A 'complete system of remedies'? Annulment actions after the Lisbon Treaty

A 'COMPLETE SYSTEM OF REMEDIES'?

Annulment Actions after the Lisbon Treaty

Case C-274/12 P *Telefónica v. Commission*, Judgment of 21 March 2012

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§1. INTRODUCTION

More than half a century after the landmark *Plaumann* ruling,[1] the issue of access to justice at the European level is still at the core of a heated debate, both within academic circles and the European judiciary, because of the restrictive conditions imposed by the European courts on the standing requirements which private applicants need to fulfil in actions for annulment.[2]

Currently, the fourth paragraph of Article 263 of the Treaty on the Functioning of the European Union (TFEU), the provision regulating actions for annulment of EU measures, provides for two situations in which natural or legal persons are accorded standing to institute proceedings against an act not addressed to them. First, if the measure is of direct and individual concern to them. Second, if the challenge is directed

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1 Case 25/62 *Plaumann v. Commission* [1963] ECR 95.

2 See, ex multis, A. Ward, 'Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity', 23 *Yearbook of European Law* (2003), p. 45; A. Arnull, 'Private Applicants and the Action for Annulment since Codorniu', 38 *Common Market Law Review* (2001), p. 7; J.M.M. Cortés, 'Ubi ius, Ibi Remedium? Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads', 11 *Maastricht Journal of European and Comparative Law* (2004), p. 233; A. Abaquense de Parfouru, 'Locus Standi of Private Applicants under the Article 230 EC Action for Annulment: Any Lessons to be Learnt from France?', 14 *Maastricht Journal of European and Comparative Law* (2007), p. 361; A. Cygan, 'Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC', 52 *International and Comparative Law Quarterly* (2003), p. 995; X. Lewis, 'Standing of Private Claimants to Annul Generally Applicable European Community Measures: If the System is Broken, where Should it be Fixed?', 30 *Fordham International Law Journal* (2006–2007), p. 1496; A. Albors-Llorens, 'Sealing The Fate of Private Parties in Annulment Proceedings? The General Court and the New Standing Test In Article 263(4) TFEU', 71 *Cambridge Law Journal* (2012), p. 52.

against a 'regulatory act not entailing implementing measures' if that act is of direct concern to them.

Both concepts of 'regulatory act' and 'not entailing implementing measures' are not defined in the Treaty and cannot be found elsewhere in primary law. The case under review sheds lights on the interpretation of the phrase 'not entailing implementing measures': by relying on the argument of the 'complete system of remedies' previously brought forward, the Court of Justice (CJEU) adopted a very broad interpretation of that phrase, essentially encompassing any measure which a Member State would take in implementation of a European measure, regardless of the ancillary nature or the type of measure to be adopted.

§2. THE FACTS OF THE CASE AND THE ARGUMENT OF THE PARTIES

The case under review concerns an appeal against an order of the General Court (GC)[3] in which the latter had declared inadmissible an action brought by Telefónica for the annulment of Article 1(1) of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortization of financial goodwill for foreign shareholding acquisitions.[4] This provision concerned a tax scheme, introduced through legislation by Spain, through which the acquisition of a shareholding in a company not established in Spain could, under certain conditions, result in financial goodwill that was capable of being amortized for up to 20 years, thereby reducing the acquiring company's tax burden. After completing the investigation procedure, the Commission, through the provision for which annulment was sought, had declared this tax scheme as State Aid that was incompatible with the common market and hence in breach of Article 88(3) EC (currently Article 108(3) TFEU).

