JURISPRUDENCIA

THE ALLEGED MECHANICAL NATURE OF NATIONAL MEASURES DOES NOT CALL INTO QUESTION THAT NATIONAL DECISIONS CONSTITUTE IMPLEMENTING MEASURES UNDER ARTICLE 263(4) TFEU

Comments On T&L Sugars Ltd (Cjeu — Judgment of 28.04.2015 (Grand Chamber) — Case C-456/13P

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Abstract

The present judgment of the Court of Justice is the latest piece in a considerable line of case law fleshing out the interpretation of the new limb which has been introduced by the Treaty of Lisbon in Article 263, fourth paragraph, TFEU with the objective to ensure that individuals do not have to break the law in order to have access to a court. This objective refers to the background of the introduction of the new category of 'regulatory acts of direct concern to them and not entailing implementing measures', against which an appeal may be lodged by private individuals. The present case also illustrates the complexity of judicial protection in a multi-layered European/national legal order. Once again the Court of Justice affirms the completeness of the system, the obligation of the member States under

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Article 19 TEU and the inability of Article 47 of the Charter, which concerns judicial protection, to change the system of judicial review as laid down by the Treaties. However, a constructive and coherent interpretation of standing requirements in the light of the right to effective judicial protection does not necessarily amount to a change of the Treaty provisions. No need, it is suggested, to remind that the *Plaumann* doctrine itself is not spelled out in the Treaty.

Key words

Judicial protection; annulment procedure; direct access of private applicants to EU Courts; regulatory acts of direct concern not entailing implementing measures; Article 47 of the Charter.

LA NATURALEZA MECÁNICA PRESUNTA DE LAS MEDIDAS NACIONALES NO PONE EN DUDA QUE LAS DECISIONES NACIONALES CONSTITUYAN MEDIDAS DE APLICACIÓN DEL ART. 263.4 TFUE

Comentario de la Sentencia T&L Sugars Ltd (Gran Sala) de 28.04.2015, C-456/13 P

Resumen

Este fallo del TJUE constituye el último desarrollo dirigido a interpretar la novedad introducida por el Tratado de Lisboa en el art. 263, párrafo cuarto, del TFUE, con el objetivo de garantizar que los particulares no se vean obligados a infringir la ley para tener acceso a un tribunal. Nos referimos a la introducción de la nueva categoría de actos reglamentarios que afecten directamente al particular y que no impliquen medidas de ejecución contra los que el particular puede interponer un recurso de anulación sin tener que demostrar su afectación individual. El presente asunto también ilustra la complejidad de la protección judicial en un sistema multinivel compuesto por el ordenamiento jurídico de la Unión y los de los Estados miembros. Nuevamente el TJUE afirmó la completud del sistema de protección jurisdiccional, la obligación de los Estados miembros en el marco del art. 19 TUE y la incapacidad del art. 47 de la Carta sobre la tutela judicial efectiva para reformar el sistema de protección jurisdiccional establecido en los tratados. Sin embargo, una interpretación positiva y coherente de los requisitos de legitimación a la luz del derecho a la tutela judicial efectiva no equivale necesariamente a un cambio de las disposiciones del Tratado. En efecto, no hace falta recordar que la doctrina Plaumann no viene exigida en el Tratado.

Palabras clave

Tutela judicial efectiva; recurso de anulación; legitimación de los particulares ante el TJUE; actos reglamentarios que afectan directamente a los particulares y que no incluyan medidas de ejecución; art. 47 de la Carta.

LA NATURE MECANIQUE PRESUMEE DES MESURES DE RENVOI NE REMET PAS EN CAUSE QUE LES DECISIONS NATIONALES CONSTITUENT MESURES D'APPLICATION DE L'ARTICLE 263.TFUE

