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“Access to judicial review by private
parties after the Treaty of Lisbon”

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Introduction

This essay examines the impact of the amendment of art. 263 TFEU by the Treaty of Lisbon, and whether the problem of access to judicial review of Union acts by private parties was addressed successfully. The essay consists of a short description of the scope of art. 263 TFEU, an analysis of the access to locus standi for non-privileged applicants and what the Treaty of Lisbon changed in relation to this, a description of other ways to remedy and a conclusion.

The scope of art. 263 TFEU

Art. 263 was amended by the Treaty of Lisbon, which made it possible to review, not only, the traditional institutions¹, but also the European Council and EU agencies, offices and bodies².

Locus standi

Art. 263(1) TFEU separates the applicants, able to challenge Union acts, in privileged, semi-privileged and non-privileged applicants. The latter is the subject of this essay, since it covers “*any natural or legal person*” as set out in art. 263(4). The access to challenge Union acts is, however, interpreted narrowly by the ECJ, so it is hard to meet the requirements listed in art. 263(4). The Treaty of Lisbon amended art. 263(4), where a distinction between regulatory and other acts were introduced. If a private party wants to challenge a regulatory act it is only necessary to establish direct concern, which, prior to the Treaty of Lisbon, has not been as problematic to establish as individual concern³. There is no definition of the term regulatory act, but they are interpreted as being non-legislative acts, since these are not based on decisions made by representatives chosen

¹ See art. 230(1) EC

² Chalmers, Davies and Monti, p. 396

³ Ibid., p. 415

by the citizens of the member states – and therefore it should be easier for private parties to challenge these acts. The legislative acts have been interpreted by the ECJ as “any measure that is couched in general an abstract terms”⁴, which is a different definition than the one given in art. 289(3) TFEU – where a legal act is “anything adopted by one of the legislative procedures”⁵. The Treaty of Lisbon should have dealt with this problem, since it creates a democratic deficit, when private parties cannot challenge a delegated or implementing act, managed without a representative institution, without direct- and individual concern⁶.

Direct concern

The direct concern-criteria consist of a requirement for causation and legal interest. The requirement for causation means that there must be a link between the act and the damaged suffered, and it must be the act that changed the legal position⁷. In some situations directives gives the member states a degree of free choice in how to implement the legislation, which in some cases has led to the causation to be gone. This raises a problem in relation to private parties access to judicial review, since the ECJ has found, that if there is no national discretion or only theoretical⁸, it is only then possible to challenge the community act. From a democratic point of view it would be better if, in cases with a little discretion, that the community act and the national legalisation were interpreted to inflict the damage⁹, so the private parties would have direct concern in these matters. The requirement for legal interest means that there must be a legal right

⁴ Chalmers, Davies and Monti, p. 415 with reference to the joined cases *Confédération Nationale des Producteurs de Fruits et Légumes and Others v Council*

⁵ Ibid., p 415

⁶ Ibid., p. 415

⁷ *BUPA and Others v Commission*, para 81 (named T-29/03 on p. 416 in Chalmers, Davies and Monti instead of T289/03 – typo) and *Alcan v Commission*, para. 15

⁸ See for instance *Piraiki-Pitraiki v Commission*

⁹ Chalmers, Davies and Monti, p. 416

to infringe, and can be illustrated by the Front National-case¹⁰, where members of the European Parliament did not have a legal right to form a “*groupe mixte*”, and therefore did not fulfil the requirement for direct concern. There is no problem connected to this requirement in relation to access to judicial review for private parties, since it is a reasonable approach that if there is no legal right from the institutions, then there cannot be an injury.

Individual concern

The other condition to challenge a legislative act is to establish individual concern. The leading case is *Plaumann & Co. v Commission*, where the “Plaumann test” was established; to establish individual concern, without an expressly addressed act (which a general legislative act seldom is), it is necessary to be “*differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*”¹¹. It is very difficult to meet the requirement in the “Plaumann test”, since it is hard to distinguish one importer of clementines from all established and future importers of clementines¹². The question is whether the private party is a member of an open group, as importers of clementines, or member of a closed group – if it is the latter it is possible to establish individual concern¹³. The argument of H. Rasmussen¹⁴, saying that the locus standi requirement has been used to make a filter for the ECJ, is problematic, since there are situations where it is impossible to seek for remedy in national courts¹⁵ - for instance with regulations and directives, and it should not, from a democratic point of view, be an argument against remedy that more people than a

¹⁰ *Front National v European Parliament*, para. 36

¹¹ *Plaumann & Co. v Commission of the European Economic Community*, para. 1 under the section “*Grounds*”.

