Dny práva – 2010 – Days of Law, 1. ed. Brno : Masaryk University, 2010
http://www.law.muni.cz/content/cs/proceedings/

ACCESS OF CITIZENS TO THE COURT OF JUSTICE: THE ROLE OF REGULATORY ACTS

IGOR BLAHUŠIAK

Faculty of Law, Masaryk University, Czech Republic

Abstract in original language
Lisabonská zmluva zmenila znenie ustanovenia býv. čl. 230 Zmluvy o založení ES týkajúceho sa žalôb na neplatnosť právnych aktov európskeho práva. V súčasnosti platné ust. čl. 264 Zmluvy o fungovaní EÚ umožňuje jednotlivcovi podávať žaloby na neplatnosť nielen tých aktov, ktoré sa ho priamo osobne dotýkajú, ale taktiež na neplatnosť regulačných aktov, ktoré sa jej priamo týkajú a nevyžadujú vykonávacie opatrenia. V tomto príspevku sa preskúmame otázku, či daná zmena znamenala rozšírenie možností prístupu jednotlivca k Súdnemu dvoru alebo nie.

Key words in original language
Európska únia; Súdny dvor; regulačné akty; občania; prípustnosť.

Abstract
Lisbon Treaty has changed the provision of former Art. 230 of the Treaty establishing the EC, on the actions against the legality of acts of the EU/EC law. The provision of the Art. 264 of the Treaty on Functioning of the EU, which is effective nowadays, empowers an individual not only to institute proceedings on legality of acts of their direct and individual concern, but also against regulatory act which is of direct concern to them and does not entail implementing measures. This contribution will analyse the issue whether the aforementioned change constitutes a widening of possibilities of an individual to institute a proceedings before the Court of Justice or not.

Key words
European Union; Court of Justice; regulatory acts; citizens; admissibility.

INTRODUCTION

There are no clear lines between constitutional, administrative, legislative or executive review of the EU legislation. Therefore, if a private party seeks to challenge an act adopted by an EU Institution, a single procedure applies. The most important provisions of the primary EU law in this regard were Articles 230 and 288(2) of the Treaty establishing the European Community[1] (TEC).[2] The former of these provisions has been reformed by

[1] This contribution will cite the version of the TEC amended by the Treaty of Nice. The TEU will be cited as amended by the Treaty of Lisbon. If any other version of the TEC or the TEU would have to be cited, we will explicitly signalize it.

the Lisbon Treaty and now is renumbered to the Art. 263 of the Treaty on Functioning of the European Union (TFEU). In this contribution, we will try to inspect, whether the change of this Article has been profound in regard to the access of private parties (citizens) to the Court of Justice (ECJ).

To this aim, we will divide this contribution into three main sections. The first one will outline the developments in the case-law of the ECJ, regarding the former Art. 234 TEC. We have to premise that the case-law was dealt with in depth rather extensively elsewhere;[3] we will limit ourselves only to a brief outline of the most fundamental decisions in this regard. The second section will inspect the impact of the Lisbon Treaty on the former Art. 234 TEC, i.e. the Art. 263 Treaty on Functioning of the EU (TFEU). In the last section we turn our attention to the issue whether the aforementioned Treaty has brought in any reforms. It will also discuss the broader implications of the application of the Art. 263 TFEU in post-Lisbon period.

1. SITUATION BEFORE THE LISBON TREATY

1.1 ARTICLE 230 TEC AND THE STANDING OF PRIVATE PARTIES

If a private party sought to challenge the legality of the EU legislation adopted by the certain institutions[4] under the Art. 230 TEC, they had three options to do so:[5]

- Either they were an addressee of a decision of these Institutions; or

- They were directly and individually concerned by a decision that was addressed to another person; or

---

[2] Although there is also considerable number of cases that arrive to the ECJ indirectly - as a preliminary reference under the Art. 267 TFEU. See case 314/85 Foto-Frost v Hauptzollamt Lubeck-Ost.

[3] See e.g. Chalmers, D. (et. al.) *European Union Law*. 1st ed. Cambridge: Cambridge University Press, 2009, p. 410 et seq.

[4] See para. 1 of the Art. 230 TEC. These Institutions are the European Parliament, acting jointly with the Council, the Council (acting solely), the Commission and the European Central Bank.

[5] See former Art. 230 TEC. Individuals belonged to so-called non-privileged applicants. The Council, the Commission, the European Parliament and the Member States were entitled to bring actions under Art. 230 TEC as privileged applicants. The Court of Auditors and the European Central Bank were so-called semi-privileged applicants; the were entitled to bring an action under the Art. 230 TEC for the purposed of protecting their prerogatives.

- They were directly and individually concerned by a decision in a form of a regulation, that was addressed to another person.

The first alternative posed almost no theoretical question and seemed to be quite clear; the test of direct concern of "acts addressed to individuals"[6] is quite straightforward.[7] However, the second and third alternative entailed a "*direct and individual concern*" requirement imposed on an applicant. Since there was no legal definition provided by the Treaties, the ECJ was to pronounce one in its case-law.

