

EU Litigation

ADVISORY

December 2, 2009

COVINGTON
COVINGTON & BURLING LLP

NEW OPPORTUNITIES FOR PRIVATE LITIGANTS TO CHALLENGE EU LEGISLATION UNDER THE LISBON TREATY - IS THE DOOR TO THE UNION COURTS WIDE OPEN?

The Lisbon Treaty finally entered into force on 1 December 2009 after a lengthy political struggle. The new rules on judicial review open new opportunities for litigants to challenge the European Union's acts and should cause companies to rethink their litigation strategies.

INTRODUCTION

The Lisbon Treaty amends the Treaty on European Union ("TEU") and the Treaty establishing the European Community, which is now called the Treaty on the Functioning of the European Union ("TFEU"). The European Union - or Union - founded on these two Treaties replaces and succeeds the European Community. Despite its reputation as the less-ambitious successor to the failed Treaty establishing a Constitution for Europe, the Lisbon Treaty reforms the Union in a number of important respects, including in relation to the judicial system.

Some changes to the judicial system concern the judicial architecture, including the internal organisation of the Courts and judicial appointments. This also involves the renaming of the existing Courts. The entire Court system is now called the Court of Justice of the European Union, and comprises three courts: the Court of Justice (previously, the European Court of Justice or ECJ), the General Court (previously, the Court of First Instance or CFI), and the Civil Service Tribunal, whose name remains unchanged. Other changes extend the jurisdiction of the Courts in the area of freedom, security, and justice, for example with respect to police and judicial cooperation and as regards visas, asylum, immigration and other policies.

For companies, however, the most important changes to the judicial system are:

- the relaxation of standing requirements for private parties seeking to challenge measures of general application; and
- the clarification that acts of Union bodies, offices and agencies may be challenged before the Union Courts.

Both of these changes, including their practical implications, will be discussed below.

Another change that has attracted a great deal of attention is the enhanced legal status of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. This change, though important, is unlikely to have a significant impact given the existing case law of the Union Courts relating to the protection of human rights under Union law, and it will therefore not be addressed further.

BEIJING

BRUSSELS

LONDON

NEW YORK

SAN DIEGO

SAN FRANCISCO

SILICON VALLEY

WASHINGTON

WWW.COV.COM

CHANGES TO THE RULES ON STANDING FOR CHALLENGING MEASURES OF GENERAL APPLICATION

Under the old rules, private parties could challenge a measure of general application if they could show that the measure was of direct and individual

concern to them. Article 263(4) TFEU maintains this test, but provides, in addition, that private parties may challenge “a regulatory act which is of direct concern to them and does not entail implementing measures.” In other words, with respect to regulatory acts, private parties no longer need to establish individual concern.

This relaxation of the rules on standing is likely to open new opportunities for litigants. However, the new rule also raises a number of important questions for the Union Courts to answer. In particular, the meaning the Courts will give to the notion of “regulatory act”, and how strictly they will apply the “direct concern” test and the requirement that the act “does not entail implementing measures” will determine how far the new rules open the doors of the Union Courts.

Background to the reform

In order to appreciate the significance of the new rule, it is important to understand the problems that arose under the old rule. Pursuant to well established case-law that goes back to the 1960s, an applicant who claims to be individually concerned by a measure of general application has to prove that the measure affects its position by reason of certain attributes peculiar to it, or by reason of a factual situation which differentiates it from all other persons, and distinguishes it individually in the same way as if the contested measure were addressed to it. In practice, this test is notoriously difficult to satisfy. Private parties who failed the individual concern test could only challenge the measure indirectly via a reference from a national court to the ECJ.

In many cases, the individual concern test produced unsatisfactory results, in particular in cases where applicants were forced to break the law in order to obtain an implementing act by a national authority that could then be challenged before a national court, with the aim of having the case referred to the ECJ. This led to a very public debate in two cases in 2002 - 2004, *UPA v Council* and *Jégo-Quééré v Commission*, in which the Courts reconsidered the individual concern test. Both cases involved a challenge against a Community regulation for which no national implementing measure had been adopted. As a consequence, the applicants could not challenge any implementing measure before their national courts. In the *UPA* case, Advocate General Jacobs proposed that the ECJ adopt a new test on individual concern, focussing primarily on the degree of the effect of the measure on the applicant. The CFI adopted a similar test in its judgment in *Jégo-Quééré*. Eventually, however, the ECJ confirmed the existing test, stating that access to justice had to be addressed at Member State level. Its position was that a change to the individual concern test could only be made by modifying the Treaty.

