32]

The present judgment adds an important piece of the puzzle: an implementing measure is any measure adopted by an implementing authority on the basis of a regulatory act, irrespective of the exercise of discretion, provided that it "constitutes a decision"[33] in the sense that legal effects formally flow from it rather than from the related EU act.[34]

This has two important consequences. First, it avoids the need to analyse the nature of national acts when assessing whether the act truly entails implementing measures, and can therefore be seen as a pragmatic approach. Secondly, it provides for a coherent and systematic application of the admissibility conditions as regards the relationship between direct concern and implementing measures, as explained further below.

It is recalled that direct concern is the first part of the two-part test relevant for standing to challenge a regulatory act (without demonstrating individual concern) and itself contains two cumulative elements: first, an EU act must directly affect an applicant's legal situation; secondly it must leave no discretion to the authorities responsible for implementing it, such implementation being purely automatic and resulting from EU law alone, without the application of other intermediate rules.[35]

In this judgment, the Court expressly applied the direct concern condition to the 'sugar producer Regulations' (Regulations No 222 and 293/2011). It is worth noting that in doing so, the judgment appears to imply, in line with the case law of the General Court and the Opinion of the Advocate General in *Telefónica*, that direct concern means the same under the second and third limbs of Article 263, paragraph 4, TFEU.[36]

Moreover, failure to address direct concern in relation to those two Regulations was expressly held to be an error of law on the part of the General Court. This further highlights that, as is apparent from the letter of the provision, there is a logical sequence in the third limb of Article 263 TFEU: first, it must be ascertained whether an applicant is directly concerned by the challenged act. Secondly, it is necessary to look at whether the challenged act is a regulatory act and, if yes, whether it entails implementing measures (if the challenged act is not a regulatory act, individual concern must also be established). This bears out when considering the practical consequences:

(i) Where a regulatory act does not require any implementing measures at all, and directly affects an applicant's legal situation with no exercise of discretion by the authorities such that implementation can be considered automatic, that act is of direct concern to the applicant and it can be challenged before the General Court without demonstrating individual concern.

(ii) Where an authority implements the regulatory act and in doing so exercises discretion, through intermediate rules or otherwise, an applicant cannot be directly concerned by the regulatory act. In the absence of direct concern it is not necessary for the Union Courts to consider the existence of implementing measures, or individual concern for that matter.

(iii) Where an authority implements the regulatory act and in doing so does not exercise discretion, such that the implementation can be considered automatic, an applicant is directly concerned by the regulatory act, if it directly affects its legal situation. However, if there are implementing measures, even mechanical ones which require no exercise of discretion, the regulatory act cannot be challenged before the General Court unless individual concern can be shown.

As mentioned above, the Court has confirmed that the exercise of discretionary power on the part of the implementing authority is "*irrelevant*" to the ques-

31 Case T-689/13, *Bilbaína de Alquitranes and Others v Commission*, ECLI:EU:T:2015:767.

32 Case T-268/10 RENV, PPG and SNF v. ECHA, ECLI:EU:T:2015:698.

33 "*Mesures de nature décisionnelle*" in French, at para. 49 of the Judgment of the General Court, supra, note 11.

34 See para. 49-50 of the Judgment of the General Court, supra, note 11, and para. 40 of the Judgment of the Court, supra, note 23.

35 C-132/12 P, *Stichting Woonpunt and Others v Commission*, ECLI:EU:C:2014:100, para. 68. In his Opinion in the present case the Advocate General also uses the expression "*intermediate measures*", supra, note 17, at para. 23.

36 The General Court considered that the interpretation of the words "*direct concern*" cannot be more restrictive under the third than under the second limb of Article 263, paragraph 4, TFEU (*Microban*, *supra*, note 4, para. 32). It has fully applied the pre-Lisbon case law on direct concern to the third limb of that provision, e.g. in Case T-93/10, *Bilbaína de Alquitranes and Others v ECHA*, ECLI:EU:T:2013:106, para. 37 and 65. The Opinion of Advocate General Kokott in *Telefónica*, *supra*, note 5, para. 59-62, suggests that the meaning should be the same in both limbs.

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tion of the existence of implementing measures. In other words, the existence of implementing measures requires that a decision is taken, but it does not matter if that decision is mechanical in nature.

Accordingly, the logic appears to be that if there is discretion, then the act is not of direct concern and the matter of standing is closed.[37] If there is no discretion, the very existence of implementing measures means that the applicant is required to show individual concern vis-à-vis the regulatory act.

This contradicts the Advocate General who considered discretion relevant in so far as requiring discretion for measures to be true implementing measures was necessary to achieve the relaxation of the admissibility conditions. Yet it is difficult to see how the Court could have done so without setting the criterion for implementing measures aside, which is impermissible.[38] If the existence of implementing measures required a degree of discretion on the part of the implementing authority (as proposed by the Advocate General), that requirement would overlap with the second part of the direct concern test.

As demonstrated above, however, discretion on the part of the implementing authority in any event means that the condition of direct concern is not fulfilled. In other words, the condition regarding implementing measures only comes into play in situations where the implementing authority has no discretion.

If the Advocate General's proposal were followed, the following problem would arise. In cases in which a challenged regulatory act directly affects the legal situation of the applicant and leaves no discretion to the implementing authority – that is to say, in cases in which there is direct concern – the action would be admissible. This would render meaningless the requirement that, in order to challenge regulatory acts, there must be direct concern *and* no implementing measures.

Finally, there is a further aspect to consider regarding the impact of this judgment on the system of remedies under the Treaties, deemed to be complete since the entry into force of the Lisbon Treaty.[39] The arguments on effective judicial protection have again been effectively pushed back on the Member States. Accordingly, it arguably falls to national courts to make certain actions admissible, under Article 19(1), second indent, TEU, where they regard national implementing measures that cannot be challenged before the Union Courts.[40] It remains to be seen if this will happen in practice.

It appears questionable whether effective judicial protection is ensured where, if a person wishes to contest the validity of an act of EU law which directly concerns it but does not individually concern it, and it happens to entail (mechanically adopted) implementing measures, the only option open to that person is to take action at the national level. In light of the risks and complexities involved in national proceedings, even on the assumption that national judicatures are obliged to submit preliminary references, one could wish for more generous admissibility conditions.[41] As this judgment indicates, however, the wording of the Treaty may not leave much room for manoeuvre.

Given the complexity of the rules on standing and the somewhat cryptic nature of this judgment, future cases are likely to bring further developments, as applicants continue their quest to be heard before the Union Courts. For now the Court has provided at least some indications on which regulatory acts can be challenged.

37 See also Case C164/14 P, *Pesquerias Riveirenses and Others v Council*, ECLI:EU:C:2015:111, para. 34-37.

38 See *Unión de Pequeños Agricultores*, *supra*, note 14, para. 44.

39 See *Pesquerias Riveirenses*, *supra*, note 37, para. 40.

40 See para. 46 of the Judgment of the Court, *supra*, note 23; see also, to that effect, the Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami*, *supra*, note 3, para. 120-121; Case C-84/14 P, *Forgital v Council*, ECLI:EU:C:2015:517, para. 66 and case law cited; Case C-64/14 P, *von Storch and Others v ECB*, ECLI:EU:C:2015:300, para. 50 and case law cited.

41 See, *mutatis mutandis*, the Opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores*, *supra*, note 14.

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