

# Another Step towards a Definition of ‘Implementing Measures’?

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Case T-397/13, *Tilly Sabco v Commission*, Judgment of the General Court (Fifth Chamber) of 14 January 2016, ECLI:EU:T:2016:8

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 General Court held effectively that the implementing measure cannot be hypothetical but must follow-on naturally from the underlying regulatory act. This note discusses the significance of this seemingly new element in the meaning of ‘entail implementing measures’ and its potential consequences.

## I. Introduction

Article 263, paragraph 4, TFEU, introduced by the Lisbon Treaty, allows natural and legal persons to challenge regulatory acts which are of direct concern to them and do not entail implementing measures, without the need to establish individual concern. The EU Courts have been gradually interpreting the new provision.<sup>1</sup>

The present writers have recently commented on the judgment of the Court in *T&L Sugars*, which clarified that the degree of discretion afforded to implementing authorities is irrelevant when determining the existence of implementing measures.<sup>2</sup> This case note follows on from that commentary with a short analysis of the judgment from the General Court of 14 January 2016 in *Tilly Sabco v Commission*. The General Court has now added a further dimension to the definition of ‘entail implementing measures’: in order to qualify as such, implementing measures must

be adopted by the relevant authority ‘during the normal course of affairs’ and follow ‘naturally’ from the underlying regulatory act. After a summary of the judgment, this note discusses what it contributes to the admissibility requirements for actions directed against regulatory acts.

## II. Facts

*Tilly-Sabco* is a French company which exports frozen chicken to the Middle East. On 6 August 2013, it brought an action for annulment before the General Court challenging a measure adopted by the Commission in the context of the EU rules for the common organisation of agricultural markets, namely export refunds for poultry meat.<sup>3</sup> It also requested interim relief, which it did not obtain.

Under the Single CMO Regulation,<sup>4</sup> certain agricultural products can benefit from export refunds

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1 Most notably, the Court defined the concept of ‘regulatory act’ in Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, at para. 61. The question of what are ‘implementing measures’ has also been broached in several cases, see e.g. Case T-262/10, *Microban International Ltd and Microban (Europe) Ltd v Commission*, EU:T:2011:623; Case C-274/12 P, *Telefónica v Commission*, EU:C:2013:852; Case C-456/13 P, *T&L Sugars Ltd and Sidul Acúcares v Commission*, EU:C:2015:284.

2 C. Buchanan and L. Bolzonello, *Towards a definition of implementing measures under Article 263, paragraph 4, TFEU*, 2015 EJRR 6(4), p. 671-676.

3 The French company *Doux SA* intervened in support of *Tilly-Sabco* in this case and also brought its own similar action in Case T-434/13, *Doux v Commission*, EU:T:2016:7. Notably France also brought an action for annulment against the Commission on the same matter in Case T-549/13, *France v Commission*, EU:T:2016:6.

4 Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ L 299, 16.11.2007, p. 1.

covering differences between global and EU market prices. In July 2013, the Commission adopted Implementing Regulation (EU) No 689/2013<sup>5</sup> which set the export refund to zero for certain categories of poultrymeat with regard to a number of destinations, including whole frozen chicken exports to particular countries in the Middle East. This was the latest in a series of reductions of the export refund which had previously been set at 40 €/100kg and then at 10.85 €/100kg.<sup>6</sup>

The applicant raised five pleas in law against the contested Regulation alleging inter alia procedural irregularities in the adoption of the act, errors of assessment, inadequacy of the statement of reasons and infringement of legitimate expectations. The Commission questioned the admissibility of the action and argued it should be dismissed as unfounded.

The General Court declared the action admissible but dismissed it on the merits. At the time of writing it is not yet known if an appeal will be lodged. The following discussion is limited to the assessment of the admissibility of the case by the General Court.

### III. Judgment of the General Court (Fifth Chamber)

The applicant argued that it had standing to bring the case under the third limb of Article 263, paragraph 4, TFEU (in the alternative, it argued it was directly and individually concerned by the act, in accordance with the second limb of that provision).

The Court started its assessment by holding that the contested act was indeed a regulatory act under the (by now) settled case-law, since it was an act of general application but not a legislative act.<sup>7</sup> The Commission had not disputed that point.