1.2 CASE-LAW OF THE ECJ PRIOR 2002

And it indeed did, in its seminal ruling in the case 25/62 Plaumann. It held that private parties were individually concerned only if they were able to distinguish themselves from all other parties, either by reason or by a factual situation. And to be stricter, this ought to be proven not only on factual basis, but also on potential. Therefore, the so-called Plaumann formula was regarded by the doctrine as controversial - while some perceived it as being too restrictive,[8] others saw a its inevitability.[9]

Some scholars[10] argued that Plaumann formula restricts applicants from reaching the justice excessively and thus raises the issue of an effective protection of fundamental rights.[11] Also, some commentators pointed out

---

[6] Usually these acts are in the form of decision, although other forms of legally binding acts are not excluded per definitionem.

[7] This test can be explained in a simplified way by holding that only a direct (causal) link between the challenged measure of the EC Law and applicant's damage or loss was to be inspected. See Chalmers, D. (et. al.) (2009a) p. 419 et seq. for further analysis of this test.

[8] See e.g. Birkinshaw, P. *A Constitution for the European Union ? - A letter from Home.* In: European Public Law, 2004. Vol. 10, No. 1, p. 82.

[9] See e. g. Schwarze, J. *The Legal Protection of the Individual against Regulations in European Union Law*. In: European Public Law, 2004, Vol. 10, No. 2, p. 297.

[10] See e.g. Birkinshaw, who points out that "*Standing under Art. 230 EC should be allowed where an individual is able to show that a measure affects his or her rights, and not simply that s/he is the only individual affected by the measure as has been interpreted by the ECJ" and continues with the warning that "denial by Luxembourg is likely to deflect applicants to Strasbourgh.*" Birkinshaw, P. (2004), p. 82.

[11] As the right to fair trial is one of the rights enshrined in e.g. Art. 6 and 13 of the European Convention of Human Rights (the ECHR), as well as in the Art. 47 of the Charter of Fundamental Rights of the European Union. See also cases T-172, 175-77/98 Salamander AG and Others v Parliament and Council; C-300/00 Federacion de Cofraidas de Pescadores de Guipozcoa and Others v Council.

the issue of consistency of ECJ's case law: it is to be noted that *Plaumann* was decided as a case no. 25/62. And every student of the European law is familiar with the ruling in Case 26/62 *Van Gen en Loos*, decided just five months before *Plaumann*. If we compare these two judgements, the differences in their tone are more than obvious.[12]

However, this decision did not mean that no private parties were able to gain access to the Court. For example, in the Case 11/82 *Piraiki-Patriaki* were Greek cotton traders allowed to gain standing against a decision of the Council.[13] Also, it did not also mean that an individual was not able to challenge any other form of legislation than a decision. In cases 789-90/79 *Calpak* the Court held that an individual may challenge also "*any decision which, although in the form of a Regulation, is of direct and individual concern to them*."[14]

1.3 CHANGE OF A DOCTRINE?

For a long time, there were no signs that the Court was willing to change its Plaumann formula. However, the judgement in the Case C-309/89 *Cordoníu*,[15] *taken* together with the judgement in the Case C-358/89 *Extramet*,[16] was perceived by many as a long-sought change.

In the spite of these expectations, further cases decided by the General Court watered down any expectations of scholars to change the Plaumann case-law for good. For instance, in the Case T-585/93 *Greenpeace*,[17] the General

---

[12] Perhaps the logic of difference lies with subject that was to be enforced against. In the case of the Member States, the Court was not hesitant to "invent" new legal remedies for private parties. On the other hand, when the acts of Institutions were to be challenged, the same Court remained very reluctant to grant hardly any standing to private parties. See Chalmers, D. (et. al.) (2009a), p. 422.

[13] See also case C-152/88 Sofrimport SARL v Commission.

[14] See point 7 of the case 789-90/79 Calpak SpA et Società Emiliana Lavorazione Frutta SpA v Commission. This ruling opened a way for an exception in the case of anti-dumping measures. See joined cases 239 and 275/82 Allied Corporation and others v Commission, as well as the case 264/82 Timex Corporation v Council and Commission.

[15] Case C-309/89 Codorníu SA v Council.

[16] Case C-358/89 Extramet Industrie SA v Council.

[17] Case T-585/93 Greenpeace v Commission.

Court dismissed application of an interest group of private parties challenging the series of decisions of the Council.[18]

In this situation, not only scholars perceived established case-law of the Court as unsatisfactory. Also, Advocate General Jacobs in his seminal opinion in the Case C-50/00 *Union de Pequenos Agricultores* called for a review of the established approach.[19] He particularly pointed out that national courts are not competent to declare measures of Community law invalid. Therefore, he pointed out that "*It seems artificial…to argue that the national courts are the correct forum for such cases*."[20]

He then pointed out the fact that the principle of effective judicial protection requires that applicants have access to the Court which is competent to grant remedies capable of protecting them against the effects of unlawful measures. Taking in account that for the measures that do not require any measures of implementation might be difficult (or even impossible) to be challenged by a private party and also the fact that the proceedings before the national courts (with possible preliminary reference procedure) presents a serious disadvantage compared to the proceedings before the Court, he arrived at the conclusion that: "*The established case law on the locus standi of individual applicants…is incompatible with the principle of effective judicial protection*."[21]

He then called for a change of approach that would shift the bias from the questions of admissibility to the questions of substance,[22] not requiring individuals to breach law before receiving an effective judicial protection. Indeed, his call was heard at the General Court when delivering the judgement in Case T-177/01 *Jégo-Quéré*.[23] It arrived at the conclusion that

---

[18] For more detailed analysis see Arnull, A. *Private Applicants and the Action for Annulment Since Cordoníu*. In: Common Market Law Review, 2001, Vol. 38, No. 7, pp. 7 et. seq. For a detailed analysis of standing of legal persons generally, see e.g. Stehlík, V. *Právní subjektivita a aktivní liegitimace právnických osob pro účely čl. 230 SES*. In: Dny veřejného práva - Sborník příspěvků z mezinárodní konference. 1. vyd. Brno: MU, 2007, p. 1192 - 1204.