Telefónica, who had acquired two shareholdings with the benefit of this tax scheme, sought the annulment of Article 1(1) of the above mentioned decision before the General Court. The latter, upholding the Commission's arguments, held that Telefónica was not to be considered as individually concerned[5] and that the contested decision could not be classified as an act not entailing implementing measures.[6]

On appeal before the Court of Justice, Telefónica argued that the ruling of the GC was based on a misinterpretation of Article 263 TFEU, both as regards the concept of 'individual concern' and that of 'implementing measures'. To these two pleas, Telefónica added another one (presented as first, but correctly re-ordered by the Court as a third

3 Case T-228/10 *Telefónica v. Commission*, Judgment of 21 March 2012, not yet reported.
4 [2011] OJ L-7/48.
5 Case T-228/10 *Telefónica v. Commission*, para. 41.
6 Ibid., para. 45.

plea), according to which the GC, by denying standing, had infringed the applicant's right to effective judicial protection.[7]

Unlike the GC, the CJEU rightly started by examining the plea according to which the contested decision had to be correctly classified as a 'regulatory act not entailing implementing measures', given that, if this classification were correct, there would be no need to examine whether Telefónica was individually concerned.

The main argument on which Telefónica based its plea is rooted in a teleological interpretation of the phrase 'regulatory act not entailing implementing measures' contained in Article 263(4) TFEU. According to Telefónica, given that the aim of the introduction of this phrase by the Lisbon Treaty was to facilitate access to justice for private applicants, the concept of implementing measures should be taken as excluding national measures carrying out merely 'ancillary obligations' to those contained in a European measure. According to Telefónica, an overly wide interpretation of implementing measures would run counter to the objectives pursued by the drafters of the Lisbon Treaty. In the application of this interpretation of implementing measures, Telefónica concluded that the decision at stake had to be considered as 'not entailing implementing measures'. This was the case since the national measure through which a Member State orders the repayment of an unlawfully granted aid should not be taken as calling into question the direct effect of the articles in the operative part of a Commission Decision declaring State Aid unlawful.

The Commission, instead, adopted a more literal and historical interpretation of the phrase 'implementing measures' and relied on the Opinion of Advocate General Jacobs in the case *Union de Pequeños Agricultores*[8] as well as the preparatory works of the European Convention for the drawing up of a Constitution for Europe,[9] during which the provision which later became the fourth limb of Article 263 TFEU was drafted. From these sources, the Commission argued that the relaxation of the standing requirements was meant to cover only situations in which there were no national implementing measures at all, given that, if there are implementing measures, despite the restrictive European standing requirements, individuals would be able to access the national courts and, there, indirectly challenge the underlying European measure. Hence, according to the Commission, the concept of 'implementing measures' should be taken as including any measures taken by the national authorities to give effect to a European measure, such as a national measure ordering the repayment of an unlawfully granted State Aid.

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7 Please note that this case note will not further deal with Telefónica's plea concerning individual concern. However, it must be pointed out that this plea was also rejected, hence it does not affect the global outcome of the case.

8 Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v. Council of the European Union* [2002] ECR I-06677.

9 [2004] OJ C-310/1.

§3. THE REASONING OF THE COURT

The Court of Justice upheld the ruling of the General Court and dismissed Telefónica's arguments.

After having reinstated the doctrine of the 'complete system of remedies', the Court also used a teleological argument to base its reasoning, but did not agree with Telefónica as to what the objective of the fourth paragraph of Article 263 TFEU should be. In particular, in perfect line with the reasoning of Advocate General Kokott on this point,[10] the Court considered the objective of the new standing requirements introduced by the Lisbon Treaty not to be a general broadening of access to justice conditions for private applicants. Instead, in the Court's view, the Lisbon reforms aimed at giving private applicants the possibility to access the European courts in one specific situation, that is, where private parties would be required to break the law in order to access the national courts and there indirectly question the validity of a European measure.

In all other situations, according to the Court, there is no need to use more liberal standing requirements, as individuals may plead the invalidity of a European measure through a preliminary question of validity pursuant to Article 267 TFEU. To this conclusion, the Court added that the existence of implementing measures should be considered with regard to the 'position of the person pleading the right to bring proceedings',[11] to the subject matter of the dispute and the part of the measure of which annulment is sought.