Commentaire de L'arret du 28.04.2015, C-456/13 P

Résumé

Cet arrêt de la CJCE constitue le dernier développement dirigé à interpréter la nouveauté introduite par le traité de Lisbonne à l›article 263, quatrième alinéa, TFUE, afin de garantir que les individus ne sont pas obligés d'enfreindre la loi pour avoir accès au juge. Il s'agit de l'introduction de la nouvelle catégorie d'actes réglementaires qui le concernent directement et qui ne comportent pas de mesures d'exécution, contre lesquels l'individu peut introduire un recours en annulation sans qu'il ne soit tenu d'apporter la preuve de l'affectation individuelle [...]. Ce cas illustre aussi la complexité de la protection judiciaire dans un système multi-niveau comprenant le système juridique de l'Union et des États membres. Encore une fois, la CJCE affirme la complétude du système de protection juridictionnelle, l'obligation des États membres en vertu de l'article 19 du TUE et le caractère inopérant de l'article 47 de la Charte sur la protection juridictionnelle pour réformer le système de protection judiciaire établi dans les traités. Cependant, une interprétation constructive et cohérente des exigences du *locus standi* des particuliers à la lumière du droit à une protection juridictionnelle effective ne signifie pas nécessairement un changement des traités. En fait, il n'y a pas lieu de rappeler que la doctrine Plaumann n'était pas forcément imposée par les traités.

Mots clés

Droit à un recours effectif; recours en annulation, qualité pour agir des particuliers devant la CJUE; actes réglementaires qui concernent directement les personnes physiques ou morales et qui ne comportent pas de mesures d'exécution; article 47 de la Charte.

SUMMARY

I. INTRODUCTION

1. The present judgment of the Court of Justice is the latest piece in a considerable line of case law fleshing out the interpretation of the new limb which has been introduced by the Treaty of Lisbon in Article 263, fourth paragraph, TFEU with the objective to ensure that individuals do not have to break the law in order to have access to a court.[2] This objective refers to the background of the introduction of the new category of 'regulatory acts of direct concern to them and not entailing implementing measures', against which an appeal may be lodged by private individuals.
2. The present case also illustrates the complexity of judicial protection in a multi-layered European/national legal order. Indeed, the question of direct access of private individuals to the EU courts is not only concerned with judicial protection against direct action of EU administrations towards private individuals without intervention of Member States' authorities. In situations of shared European/national administration it also touches upon the delineation of direct appeal before the EU courts with respect to appeal against national implementing measures before the national courts of the Member States.
3. In order to put the present judgment in the perspective of the aforementioned objective, it seems appropriate to expose, too briefly indeed, the background to and the principal developments following the intro-

[2] Paragraph 29 of the present judgment. The fourth paragraph of Article 263 TFEU has been rephrased to the effect that individuals may institute proceedings before the EU courts against an act of the institutions addressed to them or which is of direct and individual concern to them and 'against a regulatory act which is of direct concern to them and does not entail implementing measures'.

duction of the new provision. Subsequently, the facts of the case and the undertaken judgment of the General Court[3] will be explored, to be followed by a summary of the divergent approaches taken by Advocate-General Cruz Villalón and by the Court of Justice respectively. Finally, a few comments will be made.

II. STANDING OF INDIVIDUALS IN THE EU COURTS AFTER LISBON

4. The restriction of access to court for private individuals, as opposed to privileged applicants such as Member States and institutions, to claim annulment of acts of the institutions initially was inspired certainly by considerations relating to the importance of not overwhelming the fragile new institutions with claims that might paralyze their operation and relating to fear of inundating the newly established court with impossible tasks. Such considerations closely relate to the nature of the remedy. In contrast to the appeal for damages under Articles 268 and 340 TFEU which is directed towards compensation of the applicant for prejudice to its subjective position, the action for annulment purports to provide for judicial review of the objective legality of administrative acts. A typical feature characterising this type of action, available in many legal systems, is the search for an appropriate balance between, on the one hand, the far-reaching power of courts to proceed to annulment *erga omnes* of the administrative act undertaken and, on the other, limited access for claimants combined with a judicial power of review restricted to legality or validity of the undertaken act rather than including appraisal of policy choices.
5. Among the conditions for access to court in this *recours objectif* the requirements determining the legitimation of applicants to introduce the action appeal to the imagination to the extent that these relate immediately to the scope of protection of the individual. Where it appears self-evident that the addressee of an administrative decision affecting its legal or factual situation always may contest it in court, it is not obvious that anyone may challenge in court the legality of any administrative act. Between these two extremes the formula developed in the 1963 *Plaumann* Case,[4] which has dominated the concept of stand-

3 Case T-279/11, EU:T:2013:299, *T & L Sugars Ltd a.o. v European Commission*, judgment of 6 June 2013, ECLI:EU:T:2013:299.