[19] See Opinion of the AG Jacobs in the Case C-50/00 Unión de Pequeños Agricultores v Council (UPA), points 41 et seq. in particular.

[20] Ibidem, point 41.

[21] Ibidem, point 49.

[22] Ibidem, point 66.

[23] Case T-177/01 Jégo-Quéré & Cie SA v Commission.

a new interpretation of individual concern enables private parties to have their rights effectively and adequately judicially protected.[24]

However, the Court did not share the same reformist view and failed to uphold the aforementioned opinion. Instead it held that: "*It is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection*".[25]

If we realize that the judgement was delivered in mid-2002, at the time of convening the Convention for the Future of Europe (The Convention), it is not surprising to read such a statement, indeed.[26]

2. LISBON REFORM: THE ARTICLE 263 TFEU

Art. 263 TFEU amends the former Art. 230 TEC in several ways. Apart from changing the range of bodies susceptible to judicial review[27] and an introduction of one semi-privileged applicant,[28] the most important change (at the first sight) concerns the issue of standing of non-privileged applicants.[29]

In the spite of the fact that the Constitution has been set aside, its terminology is still to be found in the wording of Art. 263 TFEU. Therefore the Article speaks about regulatory acts. However, the issue is that the definition of this category of acts of the European law is lacking. In order to

---

[24] It clearly stated that the number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard. See para. 51 of the judgement in the Case T-177/01 Jégo-Quéré & Cie SA v Commission.

[25] See para. 41 of the judgment in the Case C-50/00 UPA. For an analysis of the core points of this decision, see Schwarze, J. (2004), p. 294.

[26] Some scholars point out that this very suggestion is disingenuous, since the Plaumann formula is not a part of the Treaties, but the case-law of the Court of Justice. See Chalmers, D. (et. al.) (2009a), p. 433. For an overview of an intensified scholarly debate on the standing under the former Art. 230 TEC see Varju, M. *The Debate on the Future of the Stading under Article 230(4) TEC in the European Convention*. In: European Law Review, 2004, Vol. 10, No. 1, p. 1 - 2.

[27] Acts of the European Council and agencies and bodies of the EU are newly included.

[28] Being it the Committee of Regions, that is entitled to review measures for the purpose of protecting its prerogatives. See Art. 263 TFEU.

[29] For more on the reform of the ECJ by the Treaty of Lisbon see e.g. Stehlík, V. *K reformě soudního systému EU na základě Lisabonské smlouvy*. In: Míľniky práva v stredoeurópskom priestore - Zborník z medzinárodnej konferencie. 1. vyd. Bratislava: PF UK, 2008, s. 192 - 199.

analyze this notion in the search of its contents, we have to look back at the process that started at The Convention.

2.1 CONVENTION ON THE FUTURE OF EUROPE AND THE DRAFT CONSTITUTION

Several bodies within The Convention dealt with the issue of standing under former Art. 230 TEC.

Working Group II on the Incorporation of the Charter/Accession to the ECHR considered three main options for the reform of then existing standing of private parties:[30]

- Introduction of a special remedy: a direct action to the Court for the cases when applicant would allege a violation of their fundamental rights;

- Amendment of Art. 230 TEC, concentrating on the notion of individual concern;

- Leaving the wording of Art. 230 TEC unchanged.

Since the first option proved to be rather difficult to be practically introduced, for the reasons of distinguishing between actions of constitutional and administrative character, as well as accession of the EU to the ECHR that would effectively provide for a new type of a similar remedy, it was not chosen. Likewise, the third option was not a favoured one, for the obvious reasons stated above.[31] Therefore, the discussion centred around the second option.

Also, the presentations by the Presidents of the General Court and the Court of Justice heard by the Working Group II favoured the second option. The President of a lower court held[32] that it is a matter of policy, to amend the Article 230 TEC. As for the substantial questions, he pointed out that "*a distinction should be drawn between legislative measures and regulatory*

---

[30] See The European Convention. *Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR*. Document CONV 116/02.

[31] See Section 1.2.

[32] See The European Convention. *Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the "discussion circle. on the Court of Justice on 24 February 2003*. Document CONV 575/03.

measures"[33] He then asserted that the private parties should challenge only regulatory measures openly and the Art. 230 TEC ought not to be modified as for the legislative acts.

Also, the President of the ECJ shared the similar views. He also pointed out that the proposed system of hierarchy of the EU acts would support the division of approach in the regard of legislative and regulatory measures.[34]

The issue was also debated in the Discussion Circle I "The Court of Justice".[35] It arrived to the formulation of a new wording of the former Art. 230 TEC in regard to the private parties, which read:

"Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person of which is of direct and individual concern to them, and against [an act of general application] [regulatory act] which is of direct concern to him without entailing implementing measures."[36]

This wording was then repeated by the draft Constitution. The only alteration was a deletion of possibilities - only regulatory acts were left in the respective wording, the acts of general application were omitted.[37]

We will not analyze the question whether this proposed wording represented a factual "simplification". At this stage, we have to draw attention to the distinction between regulatory acts and acts of general application. Not only the views of the Presidents cited above were taken into account, but, as we will see below, this wording has a prominent role in the considerations regarding the interpretation of an Art. 263 TFEU.