Next, the Court explicitly confirmed that the concept of direct concern has the same meaning under both the second and third limbs of Article 263, paragraph 4, TFEU.<sup>8</sup> It therefore applied the long-standing test for direct concern.<sup>9</sup> As the contested Regulation set the export refund at zero, in contrast to the previous level of 10,85 €/100kg, the General Court held that it directly affected the applicant's legal situation. Moreover, the contested Regulation left no margin of discretion to the national authorities responsible for refunds, as any refund would be zero with no possibility for them to grant more. Accord-

ingly, the Court held that, as the Commission had also conceded, the applicant was directly concerned.<sup>10</sup>

The judgment takes a more interesting turn on the issue of whether the contested Regulation 'entail[s]' implementing measures'. The Court first recalled the reason for the introduction of this condition, namely access to justice. It also recalled that in relation to assessing the existence of those implementing measures, it is only the position of the applicant that matters.<sup>11</sup>

It then stated, somewhat intriguingly, that while the concept of regulatory acts not entailing implementing measures must be interpreted in light of the objective of access to justice, as per existing case law, that this does not mean that the concept must be exclusively examined from such a perspective.<sup>12</sup>

The Court then proceeded to focus on the term 'entail' in the third limb of Article 263, paragraph 4, TFEU. It held that the word 'entail' means that only measures that the authorities (Union or national) adopt during the 'normal course of affairs' can be considered as implementing measures within the meaning of the third limb of Article 263, paragraph 4, TFEU. If no such measures are ordinarily adopted to implement the act and give effect to its consequences ('*concrétiser ses conséquences*') for the concerned entities, then the regulatory act in question does not 'entail' implementing measures.<sup>13</sup> The Court

5 Commission Implementing Regulation (EU) No 689/2013 of 18 July 2013 fixing the export refunds on poultrymeat, OJ L 196, 19.7.2013, p. 13 (henceforth the 'contested Regulation').

6 See Case T-397/13, *Tilly Sabco v Commission*, EU:T:2016:8, para. 8-9.

7 *Tilly-Sabco*, *supra*, note 6, para. 30-32; citing *Inuit Tapiriit Kanatami*, note 1 *supra*, para. 61; Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:T:2011:419, para. 56; and *Microban*, note 1 *supra*, para 21.

8 *Tilly-Sabco*, note 6 *supra*, para. 34.

9 *Tilly-Sabco*, *supra*, note 6, para. 35.

10 *Tilly-Sabco*, *supra*, note 6, para. 36-38.

11 *Tilly-Sabco*, *supra*, note 6, para. 41, citing *Telefónica*, *supra* note 1, para. 30-31.

12 *Tilly-Sabco*, *supra*, note 6, para. 42.

13 *Tilly-Sabco*, *supra*, note 6, para. 43. The judgment is only available in French at the time of writing (the language of the case). The French text states: « Cela signifie que peuvent seulement constituer des mesures d'exécution au sens de cette disposition des mesures que les organes ou organismes de l'Union ou les autorités nationales adoptent dans le cours normal des affaires. Si, dans le cours normal des affaires, les organes ou organismes de l'Union et les autorités nationales n'adoptent aucune mesure pour mettre en œuvre l'acte réglementaire et pour concrétiser ses conséquences pour chacun des opérateurs concernés, cet acte réglementaire ne « comporte » pas de mesures d'exécution ».

then underlined that according to the wording of the third limb of Article 263, paragraph 4, TFEU it is not sufficient that an act ‘could entail’ implementing measures, rather that it must so do.<sup>14</sup>

With reference to various language versions of the provision, the Court held that the wording implies that in order for a regulatory act to ‘entail’ implementing measures those implementing measures must ‘naturally follow the regulatory act’. It is not sufficient that an operator has the possibility to oblige, in an artificial way, the administration to adopt a challengeable measure, since such a measure is not one which the regulatory act entails.<sup>15</sup>

On that basis, the General Court proceeded to examine whether, during the normal course of affairs, national authorities would adopt measures to implement the contested Regulation. It considered that economic operators wishing to export agricultural products not benefitting from a refund were not obliged to present an export certificate and to request a refund amounting to zero. The Commission also essentially conceded that economic operators did not usually do so. In other words, during the ‘normal course of affairs’ national authorities would adopt no measures to implement the contested Regulation, which therefore entailed no implementing measures. The Court considered, in particular, that it would be ‘artificial’ to require the operators concerned to re-

quest the payment of a refund amounting to zero simply in order to be able to obtain a challengeable measure.<sup>16</sup>

Finally, the Court dismissed the Commission’s argument that it would be paradoxical to find that parties can have standing to challenge a regulatory act such as the one in question when it sets the refund to zero, while a positive refund would entail implementing measures. The Court recalled that, according to case-law, when assessing the existence of implementing measures it is the position of the applicant that matters, and that it is irrelevant whether there are implementing measures affecting other persons.<sup>17</sup> *A fortiori*, the General Court considered that it is entirely possible that a regulation setting the amount of refunds to zero would not entail implementing measures, while a ‘similar’ regulation fixing positive refunds would.<sup>18</sup>

The action was therefore found to be admissible. The applicant, however, lost on the merits. While interesting from the perspective of administrative law, a discussion on the merits of this case would go beyond the remit of this case note.