¹² Since the “Plaumann test’s” date for deciding is a undefined date in the future – see Craigh, Poul, “*Legality, Standing and Substantive Review in Community Law*” 509-10 as referenced in Chalmers, Davies and Monti, p. 419 footnote 105

¹³ *Commission v Koninklijke Friesland Campina*

¹⁴ Rasmussen, H. “*Why is Article 173 Interpreted Against Private Plaintiffs?*”

¹⁵ See *Greenpeace and Others v Commission* and *Unión de Pequeños Agricultores v Council*

specific group is influenced of an act¹⁶. Advocate General Jacobs was very critical about the “Plaumann test” in his opinion in UPA¹⁷, trying to use the right to access to a remedy as an argument for a new interpretation of “individual concern” in art. 263(4). The arguments of Advocate General Jacobs are understandable, but the ECJ must be very careful with changing its interpretation of the individual concern, since it should be done by the member states through treaty amendments, regardless of the fact that art. 263(4) do not give a definition of how to define individual concern. The ECJ has, since the case of Plaumann, used the same interpretation – and it creates a bigger democratic deficit, when judges changes the interpretation of law, when democratic institutions chooses not to¹⁸.

Other ways to remedy

Art. 267 TFEU makes it possible for the national courts to ask for a preliminary reference, but it is up to court to decide whether such action is necessary and the national courts are not competent to declare community-law void¹⁹. It might be necessary for the private party to breach the “*implementing measures in order to challenge the resulting sanctions or, in the absence of implementing measures (as in Jégo-Quéré), to breach the Community law and then assert its illegality in proceedings against it*”²⁰. It is a serious problem if a party has to breach the law to be able to seek for a remedy. Art. 288 do not have formal requirements to achieve locus standi, but the

¹⁶ Harlow, Carol “*Public Law and Popular Justice*” as referred to in Cygan and Szyszczak, p. 63. and the opinion of Advocate General Jacobs in *Unión de Pequeños Agricultores v Council*, para. 59

¹⁷ Ibid.

¹⁸ See different approach in Balthasar, Stephan, “*Locus standi rules for challenges to regulatory acts by private applicants: the new art. 263(4) TFEU*”

¹⁹ Advocate General Jacobs opinion in *Unión de Pequeños Agricultores v Council*, para. 41 as referred in Berry, Elspeth and Boyes, Simon, “*Access to justice in the Community courts: a limited right?*” p. 4

²⁰ Berry, Elspeth and Boyes, Simon, “*Access to justice in the Community courts: a limited right?*” p. 4

breach of the law has to be “sufficiently serious”²¹, which makes it very hard to succeed this way.

Conclusion

It is positive news for private parties that the Treaty of Lisbon has made it easier to challenge regulatory acts, since it is only needed to establish direct concern. The idea behind this is, as mentioned, that a regulatory act is created by non-elected-persons, so a representative mandate is missing – and then it should be easier to challenge than in relation, for instance, with a legislative act. The Treaty of Lisbon did, however, not change enough in relation to judicial review, since not all of the problems were addressed. After the judgement in UPA²², where it was clarified that the system had to be changed through a treaty amendment, the member states had a great opportunity to compensate on the democratic deficit, which has been an obstacle to the integration of member states in the European Union because of the “fear” of giving away power to the community in the memberstates – with England as a leading memberstate in this relation. A treaty amendment, which had addressed the problems discussed above, could have been used to legitimate the “Constitutional treaty” that never became a reality. The narrow interpretation of direct- and individual concern creates democratic deficit, and even though the Treaty of Lisbon made it possible to take action for proceedings at the ECJ for a juridical review of a regulatory act without “*individual concern*”.

The structure of the institutions in the community is a problem, if it should be decided to change the access to judicial review. At the moment the ECJ has a very big workload, which will only increase if more applicants could challenge EU acts – this would create a long processing time to reach a final result. It is unclear to what extend

²¹ *Zuckerfabrik Schöppenstedt v Council*

²² Case 50/2000 P, para. 41

the work load would rise, but some sources do not find it significant²³. Another argument is that “*too many challenges by private parties will unduly disrupt Union decision-making processes*”²⁴, since the legal process in the European Union is complex and with many actors – it is difficult to agree on legislation. These arguments are standing alone against the critique above of the limited access to judicial review for private parties, and since a new treaty is very unlikely to happen in the nearest future, the amendment by the Treaty of Lisbon must be characterized as a disappointment in relation to judicial review. The conclusion is that private parties should be able to challenge general legalisation as regulations and directives, which have influence on the life of a lot of private parties, and that the Treaty of Lisbon did not address this problem.

²³ Balthasar, Stephan, “*Locus standi rules for challenges to regulatory acts by private applicants: the new art. 263(4) TFEU*”

²⁴ Chalmers, Davies and Monti, p 421

Tables of Authorities

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