---

[33] Ibidem, p. 5.

[34] See *The European Convention. Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of*

Justice of the European Communities, to the "discussion circle. on the Court of

Justice on 17 February 2003. Document CONV 572/03.

[35] See The European Convention. *Report on the meeting on 3 March 2003*. Document CONV 619/03.

[36] See The European Convention. *Final report of the discussion circle on the Court of Justice.* Document CONV 636/03, p. 7.

[37] See The European Convention. *Articles on the Court of Justice and the High Court*. Document CONV 734/03, Annex I, p. 18; The European Convention. *Draft Constitution, Volume II – Draft revised text of Parts Two, Three and Four.* Document CONV 802/03.

Also, it is to be noted, as Varju points out, that "*The members of the group accorded that simplification of the wording did not affect the scope of Article 230(4) TEC.*"[38] This is a very important remark.

2.2 THE TREATY OF LISBON

As we have noted in the sections above, the Treaty of Lisbon has made a provision for review of acts of agencies and bodies of the Union, as well as the acts of the European Council that produce legal effects on the third parties. It also widened the range of semi-privileged applicants, raising the Committee of Regions to this category.

In regard to the standing of private parties, the Treaty of Lisbon left the wording of the Constitution untouched. Therefore, there are at the time of writing three possible options for a private party to challenge an act of the EU Institutions, under the wording of the Art. 263 TFEU:

- Institute proceedings against an act addressed to that person; or

- Institute proceedings against an act which is of direct and individual concern to them; or

- Institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures.

The next section of this contribution will analyze these options briefly and point out to the most problematic issues concerning them.

3. LISBON REFORM OF THE STANDING OF PRIVATE PARTIES CHALLENGING ACTS OF THE INSTITUTIONS: A BRIEF ANALYSIS

If we want to analyze the current wording of the Art. 263 TFEU, we have to take in account the fact that the Treaty of Lisbon has not adopted the hierarchy of legal acts proposed in the Constitution.[39]

---

[38] Varju, M. (2004), p. 53.

[39] See Art. I-33 - I-35 of the Treaty establishing a Constitution for Europe. These Articles provide the definition of legislative and non-legislative acts; the former being European laws and European framework laws and the latter being European regulations and decisions, under the conditions specified therein.

It is therefore to be inspected, what acts may be challenged via means of the options outlined above. The first option of the Art. 263 TFEU relates to decisions and the second one to the other measures adopted by the Institutions. There is no substantial change to be specifically noted, compared to the wording of the Art. 230 TEC.

However, questions are linked to the third option. Which acts are subject to new relaxed requirements? To be put more straightforward, what acts are covered by the notion of regulatory acts?

Indeed, as scholars point out,[40] the new wording of Art. 263 TFEU relies heavily on the distinction between legislative and regulatory acts. For the former, the conditions of admissibility are retained on a strict level, for the latter, they are relaxed and the demonstration of an individual concern is no longer insisted on. It is therefore to be inspected more thoroughly what kind of acts the term "regulatory" act denotes.

3.1 ANALYSIS OF THE ART. 263 TFEU: IN THE SEARCH OF REGULATORY ACTS

3.1.1 LINGUISTIC ANALYSIS

When trying to determine, what acts can be denoted as regulatory, one might turn to the examination and analysis of the different wordings of the TFEU. However, not a little help is found here, on can only be, at best, misled.

The majority of versions operate with the notion of regulatory acts. For example, the French wording provides for *actes réglementaires*, the Slovak one for *regulačné akty*, the Polish one for *akty regulacyjne,* similarly as the Italian one *(atti rigolamentari)* and the Spanish one *(actos reglamentarios)*. These notions are of a little or no help in regard to the analysed issue.

A slightly different wording is used in the German version, providing for *Rechtsakte mit Verordnungscharakter*. This might be a bit of a help here, contrary to the languge versions the translators of which might not have fully grasped the actual meaning of the analyzed provision. For instance, the Czech version provides for *akty s obecnou působností* (acts of general application), which is a wording that was explicitly refuted by the Convention - the Czech version operates with a more general term than originally intended.

---

[40] See e.g. Varju, M. (2004), p. 54.

Therefore, the linguistic analysis does not provide us with a sufficient evidence to characterize regulatory acts properly. Instead, it raises questions on a quality of some language versions of the Treaties that might be in a stark contrast to the texts in the languages that were worked with throughout the negotiations of new Treaty(ies).

3.1.2 SYSTEMATIC ANALYSIS

If we theoretically analyze the issue from the systematic point of view, we arrive at the finding that there are basically three views on the matter in the doctrine:[41]

- Regulatory acts precieved as (all of) the acts of a legal regulation, notwithstanding their form and legal characteristics;

- Regulatory acts as the legislative acts and other legislative acts, as provided by the Treaty of Lisbon;

- Regulatory acts as the non-legislative acts, directly effective and without any implementing measures.

As for the first option, we have to point out once again, that some of the language versions indeed perceive regulatory acts as the acts of general application. However, we have demonstrated that this view was explicitly refuted when drafting the final wording of the Article 263 TFEU and therefore cannot be accepted as its interpretation.