4 Case 25/62, *Plaumann v Commission*, judgment of 15 July 1963, ECLI:EU:C:1963:17, requiring in particular that, in order for an act of general application to be of individ-

ing in direct actions in the EU courts for more than fifty years, took a rigorously restrictive position from the outset. In particular as regards measures of general application for which no further implementation was required, the strict interpretation of the notion of individual concern gave rise to serious criticism. In such cases of directly and generally applicable provisions of EU regulations, e.g. concerning the required measurements of fishing nets, the economic operators concerned by the provision would have to violate the law and to provoke administrative or penal sanctions in order to be able to challenge the measure by way of defence in court.[5]

6. Against this backdrop the new provision referred to in para. 1. above has been introduced, initially in the Constitutional Treaty, later by the Lisbon Treaty. Giving rise to controversy from the outset, the concept of a 'regulatory act' and the notion of 'entailing implementing measures' have generated various cases.[6] The first case, *Inuit Tapiriit*,[7] establishes a formal opposition between legislative acts, adopted according to the ordinary legislative procedure, and regulatory acts, the latter potentially being all other acts of general application. In *Telefonica*[8] and *Stichting Woonpunt*,[9] concerning state aid measures, the notion of an implement-

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ual concern to natural or legal persons, the act must affect those persons by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as an addressee of the act.

5 Cf the well-known Cases C-50/00 P, *UPA v Council*, ECLI:EU:C:2002:462, and C-263/02 P, *Commission v J*égo-Quéré, ECLI:EU:C:2004:210, in particular the Opinion of A-G Jacobs in *UPA*.

6 See on the background of the matter, the first controversies on the new provision and the first cases Sergio ALONSO DE LEÓN, «Por fin una definición de los 'Actos Reglementarios' del art. 263.4 TFEU», *RDCE,* 2013, 345-360; Arjen MEIJ, «Standing in Direct Actions in the EU Courts after Lisbon», in *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins, Mélanges en l'honneur de Paolo Mengozzi,* Bruxelles, 2013, 301-312; J. WILDEMEERSCH, «La condition relative à l'absence de measures d'exécution et l'arrêt Telefonica: de l'inutilité d'une réforme», *R.A.E.-L.E.A.*, 2013/4, 861-871; James R. WILLIAMS, «Standing on its head: a frosty reception to the Advocate general's Opinion in Inuit I», *www.academia.edu*; Steve PEERS and Mario COSTA, «Judicial Review of EU Acts after the Treaty of Lisbon», *EuConst* 2012, 8, pp. 82-103 all with further references.

7 Case C-583/11 P, *Inuit Tapiriit a.o. v Parliament and Council,* ECLI:EU:C:2013:625.

8 Case C-274/12, *Telefonica s.a. v Commission,* ECLI:EU:C:2013:852.

9 Cases C-132 and 133/12 P, *Stichting Woonpunt a.o. v Commission and Stichting Woonlinie a.o. v Commission,* ECLI:EU:C:2014:100.

ing measure is interpreted in connection with the phenomenon of multi-level regulation involving EU institutions and national administrations and with the provision of a complete system of legal protection accordingly. In the present case the notion of implementing measures again calls for attention, alongside a peculiar application of the good old *Plaumann* doctrine.