Applying these requirements to the situation at stake, the Court, in line with the views taken by the Advocate General,[12] came to the conclusion that Article 1(1) of the contested decision addressed to Spain had to be considered as entailing implementing measures, since it only constituted a declaration of the aid incompatible with the common market. This provision is, firstly, only addressed to (and, therefore, according to Article 288 TFEU only binding on) Spain, and, secondly, it does not define the consequences of the unlawfulness of the national action. This means, according to the Court, that there will be by necessity implementing measures, such as a tax notice or a rejection of an application for the grant of the tax advantage created by the unlawful Spanish tax regime.

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10 Opinion of Advocate General Kokott in Case C-274/12 P *Telefónica v. Commission*, delivered on 21 March 2013, para. 40.

11 Case C-274/12 P *Telefónica v. Commission*, para. 30. On this point it is worth noting that the Advocate General made an interesting distinction (which it is not taken up by the Court) between abstract and concrete legal effects of a measure. In particular, the Advocate General considered that a measure can be regarded as not entailing implementing measures only where it is capable of producing *concrete* legal effects for each of the addressees of the measure itself. A different interpretation would mean, according to the Advocate General, that essentially all regulatory measures would be considered as not entailing implementing measures because they are capable of producing *abstract* legal effects (Opinion of Advocate General Kokott in Case C-274/12 P *Telefónica v. Commission*, para. 42).

12 Opinion of Advocate General Kokott in Case C-274/12 P *Telefónica v. Commission*, para. 50.

Due to the existence of implementing measures and the possibility for Telefónica to bring proceedings before a national court and cause the latter to ask a preliminary question of validity of the contested decision, the Court also concluded that Telefónica's right to effective judicial protection had not been infringed.

§4. COMMENTS

This ruling can be inserted in the line of cases which arose after the entry into force of the Lisbon Treaty, and in which the European courts provided clarification on the scope of application of the newly introduced standing requirements.

The first stream of case law concerned the meaning and scope of 'regulatory act',[13] which was conclusively determined by the Court of Justice in the appeal of the *Inuit* case, where it was established that regulatory acts are non-legislative measures of general application.[14]

The issue of 'implementing measures' had already been tackled by the Court in *Eurofer*.[15] In this case, which concerned the determination by the Commission of Union-wide rules for harmonized free allocation of emission allowances, the question of implementing measures was, however, phrased in terms of whether the fact that Member States had no discretion in implementing the underlying EU measure essentially meant that implementing measures did not exist. By using the same rationale as in the case under review, the Court concluded that such lack of discretion is an element in the determination of direct concern, but not in assessing the question of whether implementing measures existed. The same reasoning was reiterated in *Palirria Souliotis*[16] concerning customs measures, in *Bricmate*[17] on anti-dumping, and in *Atladis*,[18] which, like the case under review, also concerned an unlawfully granted aid.

The case under review, however, adds to the existing case law a thorough reasoning on the rationale underlying the current interpretation of the concept of implementing

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13 See for example T-16/04 *Arcelor v. Parliament and Council* [2010] ECR II-211; T-532/08 *Norilsk Nickel Harjavalta and Umicore v. Commission* [2010] ECR II-3959; T-539/08 *Etimine and Etiproducts v. Commission* [2010] ECR II-4017; T-262/10 *Microban International and Microban (Europe) v. Commission* [2011] ECR II-7697. For a debate before the Court clarified the phrase, see S. Balthasar, 'Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: the New Article 263(4) TFEU', 35 *European Law Review* (2010), p. 542.

14 C-583/11 P *Inuit Tapiriit Kanatami and Others v. Parliament and Council*, Judgment of 3 October 2013, not yet reported. For a discussion of the case law leading up to this ruling, see H. Roer-Eide and M. Eliantonio, 'The Meaning of Regulatory Act Explained: Are There Any Significant Improvements for the Standing of Non-Privileged Applicants in Annulment Actions?', 14 *German Law Journal* (2013), www.germanlawjournal.com/index.php?pageID=11&artID=1581; for a comment to this ruling, see A. Albors-Llorens, 71 *Cambridge Law Journal Cambridge Law Journal* (2012), p. 52.