We are left with the latter two options. Considering the developments outlined above, we can argue that the Convention intended the notion of regulatory acts to denote only non-legislative acts.[42] Therefore, the second option is also to be refuted and we are left with the third option, which is prevalent in the academic literature.[43]

The non-legislative acts are defined by the Treaty of Lisbon rather mechanically - as the acts not adopted in the legislative procedure.[44] They

---

[41] Cf. Doughan, M. *The Treaty of Lisbon 2007: Winning Minds, not Hearts*. In: Common Market Law Review, 2008, Vol. 45, No. 45, p. 676 et seq.

[42] See section 2.1.

[43] See efg. Doughan, M. (2008), p. 677. Cf. Birkinshaw, P. (2004), p. 81 et seq.; Turk, A. *The Concept of the "Legislative" Act in the Constitutional Treaty.* In: German Law Journal, 2006, Vol. 6, No. 11, p. 1569.

[44] Cf. Art. 289 (3) TFEU.

form a very heterogeneous group of acts, indeed. As Doughan shows,[45] at least three general categories of non-legislative acts can be identified:

- Non-legislative acts adopted directly under Treaties,[46]

- Non-legislative acts adopted as delegated acts,[47]

- Non-legislative acts adopted as implementing acts.[48]

Systematic analysis therefore gives us a point of direction in the search of the contents of the notion "regulatory acts".[49] However, the pointed group of acts is defined rather mechanically and is also somewhat heterogenous. We will therefor have to wait for the ECJ to establish more clear guidelines in this matter.

Therefore, from the systematic point of view, we can characterize the amendment of the former Art. 230 by the Treaty of Lisbon as a minimalist one, pointing at the direction of the non-legislative acts. However, if the notion of regulatory acts were a synonym of the term of non-legislative acts, one can ask for the reasons of such complicacy. Therefore, it seems that these two notions are of a different scope.[50]

One other remark has to be voiced in the regard to the regulatory acts. Since the Art. 263 TFEU provides the special option for the acts addressed to individuals (of individual application) and a special option for the regulatory acts, one can assume that regulatory act shall be perceived in the light of this logic as the acts of general application only.

3.1.3 TELEOLOGICAL ANALYSIS

The drafters of the analyzed provision could have used a generous approach and open a leeway for private parties to challenge any acts of the Institutions

---

[45] Dougan, M. (2008), p. 644.

[46] See e.g. Art. 74, 105, 108, 132, 329 TFEU.

[47] See Art. 290 TFEU.

[48] See Art. 291 TFEU.

[49] See also Turk, A. (2006), p. 1596.

[50] Similarly Pabel, K. *The Right to an Effective Remedy Pursuant to Article II-107 Paragraph I of the Constitutional Treaty*. In: German Law Journal, 2006, Vol. 6, No. 11, p. 1610.

of a general application. Instead, in a search of an effective solution, a restricted approach was chosen, in order to ensure a better access to justice, but not to totally relax the conditions of it.[51]

This is in accordance with national legal orders of the Member States. At the time of writing, there is no such legal order that provides for a general and unconditional remedy against legislative acts.[52]

Also in this regard, we have to point out at the wording of Art. 19(1) TEU. The option of utilizing the Art. 263 TFEU might be perceived only as the third option of a private party to challenge an act of the Institution, only after national proceedings and preliminary ruling proceedings.

And to be recalled, the members of the Convention were pointing out that the reformed wording of the former Art. 230 would not affect its scope.[53]

These arguments point in the direction of an intention of the drafters to interpret the notion of regulatory acts narrowly.

Also, as Varju points out,[54] there might be other decisive factor in the search of the spirit of the Lisbon reform - the absence or presence of the implementing measures. New wording responds to a problem concerning the self-executing acts, not entailing any implementing measures, i.e. acts that do not depend on adoption of any national measures and therefore an option for a preliminary reference is not opened. It is precisely this type of acts that are covered by the third option provided by the Art. 263 TFEU. Only for these acts are the condition relaxed and individual concern is dropped.

Therefore, the legislative measures seem to be equally "protected" from the legal challenges by private parties as they were in the pre-Lisbon era. The underlying logic driving the amendment of the former Art. 230 TEC does not seem to be the one of an enactment of a new general remedy against legislative measures of the Institutions and providing for a fundamental reform of the provision on standing of private parties against legislative acts.[55] On the contrary, another logic seem to stand out of the Lisbon reform

---

[51] On the principle of effectiveness in the European legal order, see e. g. Acetto, M., Zleptnig, S. *The principles of Effectiveness: Rethinking its Role in Community Law*. In: European Public Law, 2005, Vol. 11, No. 3, p. 376 - 403.

[52] See opinion of AG Jacobs in the Case C-50/00 UPA v. the Council, paras. 89 et seq.

[53] See Section 1.2.

[54] See Varju, M. (2004), p. 55.

[55] Compare Pabel, K., (2006), p. 1611.

- filling the legal gap in regards, in particular, to the self-executing acts, as well as providing for a greater extent of clarity contributing to easier application of the Article in question.

As for our central question inspected in this section, teleological interpretation suggests adding another definition criterion to the notion of regulatory acts. Therefore we argue that regulatory acts should be perceived as self-executing non-legislative acts of a general application.