III. THE T & L SUGAR CASE: FACTS AND FIRST INSTANCE

7. The present case provides a classic example of what is currently often called multi-level regulatory policy, in the agricultural sector, which represents the earliest area of common policies. The contested regulations adopted solely by the Commission, therefore not according to the ordinary legislative procedure,[10] provide for two parallel interventions in the common sugar market designed to increase supply in order to overcome shortage. Since the adoption of a common agricultural policy in the 1960s, the sugar market is regulated by a strict regime of production quota, largely for beet sugar, and import duties on cane sugar from third countries. Early in March 2011 and for the remaining part of the marketing year 2010-2011 registered producers were allowed to market 'out-of-quota' quantities of 500 000 tonnes sugar and 26 000 tonnes isoglocose. For these quantities exceeding the production quota established for that year, the usual surplus levy of EUR 500 per tonne was reduced to zero. Similarly, for the remaining period from 1 April to 30 September import duties were suspended for a maximum quantity of 300 000 tonnes. According to detailed implementing provisions, in order to benefit from these measures, interested operators submit to the competent national authorities applications for production certificates or import licences for the quantities for which they want to participate. Upon verification of their admissibility, the national authorities notify the applications to the Commission. As it so happened, already in the very first week of operation both facilities were fully overbooked. Therefore, the Commission first adopted Implementing Regulation No. 293/2011 defining an allocation coefficient of 67 % to be applied by the national authorities to applications for production certificates submitted between 14 and 18 March 2011 and notified to the Commission, furthermore rejecting subsequent applications and closing the period for submission. As regards imports, Implementing

10 Cf Arts 289 and 294 TFEU on the co-decision procedure.

Regulation no. 393/2011 fixed at 1.8 % the allocation coefficient for licences lodged from 1 to 7 April 2011 and suspended the submission of further applications.

8. The applicants for annulment of the Commission regulations opening these measures as well as of the aforementioned implementing regulations, are among the largest cane sugar refiners of the EU. The Commission contends that the action for annulment is inadmissible as the contested regulations, although they are regulatory acts within the meaning of Article 263, fourth paragraph, TFEU, are not of individual or direct concern to the applicants and moreover entail implementing measures.

9. The General Court indeed dismisses the action as inadmissible. First, it confirms that the contested regulations are regulatory acts for the purpose of Article 263, fourth paragraph, TFEU, given that they are acts of general application which have not been adopted according to the ordinary legislative procedure or according to a special legislative procedure.[11] Secondly, the General Court considers that the regulations cannot be categorised as acts that do not entail implementing measures within the meaning of Article 263 TFEU. To that effect, it takes into account that interested operators must first submit an application to the national authorities which also issue the production certificates and the import licences applying the allocation coefficients established by the Commission. Therefore, the contested regulations cannot in the Court's view produce their legal effects vis-à-vis the operators concerned without the intermediary step of measures first being taken by the national authorities; they are thus based on individual decisions taken at national level, in default of which they cannot affect the legal position of the persons concerned.[12] The applicants' argument that the role of the national authorities is 'purely mechanical' is rejected, firstly, by reference to earlier case law of the General Court establishing that the question of whether the contested regulatory act allows a degree of discretion to the responsible authorities is irrelevant for the notion of implementing measures, and, secondly, because the contested regulations require the adoption of national measures in order to produce legal effects vis-à-vis individuals.[13]

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11 Case T-279/11, ECLI:EU:T:2013:299, paragraph 36, referring to its judgment in Case T-262/10, *Microban, ECLI:EU:T:2011:623*.

12 *Ibidem*, paragraphs 46-50.

13 *Ibidem*, paragraphs 52-56.

10. In the context of whether there would be a remedy in national courts, the judgment interestingly reports references made to Portuguese and French law and the view taken by the Commission that the present applicants probably would not have standing in national courts for lack of sufficient interest. However, according to the General Court, in summary on this point, uncertainty about access to a national court cannot influence the interpretation of Article 263, not even in the light of the principle of effective legal protection.[14]
11. To the extent that the final limb of the fourth paragraph of Article 263 TFUE does not apply, in order to have standing the applicants need to demonstrate that they satisfy the original criterion of being directly and individually concerned by the contested measures. As regards the Commission's submission that the undertaken regulations constitute acts of general application which are not of individual concern to the applicants, the General Court sticks to a strict application of the old *Plaumann* doctrine. Even if Implementing Regulation No 393/2011 on 19 April 2011 fixed the allocation coefficient solely for the import licences submitted between 1 and 7 April 2011 and therefore concerned a fixed number of economic operators — among whom the applicants — and which could not be increased, according to the Court, the limited class results from the very nature of the system established by the regulation in question, thus constituting an objective legal or factual situation in the sense of the *Plaumann* doctrine. As should be apparent from the method of calculation provided for by the underlying regulation the coefficient depends on the available quantity and the requested quantity and does not take into account the content of individual applications or the specific situation of applicants. Consequently, Implementing Regulation No 393/2011 is held to affect the applicants' legal position as a result of an objectively determined legal or factual situation.[15] Subsequently, the General Court proceeds to a somewhat circular reasoning to the effect that it would not have been possible to adopt a single coefficient to distribute the available quantity without knowing the total number of applications which had been properly submitted. Therefore, in the Court's view, the submission of applications was bound to be suspended before the adoption of the contested regulation and the creation of the limited class therefore re-