#### IV. Comments

It is helpful at this point to recall some of the main tenets of the existing case-law on the phrase ‘entail implementing measures’.

The case-law has developed certain tests to determine whether a regulatory act entails implementing measures. First, it is only the position of the applicant that matters, it being irrelevant whether there are implementing measures affecting other persons.<sup>19</sup> Secondly, the degree of discretion available to the authorities responsible for the implementing measures is irrelevant.<sup>20</sup> Thirdly, reference should be made exclusively to the subject matter of the action such that in an action for partial annulment it is solely an implementing measure which that part of the act may entail that can be taken into consideration.<sup>21</sup>

The General Court has now added a new element: only measures adopted by the EU or by the Member States during the ‘normal course of affairs’ can constitute implementing measures within the meaning of Article 263 TFEU. If the Union and national authorities do not ordinarily adopt any measure to implement the regulatory act and to give effect to it vis-

14 *Tilly-Sabco*, *supra*, note 6, para. 43-44

15 *Tilly-Sabco*, *supra*, note 6, para. 45: « [I]l doit s’agir de mesures qui suivent naturellement l’acte réglementaire. Il n’est pas suffisant qu’un opérateur ait la possibilité d’obliger, de manière artificielle, l’administration à adopter une mesure susceptible de recours, car une telle mesure ne constitue pas une mesure que l’acte réglementaire « comporte ». »

16 *Tilly-Sabco*, *supra*, note 6, para. 59-62

17 *Tilly-Sabco*, *supra*, note 6, para. 65; see also *Telefónica*, note 1 *supra*, para. 65.

18 *Tilly-Sabco*, *supra*, note 8, para. 65: « À plus forte raison, il n’est pas exclu qu’un règlement fixant à zéro le montant de restitutions ne comporte pas de mesures d’exécution, tandis qu’un règlement « similaire » fixant des restitutions à un montant positif en comporte. »

19 *Tilly-Sabco*, *supra*, note 6, para. 41-42, citing *Telefónica*, *supra*, note 1, para. 30-31. See also *T&L Sugars*, *supra*, note 1, para. 32, and Case C-132/12 P, *Stichting Woonpunt and Others v Commission*, EU:C:2014:100, para. 50.

20 See C. Buchanan and L. Bolzonello, *Towards a definition of implementing measures under Article 263, paragraph 4, TFEU*, 2015 EJRR 6(4), p. 671-676; see also Case T-279/11, *T&L Sugars Ltd and Sidul Açúcares v Commission*, EU:T:2013:299, para. 49-50; cf. *Tilly-Sabco*, *supra*, note 8, para. 43.

21 Case C-84/14 P, *Forgital v Council*, EU:C:2015:517, para. 52.

à-vis each concerned operator, the regulatory act in question does not 'entail' implementing measures.<sup>22</sup>

It would be artificial for a concerned operator to make a request to the relevant authority to pay a refund amounting to zero only for the purpose of obtaining a challengeable act, therefore the granting of that request (which would be obligatory for the authority) would not happen in the normal course of affairs.<sup>23</sup> In so holding, the Court built on the principle that the concept of entailing implementing measures must be looked at from the view of the applicant. However its reasons for so doing are not entirely clear from the judgment and therefore it remains to be seen if, and how, this approach will be developed in future.

The Commission's argument that it is 'paradoxical' to allow direct actions when the refund is zero, but to require national action when the refund is positive, was briefly dismissed by the General Court on the basis of the fact that the existence of implementing measures must be assessed with reference to the position of the applicant.<sup>24</sup> The case was therefore declared admissible despite the fact that the forum in which the relevant regulatory act can be chal-

lenged may thus come to depend on the level of the refund.

This curious situation may be due to the fact that this case regards the lowering of an entitlement to zero, rather than the placing of obligations on an economic operator which would more readily give rise to an implementing measure, such as in the case of custom duties.<sup>25</sup>

Overall, the finding of the General Court on admissibility in this case hinges on a literal reading of the term 'entail' and may raise mixed feelings. On the one hand, requiring an assessment of whether a certain implementing act would follow-on naturally from a regulatory act can be viewed as introducing a further and unnecessary element of complexity in Article 263, paragraph 4, TFEU. On the other hand it can be viewed as a victory for common sense.

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22 *Tilly-Sabco*, *supra*, note 6, para. 43.

23 *Tilly-Sabco*, *supra*, note 6, para. 62.

24 *Tilly-Sabco*, *supra*, note 6, para. 64-65.

25 See for example C-552/14 P, *Canon v Commission*, EU:C:2015:804, paras. 50-51.