3.2 CRITICISM OF THE WORDING OF THE ART. 263 TFEU

However, there might be found criticisms of scholars of this rather narrow definition. There are three fundamental arguments:[56]

- The provision of Art. 263 TFEU only curtails the standing of private parties to challenge legislative acts only directly; the other option, being Art. 267 TFEU is not curtailed directly;[57]

- The Art. 263 TFEU relies on the logic of national constitutional systems, where the higher level of hierarchy of norms is challenged, the more difficult for a private party it is to launch such an action. The criticism concentrates here to the issue that this logic is justified in a system that is democratically accountable, which the EU, according to some critics, is not;

- The Art. 263 TFEU relies on a distinction of regulatory and "other" acts, which is formalistic and sometimes even arbitrary.

If we inspect more closely these arguments, the first one seems not to be taking fully into account the filtering of actions that may occur on the national level. It is up to national courts to analyze an action in the view of raising a preliminary question and to do so; a private party does not have any "*right to preliminary question*" at their disposal.[58] Thus, it is up to national courts to assess relevant criteria in this regard and therefore to apply a some kind of a "filter". Therefore, although being questionable in the terms of appropriateness or arbitrariness, there does exist a curtailing filter also for the applications lodged with the national courts.

---

[56] See Dougan, M. (2008), p. 678 et seq.

[57] Although there is a inherent "filter" of applications, depending on the fact if a national court decides to raise a preliminary question or not.

[58] See Pabel, K. (2006), p. 1615 et. seq.

As for the second critical argument, we have to disagree that the EU Institutions adopting legislative acts suffer from a substantial democratic deficit.[59] However, it is important to note this concern. Amended wording of the Art. 263 TFEU indeed provides an answer to it, by widening the scope of measures falling into the scope of judicial review under the provision in question. Not only the acts of European Council, but more importantly, the acts of EU bodies and agencies, that invoke legal effects on the third persons, may now be subjected to a judicial review. Indeed, the total number of agencies and other EU bodies increased significantly in the past ten years[60] and therefore, the new wording of the Art. 263 TFEU should not, in our view, be perceived as a development undermining principles of rule of law in the EU. On the contrary, the new wording responds to the aforementioned trend and strengthens the position of private parties in this regard.

As for the third criticism, being it formalism and arbitrariness of determining what a regulatory act is and what is not, we have to assent with it. As we have proven in the preceding sections, the Treaties do not provide for any definition of this notion. It will therefore (again) depend on the case-law of the ECJ to define it. Taking into account its cautious approach in this regard, the relevant provisions of legal orders of Member States as well as the rationale of the reform introduced by the Member States (on the request of the ECJ), we are in the view that no significant change of approach occurs. Although future developments might lead in other directions and also taking into account the fact that making any predictions is a very precarious task, we insist that the ECJ will maintain its cautious approach and will interpret the notion of regulatory acts only to the extent that will not enable private parties to challenge legislative measures of the Institutions,[61] which seems to be, after all, corresponding to the spirit of the

---

[59] Since the issue of a perceived "democratic deficit" in the EU is a perpetual one and many contributions have been written to academic debate, we will limit ourselves only to this assertion. For more our position on the issue of democratic deficit and the for the debate itself see e.g. Folesdal, A., Hix, S. *Why there is a democratic deficit in the EU: A response to Majone and Moravcsik.* Available [online] www.connex-network.org, cit. 17.11.2010; Moravcsik, A. *In Defence of the Democratic Deficit: Reassessing the Legitimacy in the European Union*. In: Journal of Common Market Studies, 2002, Vol. 40, No. 4. See also in this regard Lang, J. T. *Checks and Balances: The Institutional Structure and the "Community Method".* In: European Public Law, Vol. 12, Issue 1, 2006, pp. 127 - 154.

[60] For more in this regard see e.g. Chiti, E. *An Important Part of EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*. In: Common Market Law Review, 2009, Vol. 46, No. 1, pp. 1395-1442.

[61] To support this assertion, we particularly turn the attention to the Cases C-131/03 Reynolds Tobacco and Others v Commission, as well as C-417/04 Regione Siciliana v Commission. In these cases, although not primarily directly concerning the standing of private parties, the Court continued to apply its strict admissibility policy, even though new wording of the Art. 230 TEC was published. See Biondi, A., Maletic, I. *Recent*

reform of the former Art. 230 TEC by the Treaty of Lisbon. However, even these premises do not undermine the validity of the aforementioned proposed definition of the regulatory acts.

One further argument can be raised in this regard. If the ECJ widened the scope of application of the notion of regulatory acts to all of the acts adopted by the Institutions, which invoke legal effects on the third parties, it would create an universal right to judicial protection against measures of general application. However, we have seen in the teleological analyse of the Art. 263 TFEU in the foregoing section that there was no such intention of the drafters of the Treaty(ies). Also, the Art. 48 TEU has to be borne in mind in this regards, stating that fundamental changes of the rules set by the Treaties have to be carried via means of the proper procedures enshrined in it. No procedure via means of case-law is mentioned there. Therefore, the Court curtailed its jurisdiction in the *Plaumann* case and it is likely to rather large extent that it will act in the future operating under the same logic.[62]

This assertion is supported by the minimalist approach chosen in the amendment of the former Art. 230 TEC. If we inspected the case *UPA* closely under the new wording of Art. 263 TFEU, we would be able to arrive at conclusion that the disputed regulation was a legislative act and therefore it would be a subject to the same conditions as in the pre-Lisbon period.[63]

3.3 A VIEW FROM A WIDER PERSPECTIVE

However, a there is a fundamental question that has not been voiced yet. If we inspect the issue of standing of private parties in regard to the annulment of acts of the EU Institutions, it is completely legitimate to ask whether we do need any significant widening of standing. Or, to put more strongly, is any widening of the access of private parties in this regard needed? Or conversely, are there any limits desirable, in particular in relation to the legislative measures?