14 *Ibidem*, paragraphs 58-73, with references to earlier case law.
15 *Ibidem*, paragraphs 74-87.

sulted from the very nature of the system established by the underlying regulation.[16]

12. Strikingly, the judgment does not make any visible effort to distinguish the present case from the 45 year old *International Fruit* Case in which the Court of Justice analysed a quasi-identical import regulatory regime. In that case the Member States each week communicated to the Commission the quantities for which import licences had been requested during the preceding week and on that basis the Commission decided periodically on the issue of import licences and the percentage of the total of the requested quantity for which licences could be granted, which is typically what is now called an allocation coefficient. The Court held in that case that even though the Commission took account only of the quantities requested, it decided on the subsequent fate of each application which had been lodged in the period taken into account. Consequently, the relevant provision of the regulation in question was not considered a provision of general application, but a conglomerate of individual decisions taken by the Commission under the guise of a regulation, each of which decisions was held to affect the legal position of each author of an application for a licence, thus individually concerned.[17] In the present case the General Court takes a manifestly opposite stance holding that Implementing Regulation No 393/2011 fixing the allocation coefficient — in *International Fruit* terms thus deciding on the fate of each application for an import licence submitted in the relevant period of time — cannot be considered to constitute a set of individual decisions, given that it concerns a group of operators defined in a general way by disregarding the content of individual applications and the specific situation of each of the applicants.[18] It would appear that this qualification is plainly irreconcilable with the *International Fruit* Judgment. The references made to the very nature of the system and to the objective legal or factual situation determined by the regulation do not alter the fact that while establishing the allocation coefficient in relation to a closed class of applications the Commission decides the result to be given to each and every one of them. In the light of the *International Fruit* approach it is hard to explain the general nature of the regulation as conceived by the General Court.

16 *Ibidem*, paragraph 88.

17 Joint Cases 41-44/70, *International Fruit Company a.o. v Commission,* judgment of 13 May 1971, ECLI:EU:C:1971:53*,* paragraphs 16-22.

18 Case T-279/11, ECLI:EU:T:2013:299*,* paragraph 93.

IV. THE OPINION OF THE ADVOCATE GENERAL AND THE JUDGMENT OF THE COURT

13. Before the Court of Justice the applicants submit three grounds of appeal. They claim, firstly, that the General Court misinterpreted the new concept of an 'act not entailing implementing measures'; secondly, that the General Court erred in holding that Implementing Regulation No 393/2011 establishing the allocation coefficient for the requested imports, was not of individual concern to them; thirdly, that the General Court made an error of law where it held that the plea of illegality raised before it had to be rejected.

14. In his Opinion in the appeal case before the Court of Justice A-G CRUZ VILLALÓN points out that the interpretation of the condition of direct concern developed in the pre-Lisbon context and operated in tandem with the condition of individual concern does not provide an adequate response in the context of the new dual condition for the admissibility of appeals against the newly introduced category of 'regulatory acts', requiring that these are not of direct concern to the applicants and do not entail implementing measures. In the pre-Lisbon conception in order to directly concern an applicant, an act must directly affect its legal situation and leave no discretion to the authorities implementing that act, such implementation being purely automatic and resulting solely from EU law. In such perspective the condition relating to the absence of implementing measures — in other words, the absence of acts going beyond purely automatic implementation — is inherent in the condition relating to direct concern.[19] In the A-G's view it is necessary to draw a distinction between the two new conditions relating to regulatory acts in order to make sense of the conceptual duality. As a matter of fact some regulatory acts, while being of direct concern to natural or legal persons, still can entail implementing measures. As a consequence, the A-G distinguishes two opposing schools of thought. According to the first view, any step — however minimal — taken by a national authority in the process of implementing a regulatory act would suffice for the condition concerning the absence of implementing measures not to be satisfied.[20] In the alternative view

