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THE MICROBAN JUDGMENT – EXPANDING ACCESS TO JUSTICE IN EUROPE

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Delivered on October 25 2011, the *Microban* judgment,by defining the new category of challengeable acts laid down by the Lisbon Treaty, softens the locus standi of individuals in front of EU Courts. As such, it is of considerable importance for practitioners of EU law.

Introduction

Undersettled case law, access to justice isone of the constitutive elements of a European Union based on the rule of law.According to the Court of Justice of the European Union(CJEU), this is guaranteed in the treaties through establishing a 'complete system oflegal remedies'designed topermit the CJEU to review the legality of measuresadopted by the EU institutions. Yet, in the framework of the action for annulment, the conditions for legal standing have historically been restrictive, which has led many toquestion the 'completeness' of the EU judicial system. While anindividual may lodge a complaint against an act that is specifically addressed to him (e.g. a decision finding anticompetitive behaviour), he could notchallenge an act of which he wasnot the addressee unless he couldshow that the act was of individual and direct concern to him. In particular, the concept of 'individual concern' was construed very narrowly: the applicanthadto show that he was affected by the measure in

question just as if he had been the express addressee. This interpretation meant in practice that, besides a few exceptions, a complainant couldcontest the validity of general legislative measures, such as a regulation or a directive, in so far as they are typically designed to create general rules aimed at an indefinite number of addressees.

To mitigate the ensuing situation of 'denial of justice' caused by the restrictive rules on standing, the CJEU systematically held that the preliminary referenceprocedure under Article 267 TFEU (ex Article 234 EC) could adequately complement the action for annulment, in that itallowedindividuals the opportunity to challenge the validity of measures adopted by EU institutions in front of national courts. However, as illustrated by judicial practice, this approach failed to recognize that, in the absence of implementation measures, the parties were often unable to initiate national court proceedings aimed at eventually triggering a request for a preliminary reference on the validity of the EU measure in question.

The Lisbon Treaty seemed to address this loophole in the EU 'complete system of legal remedies': the provision setting out the annulment action was modified such that Article 263(4) TFEU now allows individuals standing to challenge'regulatory acts' which are of 'direct concern' to them and 'do not entail implement measures'. However, in the absence of a definition of this expression, the precise meaning of this additional category of acts that are subject to judicial review by individuals was unclear. We havehad to wait until October 25, 2011 to obtain from the General Court of the European Union(GCEU) a first definition of this new category of challengeable acts.

Facts

Following Ciba Inc.'s request, Triclosan, an anti-microbial agent used in food packaging, was included in 2008 in the 'provisional list of additives' provided for by Directive 2002/72 relating to plastic food contact materials. It was, as a result, allowed to be placed on the market. This risk management decision built upon two positive scientific opinions: the first

delivered in 2000 by the Scientific Committee on Food; the second by EFSA in 2004.

However, following Ciba's withdrawal of the application for authorisation on the use of triclosan as an additive in food contact materials, the Commission adopted on March 2010 a decision concerning the non-inclusion of triclosan in the 'positive list' of authorised substances. As a result of this decision - adopted under the regulatory procedure with scrutiny (RPS) - this substance could no longer be placed on the market.

Microban International and Microban Europe, being engaged in the manufacture and sale of food contact materials containing triclosan, challenged the Commission's decision in front of the General Court.

Admissibility

Although not formally raising an objection of inadmissibility, the European Commission opposed Microban's legal action by arguing that its action was inadmissible in so far as the contested decision was not a 'regulatory act requiring no implementing measures' within the meaning of Article 263(4) TFEU. It also argued that – in any event – the contested decision was not of direct and individual concern to them.

The GCEU had already sketched out the meaning of 'regulatory act' on September 6, 2011 in *Inuit TapiriitKanatami*. In this case, the applicants (natural persons, commercial companies and non-profit-making organisations and associations representing Inuit interests) challenged Regulation (EC) No 1007/2009 on trade in seal products which imposed a ban on imports into the EU and sale of products deriving from all species of seals.By virtue of 'a literal, historical and teleological interpretation', the General Court concluded that regulatory acts are'all acts of general application apart from legislative acts'. Yet it remained to be established what was meant by the other two components of this new category of challengeable acts: 'direct concern' and the lack of 'implementing measures'. That was what the GCEU was called upon to decide in *Microban*.

Direct concern

As regards the concept of 'direct concern', the GCEU noted that the reference made to this requirement as recently introduced in Article 263(4) TFEU should be interpreted in the same way as it appeared in Article 230(4)EC. Under established case law, this condition requires first that the contested measure directly affects the legal situation of the individual and second that it does leave no discretion to its addressees. In the present cases, after a detailed examination of both conditions, the GCEU concluded that the contested act was of direct concern to Microban.

Lack of Implementing measures

As regards the concept of lack of implementing measures, the GCEU notedthat the decision of non-inclusion of the substance had the immediate consequence of its removal from the provisional list and a prohibition on the marketing of triclosan. This result was attained without the Member States needing to adopt any implementing measures. While it recognizedthat the transitional period established by the contested decisions, allowing the possibility of marketing triclosan to be extended until 1 November 2011, might have given rise to implementing measures by the Member States, the GCEU concluded that these measures were not only optional but also ancillary to the main purpose of the contested decision, namely the prohibition of the marketing of triclosan. It wasby relying on these arguments that the GCEU ruled out that the contested decision entailed implementing measures and declared Microban's legal action admissible.

Observations

*Microban*is set to go down in history as a landmark ruling. By shedding some light on the new category of challengeable acts, it provides the first interpretation of the rules governing access to justice after the entry into force of the Lisbon Treaty. The interpretation provided for by the General Court in the judgment of the new category of EU acts that are subject to judicial review confirms what the EU legal community had been hoping for: an easier access to the EU Courtsagainst those EU acts whose implementation is more in the hands of the EU than in those of the

Member States. Now, when facing 'regulatory acts not entailing implementing measures', individuals will no longer be expected to infringe them in order to be able to challenge their validity in front of national courts. Advocate General Jacobs had already trenchantly criticisedthis scenario in *Unión de PequeñosAgricultores*, when he stated that "ndividuals clearly cannot be required to breach the law in order to gain access to justice".

Thereform of locus standias clarifiedby *Microban* may bring the EU closer to the hitherto rhetorical statement contained in the legendary*Les Verts* judgment according to which the EU system of legal remedies is 'complete'. Now, Article 263(4), read in conjunction with Article 263(1), permits any individual, be it a natural or legal person, to institute proceedings against:

1. an act addressed to that person;
2. a legislative or regulatory act of general application which is of direct and individual concern to that person;
3. certain acts of general application, namely regulatory acts which are of direct concern of that person and do not entail implementing measures (i.e. delegated acts and implementing measures).

The most immediate impact of such an opening of the EU judicial gate stems clearly from the *Microban* judgment itself, in which the General Court annulled the measure (see here for further details). As soon as legal challenges against this category of regulatory acts are held admissible the scrutiny of the Court inevitably kicks in and shows its teeth.

The time seems ripe for an effective judicial review of EU rule-making. This development must be applauded, as it is likely to lead the EU judiciary to develop a more articulated scrutiny of EU rulemaking. In so doing, it is also likely to provide an incentive to the EU institutions to support an "open, efficient and independent European Administration", as foreseen in Article 298 TFEU, when engaging in rule-making.