In order to answer to these questions, we have to inspect the issue from a wider perspective and analyse not only questions of law, but also questions of policy.

Developments in Luxembourg: The Activities of the Community Courts in 2006. In: European Public Law, 2007, Vol. 13, No. 4, pp. 569 - 585.

[62] Similarly Schwarze, J. (2004), p. 297.

[63] Similarly also Doughan, M. (2008), p. 677.

As for the questions of policy, we have to take in account the system of EU-lawmaking.[64] This is characterized by its complexity and rather complicated way of achieving of compromises. Therefore, a delicate balance has to be struck between pursuing a narrow individual objective and preserving a compromise that might have been very difficult to achieve. If there was no such balance, adoption of EU legislative acts could be seriously impeded.[65]

However, this does not mean that an individual need not to be judicially protected. On the contrary, the vital question in this matter is to find an extent, to which the rights of individual have to be protected directly by the judiciary and up to which point they can be protected by other means.[66] This means, inter alia, that effective remedy requires the possibility of an individual to have an action available, if no other means of legal protection are available.[67]

Congruently to the premises stated in the preceding sections, we add that in all Member States are the remedies against legislative measures either unavailable, or restricted against measures of the executive.[68] Since the democratic legitimacy of measures adopted by the legislative procedures can be denoted as existent, not only provided via the channel of the European Parliament, but also indirectly via the channel of the representatives of Member States in the Council, one can apply the similar logic also to the EU. Therefore, we are of the opinion that only the acts of executive non-majoritarian organs should be subject to the proceedings enshrined in the Art. 263 TFEU.[69]

These will practically be, taking into account the wording of 289 TFEU, non-legislative acts. However, on has also to reflect that non-legislative acts do not form the same category as regulatory acts. As we have seen, interpretation of the Art. 263 points in the direction that regulatory acts

---

[64] See Schwarze, J. (2004), p. 288.

[65] Ibidem, p. 289.

[66] Not only at the EU level, but also at the national level or by international instruments. Also, possibilities participation in the legislative process/process of drafting an act has to be taken into account.

[67] Pabel, K. (2006), p. 1613.

[68] See opinion of AG Jacobs in the Case C-50/00 UPA v. the Council, paras. 89 et seq.

[69] Compare Chalmers, D., Monti, G. *European Union Law. Updating Supplement*. 2nd ed. Cambridge: Cambridge University Press, 2009, p. 87. Also in this regard, the authors mention the issue of nature of applicants - for instance, private parties can be also pressure groups, for which the judicial intervention would mean just another tool in the pursuit of their often narrowly defined interest. See Chalmers, D. (et al.) (2009a), pp. 433 - 436.

should be perceived as self-executing non-legislative acts. This divides the judicial protection of private parties into two branches. Either the regulatory acts entails implementing measures and are opened to challenge via means of national courts, preliminary reference, or (as the last resort) by the means of a "traditional procedure" under the Art. 263 TFEU, or they are self-executing and of general application and they can be challenged under a "new relaxed procedure" under the Art. 263 TFEU.

The question then arises for the justification of this division. Some scholars call for deletion this distinction and opening the leeway for private parties to challenge all of the non-legislative acts.[70] Certainly, question of policy can be raised here: do we need a higher workload on the ECJ? This is a question of striking the balance between the principles. The finding of this balance is precisely the task of drafters of the primary law, as the ECJ pointed out in the Case UPA.[71]

CONCLUDING REMARKS

It is therefore rather uncertain whether the new Art. 263 TFEU could be perceived as an answer to the call of AG Jacobs for turning the attention from questions of admissibility to the questions of substance.[72]

In our opinion, it will be the ECJ again that will determine the answer to the question of admissibility of actions of private individuals seeking to challenge the legality of acts of the EU Institutions. Taking into account its cautious approach in this regard, the relevant provisions of legal orders of Member States as well as the rationale of the reform introduced by the Member States (on the request of the ECJ), we are in the view that no significant change of approach occurs. Although future developments might lead in other directions and also taking into account the fact that making any predictions is a very precarious task, we insist that the ECJ will maintain its cautious approach and will interpret the notion of regulatory acts only to the extent that will not enable private parties to challenge legislative measures of the Institutions,[73] which seems to be, after all, corresponding to the spirit of the reform of the former Art. 230 TEC by the Treaty of Lisbon.

---

[70] See e. g. Schwarze, J. (2004), p. 287.

[71] Case C-50/00 UPA, cited above.

[72] See note 19 above.

[73] See note 56.

In this contribution, we were able to identify regulatory acts as self-executing non-legislative acts of general application. Although this definition is to be tested by the ECJ on its validity, we once again assert that the ECJ is likely to maintain a minimalist approach chosen by the drafters of the Treaty of Lisbon, which the provided definition conforms to.

Turning back to the research question raised at the introduction of this contribution, we assert that the Treaty of Lisbon indeed changed the position of a private party seeking to challenge an act of the EU Institutions. Although this change in standing was not as ambitious as many called for and limited itself only to filling the legal gap(s) existing in the pre-Lisbon era, it means a greater involvement of the organs of the EU in this proceedings, as well as opened leeway for an easier challenge of a new legal category of regulatory acts.