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19 Opinion A-G Cruz Villalón in Case C-456/13 P, ECLI:EU:C:2015:284, paragraphs 23-25 with reference a.o. to C-406/96 P, *Glencore Grain v Commission*, pt 41, C-132/12 P, *Stichting Woonpunt a.o. v Commission*, pt 68 and C-133/12 P, *Stichting Woonlinie a.o.*, ECLI:EU:C:2014:100, paragraph 55.

20 *Ibidem* paragraphs 27-28.

defended in the Opinion the new wording introduced in Article 263, fourth paragraph of the Treaty calls for a functional division between the two conditions. In such approach direct concern would refer to the definition of the undertaken act and the identification of its addressees, whereas implementing measures ensure that the regulatory act is fully operational. For the A-G, if it is true in the present case that, as the General Court pointed out, operational implementation of the contested regulations required the Member States to take action and to adopt a certain number of administrative measures, it is difficult to conclude that the purely administrative activity carried out by the national authorities involves the exercise of implementing powers.[21]

15. As I understand the Opinion the notion of implementing measures entailed by a regulatory act in the sense of the new provision in the view of A-G Cruz Villalón implies a measure of discretion in the exercise of an implementing power necessary for the full operation of the regulatory act undertaken. Where the operational discretion lies with Commission and the national authorities execute a purely automatic administrative activity, the discretionary power exercised in the Commission's regulatory act would not in his view entail implementing national measures which may be susceptible of appeal in the competent national court.

16. Therefore the Advocate General considers that the assessment of the General Court is flawed by an error of law. Firstly, the Commission regulations entirely determine the scope of the exceptional measures as well as the conditions for eligibility and admissibility to be satisfied in order to benefit from those measures. Moreover, the Commission fixes the allocation coefficients for both actions. On the other hand, the applications to the national authorities for import licences are not constitutive of the right to benefit from the Commission measure and the action taken by those authorities in the exercise of strictly circumscribed powers does not go beyond simple administrative cooperation or mere technical management of the measures adopted by the Commission. According to the Opinion it is the Implementing Regulations determining the quantities to be allowed on the market which contain implementing measures in the strict sense.[22] Consequently, the Advocate General proposed that the appellants' first ground of appeal be upheld and that the judgment under appeal be set aside to the extent that the General Court held that Implementing Regulations No 302/2011 and No 393/2011 entailed

21 *Ibidem* paragraphs 32-34.

22 *Ibidem* paragraphs 42-47.

implementing measures for the purpose of the final limb of the fourth paragraph of Article 263 TFEU and that the action be declared admissible as regards the import tariff quota regulations.

17. The Court of Justice in turn does not follow A-G Cruz Villalón and furthermore criticizes the General Court as regards the order in which it has examined the admissibility question under the new provision. Concerning the first ground of appeal relating to the concept of an act not entailing implementing measures, the Court reiterates meanwhile established case law to the effect that this concept must be interpreted in the light of the objective of the new provision to ensure that individuals do not have to break the law in order to have access to a court. However, where a regulatory act entails implementing measures, judicial review is ensured irrespective of whether those measures were adopted at EU or Member State's level. Individuals who are precluded from challenging an EU regulatory act directly before the EU judicature, are protected against the application to them of such an act by the ability to challenge the implementing measures which the act entails, either before the EU judicature against implementing acts of EU instances pleading the invalidity of the underlying EU act by way of exception of illegality under Article 277 TFEU or before national courts against implementing measures of national authorities pleading the invalidity of the underlying EU regulation in view of a preliminary reference under Article 267 TFEU. The question of whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the new provision.[23]