15 T-381/11 *Eurofer v. Commission*,Judgment of 4 June 2012, not yet reported.

16 T-380/11 *Palirria Souliotis v. Commission*, Judgment of 6 September 2012, not yet reported.

17 T-596/11 *Bricmate v. Council*, Judgment 12 September 2013, not yet reported.

18 T-400/11 *Altadis v. Commission*, Judgment of 9 September 2013, not yet reported.

measures. The Court essentially reinstates, as many times before, the existence of a 'complete system of legal remedies' designed to ensure judicial review of the legality of European Union acts within the EU legal order, according to which individuals may challenge directly EU measures before the European courts according to Article 263 TFEU. Where natural or legal persons cannot directly challenge European Union acts – by reason of the conditions of admissibility stated in the fourth paragraph of Article 263 TFEU – they are entitled to plead the invalidity of a European Union act at issue before the national courts and tribunals and ask the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU.[19]

From this premise, it is only logical that the Court concludes for a broad interpretation of the concept of 'implementing measures', given its reliance on the indirect route (that is, through a preliminary question of validity) for the challenge of European measures.

The Commission (whose arguments the Court seems to adopt) based its reasoning on the Opinion of Advocate General Jacobs in the case *Union de Pequeños Agricultores*: this reference is rather at odds with the Commission's position, given that in his Opinion the Advocate General challenged the existence of the allegedly complete system of remedies set up by the Treaties.[20] While his considerations have been partially addressed by the reforms introduced by the Lisbon Treaty, all his criticisms concerning the use of the preliminary reference procedure to challenge the legality of an EU measure still remain applicable.

In particular, he recalled that access to the Court of Justice of the European Union (CJEU) via the preliminary reference procedure is not available to applicants as a matter of right. This is the case since national courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EU measure to the CJEU or might err in their assessment of the validity of the measure and decline to refer a question to the CJEU on that basis.[21] In addition, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants' claims might be redefined or that the questions referred might limit the range of measures whose validity is being challenged before the national court.[22] Finally, the Advocate General considered that proceedings brought before a national court are more

19 See for example Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, para. 23; Case C-50/00 P *Unión de Pequeños Agricultores v. Council* [2002] ECR I-06677, para. 40; Case C-131/03 P *Reynolds Tobacco and Others v. Commission* [2006] ECR I-07795, para. 80; and Case C-59/11 *Association Kokopelli*, Judgment of 12 July 2012, not yet reported, para. 34.

20 For a different opinion on why the system of remedies is indeed complete, see A. Kornezov, 'Shaping the New Architecture of the EU System of Judicial Remedies: Comment on *Inuit*', 2 *European Law Review* (2014), p. 251.

21 Opinion of Advocate General Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores v. Council of the European Union*, para. 42.

22 Ibid.

disadvantageous for individuals compared to an action for annulment under Article 263 TFEU, since they involve delays and extra costs.[23]

The application of this system to the case under examination means that the applicant company will have to wait until the national authorities have acted upon the Commission decision (by sending it the annual tax notice) or will have to apply for the relevant tax benefit with the tax authorities in order to have its application rejected and be able to access the national courts to indirectly challenge the validity of the Commission decision. While the first of these two options 'only' entails more time and more legal uncertainty for the applicant, it is hard to see how the second solution (namely applying for a benefit, while knowing the authorities will reject it, as a means to have access to a court) is so fundamentally different from having to break the law in order to have access to a court, the very situation which the drafters of the Lisbon Treaty wanted to repair. In both cases, indeed, the individual is 'forced' into a certain behaviour and has to 'manufacture a case' just to be able to gain access to a court.

In conclusion, the case under review shows that, despite the amendments brought to the standing rules by the Lisbon Treaty, the question of whether the current judicial architecture of the European Union guarantees the fulfillment of the right to effective judicial protection enshrined in the Charter of Fundamental Rights, is definitely still an open one.

[23] Ibid., para. 44.