Literature:

Primary sources

- Case 789-90/79 Calpak SpA et Società Emiliana Lavorazione Frutta SpA v Commission.
- Cases 239 and 275/82 Allied Corporation and others v Commission.
- Case 264/82 Timex Corporation v Council and Commission.
- Case 314/85 Foto-Frost v Hauptzollamt Lubeck-Ost.
- Case C-152/88 Sofrimport SARL v Commission.
- Case C-309/89 Codorníu SA v Council.
- Case C-358/89 Extramet Industrie SA v Council.
- Case T-585/93 Greenpeace v Commission.
- Case T-172, 175-77/98 Salamander AG and Others v Parliament and Council.
- Case C-50/00 Unión de Pequeños Agricultores v Council (UPA).
- Case C-300/00 Federacion de Cofraidas de Pescadores de Guipozcoa and Others v Council.
- Case T-177/01 Jégo-Quéré & Cie SA v Commission.

- Case C-131/03 Reynolds Tobacco and Others v Commission.
- Case C-417/04 Regione Siciliana v Commission.
- The European Convention. *Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR*. Document CONV 116/02.
- The European Convention. *Oral presentation by M. Bo Vesterdorf, President of the Court of First Instance of the European Communities, to the "discussion circle. on the Court of Justice on 24 February 2003*. Document CONV 575/03.
- The European Convention. *Report on the meeting on 3 March 2003*. Document CONV 619/03.
- The European Convention. *Final report of the discussion circle on the Court of Justice.* Document CONV 636/03.
- The European Convention. *Articles on the Court of Justice and the High Court*. Document CONV 734/03.
- The European Convention. *Draft Constitution, Volume II – Draft revised text of Parts Two, Three and Four.* Document CONV 802/03.

Secondary sources

- Acetto, M., Zleptnig, S. *The principles of Effectiveness: Rethinking its Role in Community Law*. In: European Public Law, 2005, Vol. 11, No. 3, 27 pp. ISSN 1354-3725.
- Arnull, A. *Private Applicants and the Action for Annulment Since Cordoníu*. In: Common Market Law Review, 2001, Vol. 38, No. 7. 45 pp. ISSN 0008–4506.
- Biondi, A., Maletic, I. *Recent Developments in Luxembourg: The Activities of the Community Courts in 2006*. In: European Public Law, 2007, Vol. 13, No. 4. 17 pp. ISSN 1354-3725.

- Birkinshaw, P. A Constitution for the European Union ? - A letter from Home. In: European Public Law, 2004. Vol. 10, No. 1. 28 pp. ISSN 1354-3725.
- Chalmers, D. (et. al.) European Union Law. 1st ed. Cambridge: Cambridge University Press, 2009. 1240 pp. ISBN 978-0-521-52741-5.
- Chalmers, D., Monti, G. *European Union Law. Updating Supplement*. 2nd ed. Cambridge: Cambridge University Press, 2009. 217 pp. ISBN 978-0-521-07013-3.
- Chiti, E. *An Important Part of EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*. In: Common Market Law Review, 2009, Vol. 46, No. 1. 48 pp. ISSN 0008–4506.
- Doughan, M. *The Treaty of Lisbon 2007: Winning Minds, not Hearts*. In: Common Market Law Review, 2008, Vol. 45, No. 45. 87 pp. ISSN 0008–4506.
- Folesdal, A., Hix, S. *Why there is a democratic deficit in the EU: A response to Majone and Moravcsik.* Available [online] www.connex-network.org, cit. 17.11.2010.
- Lang, J. T. *Checks and Balances: The Institutional Structure and the "Community Method".* In: European Public Law, Vol. 12, Issue 1, 2006. 27 pp. ISSN 1354-3725.
- Moravcsik, A. *In Defence of the Democratic Deficit: Reassessing the Legitimacy in the European Union*. In: Journal of Common Market Studies, 2002, Vol. 40, No. 4. 22 pp. ISSN 0021-9886.
- Pabel, K. *The Right to an Effective Remedy Pursuant to Article II-107 Paragraph I of the Constitutional Treaty*. In: German Law Journal, 2006, Vol. 6, No. 11. 16 pp. ISSN 2071-8322.
- Schwarze, J. *The Legal Protection of the Individual against Regulations in European Union Law*. In: European Public Law, 2004, Vol. 10, No. 2. 20 pp. ISSN 1354-3725.

- Stehlík, V. *Právní subjektivita a aktivní legitimace právnických osob pro účely čl. 230 SES*. In: Dny veřejného práva - Sborník příspěvků z mezinárodní konference. 1. vyd. Brno: MU, 2007. 12 pp. ISBN 978-80-210-4430-2.
- Stehlík, V. *K reformě soudního systému EU na základě Lisabonské smlouvy*. In: Míľniky práva v stredoeurópskom priestore - Zborník z medzinárodnej konferencie. 1. vyd. Bratislava: PF UK, 2008. 7 pp. ISBN 978-80-7160-271-2.
- Turk, A. *The Concept of the "Legislative" Act in the Constitutional Treaty*. In: German Law Journal, 2006, Vol. 6, No. 11. 16 pp. ISSN 2071-8322.
- Varju, M. *The Debate on the Future of the Stading under Article 230(4) TEC in the European Convention*. In: European Law Review, 2004, Vol. 10, No. 1. 13 pp. ISSN 1354-3725.

Contact – email
igor.blahusiak@gmail.com, blahusiak@mail.muni.cz