18. Taking up a suggestion made by the A-G,[24] the Court considers that since the appellants do not have the status of producers of sugar and their legal situation is not directly affected by the regulations relating to the production quota, those regulations are not of direct concern to them. In the Court's view it follows that the General Court erred in law as it did not examine whether the production quota regulations were of direct concern to the refiners bringing the action, while basing its finding that the action was inadmissible on the fact that those regulations entailed implementing measures. Insisting that it is an error of law

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23 Case C-456/13 P, *T&L Sugars Ltd a.o.*, judgment of 28 April 2015, ECLI:EU:C:2015:284, paragraphs 29-32 referring a.o. to C-274/12, *Telefonica v Commission*, ECLI:EU:C:2013:852, paragraphs 27-30.

24 Without reference to the Opinion, Case C-456/13 P, *T&L Sugars*, ECLI:EU:C:2015:284, paragraph 37, cf Opinion in Case C-456/13 P, *T&L Sugars* Ltd, ECLI:EU:C:2015:284, paragraph 43.

not to examine first the criterion of direct concern before getting to the notion of implementing measures of the second part of the new limb, the Court appears to give a purely cartesian lesson without drawing the consequence of setting aside the judgment of the General Court in so far, precisely because the production quota regulations are not of direct concern to the refiners.[25] To such extent the refineries' action is inadmissible anyway. Most often courts, including the EU courts, are not afraid of some pragmatism in choosing ways and means of dealing with grounds or pleas put forward, whether on admissibility or substance. It is not quite clear why it was considered useful or appropriate to give this lesson without any consequence.

19. As regards the import licence regulatory acts the Court of Justice follows in brief statements the reasoning of the General Court to the effect that the Implementing Regulations produce their legal effects vis-à-vis the applicants only through the intermediary of acts taken by the national authorities following the applications for import licences. Therefore, the decisions of national authorities granting licences on the basis of the coefficients fixed by the Commission as well as decisions refusing such licences in full or in part are held to be implementing measures within the meaning of the final limb of the fourth paragraph of Article 263 TFEU. Without bothering about the analysis made in the Opinion, the allegedly mechanical nature of the measures is considered irrelevant in this context.[26]
20. By contrast the argument derived from the principle of effective judicial protection under Article 47 of the Charter is dealt with extensively by reference to previous case law, underlining in particular that Article 47 is not intended to change the system of judicial review laid down by the Treaties, that an interpretation of the admissibility conditions in the light of the fundamental right to effective judicial protection cannot have the effect of setting aside those conditions and that the Treaties have established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, entrusted to the EU judicature either directly through Articles 263 and 277 TFEU or indirectly through the national courts and Article 267 TFEU, as reaffirmed by the second subparagraph of Article 19(1) TEU.[27]
21. Under the second ground of appeal the Court plainly confirms the approach taken by the General Court as regards the criterion of individual

25 Case C-456/13 P, ECLI:EU:C:2015:284, paragraphs 38-39.
26 *Ibidem* paragraphs 40-42.
27 *Ibidem* paragraphs 43-50.

concern which rebounds in the presence of a regulatory act entailing implementing measures as established under the first ground of appeal. By calculating the allocation coefficient according to the available quantity and the requested quantity, the Court held, Implementing Regulation No 393/2011 did not take into account the content of individual applications or particular qualities of the appellants but took exclusively account of the fact that the quantities covered by the applications lodged exceeded the available quantities. Therefore the General Court rightly held that this Implementing Regulation was not of individual concern to the appellant refineries claiming their share of the import facility opened by the Commission.

V. COMMENTS

22. The present case calls for four observations. A first one is to the effect that the approaches taken by the Court in the interpretation of the newly introduced provision in the fourth paragraph of Article 263 do not make the impression of a tendency of liberalization of the rigorous standing requirements prevailing so far. This should be understandable in the light of the current debate on the workload of the General Court which is the first court to be addressed by the direct actions at stake. Such argument in favour of maintaining rigorous standing requirements is less convincing, however, if one takes into account the complexity of the system and the amount of time involved in dealing with admissibility questions.[28] As is underlined by the Court from the outset, however, the purpose of the Treaty amendment is to ensure that individuals do not have to break the law in order to have access to a court, not in considerations of court workload. The remaining question, then, is whether the present judgment viewed in the line of case law on the new provision developed so far is apt to contribute to that purpose. The answer to this question is not self-evident. In particular the references made in the judgment of the General Court to access in the national courts shed some light on the uncertainties remaining about the delineation of access to national courts as against direct access to the General Court. Although the relationship between the two elements of the new formula — is the regulatory act of direct concern to the appellant and does it entail implementing measures — is far from clear, it is apparent that the Court joins

[28] An unsubstantiated but educated guess would be that judges spend between 20 and 30 % of their time on admissibility issues.

the General Court in the idea that the nature of a measure conceived as implementing measure is irrelevant. In other words, any intervention of a national authority in relation to the application of a regulatory act on the national level is presumed to be challengeable in a national court. Against the backdrop of the Court's insistence on the completeness of the system of legal remedies and procedures and the obligation of the Member States pursuant to Article 19 TEU to provide remedies sufficient to ensure effective judicial protection, this approach to the notion of implementing measures raises questions.

23. Even if standing requirements in national courts, for the present purposes usually administrative courts, may not be as restrictive as in the EU Courts, not any administrative action may be challengeable in court. Apart from conditions relating to the quality of the appellant, more particularly criteria concerning the legal effects produced by the act in question may determine whether an action may be brought in court. Also under EU law an act of a confirmative or technical nature not bringing about any autonomous legal effects may not be challenged in court. Admittedly, the idea put forward by A-G Cruz Villalón to require a minimum of discretionary power in order to qualify an act as an implementing measure in the sense of the new provision does not at this stage seem sufficiently circumscribed. However, his approach can help to bring the conditions for access to courts on national and on EU levels closer and to close an eventual gap as shown in the present case in the Portuguese example. Indeed, the Court's emphasis on the complete character of the EU system of legal protection has a strong normative connotation. It is not based on any degree of empirical data concerning the actual practice of access to courts in the Member States. In the present case the General Court added interestingly that the situation as to access to national courts could not be of any influence on the interpretation of standing requirements. The Court of Justice in turn puts forward the completeness of the system and the obligation of the member States under Article 19 TEU. In doing so in a case such as the present, the Court of Justice runs the risk of pushing national courts in a situation where they are forced to provide judicial protection against purely confirmative acts that would not be open to appeal under national law, neither for that matter under EU law. It would appear, that a constructive and coherent interpretation of the notions of direct concern and implementing measures is primordial and cannot be replaced by an overload of uncertain normative concepts.

24. A similar note is in order with regard to the right to effective judicial protection. As a matter of fact, the first consideration in the present and previous judgments in respect of this principle, now enshrined in

Article 47 of the Charter, is to the effect that this article is not intended to change the system of judicial review as laid down by the Treaties. With due respect, it would appear that this is not the question. Indeed, a constructive and coherent interpretation of standing requirements in the light of the right to effective judicial protection does not necessarily amount to a change of the Treaty provisions. No need, it is suggested, to remind that the *Plaumann* doctrine itself is not spelled out in the Treaty.

25. This reference to *Plaumann* calls for a final observation. Conspicuously, the application given to this doctrine in the present case unisono by the General Court and the Court of Justice unconvincingly deviates from previous case law, admittedly old case law, even so in application of the same old doctrine. Furthermore, apart from *International Fruit*, several other cases reflect the idea that intervention with regard to and on account of particular data relative to each member of a closed group amounts to affecting these members individually.[29] It appears therefore that the present judgments represent an even more rigorous approach to the original standing requirements. It is not evident which judicial policy is carried out here.

[29] E.g. Cases 106-107/63, *Toepfer*, *ECLI:EU:C:1965:65,* Case 11/82, *Piraiki*, ECLI:EU:C:1985:18*,* Case 152/88, *Sofrimport*, ECLI:EU:C:1988:296*,* Case C-209/89, *Codorniu,* and Cases C-182/03 and C-217/03, *Belgium and Forum 187 v Commission,* ECLI:EU:C:2003:385.