The new rules in the Lisbon Treaty

The Lisbon Treaty takes account of the rulings in the *UPA* and *Jégo-Quééré* cases in two respects. First, it imposes an obligation on Member States to provide remedies sufficient to ensure effective protection in the fields of EU law (Article 19 TEU). In practice, this means that Member States must make it possible to bring a case before a national court with a view to obtaining a reference to the Court of Justice, without having to break the law.

Second, it gave up the individual concern requirement in respect of regulatory acts that are of direct concern to the applicant and do not entail implementing measures. As mentioned above, the significance of this relaxed standing requirement will depend on

the Union Courts' interpretation of the notion of "regulatory act" and the meaning of "direct concern" and "does not entail implementing measures".

The meaning of "regulatory act"

The TFEU does not define the term "regulatory act". For the reasons that follow, the Courts will have the choice between a wide or a narrow interpretation.

The reference to "regulatory act" in Article 263(4) TFEU would appear to constitute a legislative oversight. The term "regulatory act" appeared for the first time in a provision of the Treaty establishing a Constitution for Europe ("Constitutional Treaty"), which was identical to Article 263(4) TFEU. The Constitutional Treaty, however, also proposed a number of new legal instruments, including a "European regulation," which was defined as a non-legislative act. Moreover, "regulations" as known under the EC Treaty were renamed "European laws". Hence, under the Constitutional Treaty, the relaxed standing rule arguably applied only to non-legislative acts.

Under the Lisbon Treaty, the TFEU also distinguishes between legislative acts, adopted by the Council and the European Parliament by ordinary or special legislative procedure, and non-legislative acts, which appear to include all other acts. However, under the TFEU existing legal instruments, including regulations, are maintained and non-legislative acts are not named "European regulations". Therefore, the wording of the TFEU does not suggest that the notion of "regulatory acts" is confined to non-legislative measures.

The Courts will therefore have to decide whether to adopt a wider definition of "regulatory act," based on the wording of the TFEU, or a narrower definition, based on the drafting history of the TFEU. We think there are a number of reasons why the Courts should—and may in fact be willing to—adopt a wide definition of "regulatory act". First, the lack of any definition and the fact that the TFEU maintains the distinction between regulation, directives, and decisions, speaks in favour of a wide interpretation of "regulatory act" as comprising both legislative regulations as well as non-legislative regulations. Second, a narrow interpretation could lead to discriminatory results. For example, there are several EU measures that regulate or prohibit the use of certain substances or products. Typically, the substances or products concerned are set out in an annex to the measure, and the annex can often be amended through, what is now, a non-legislative act. Thus, under a narrow interpretation of the new standing requirements, a company that is affected by the original act could not bring a direct action, whereas a company that is affected by the inclusion of a substance through an amendment of the original act could mount such a challenge. Finally, a narrow interpretation would not fully address the practical problems highlighted in the *UPA* and *Jégo-Quééré* cases.

The meaning of "direct concern" and "does not entail implementing measures"

In order to challenge regulatory acts, private parties will now only need to satisfy the test of direct concern and show that the regulatory act does not entail implementing measures. According to existing case law, a private party is directly concerned by a Community act if the act directly affects its legal position and leaves no discretion to the Member State entrusted with the task of implementing it. If implementation is purely automatic, without the application of other intermediate rules, or a foregone conclusion, there is deemed to be no discretion.

The case law on direct concern as it stands is not particularly refined. As most litigants who challenged measures of general application in the past failed to establish individual concern, the Courts rarely had to consider direct concern. However, the new Article 263(4) TFEU places greater emphasis on the test of direct concern. In particular, the

Courts will need to clarify the meaning of discretion in this context, for example where no discretion is left to Member States regarding the implementation of the rule, but where there is discretion regarding sanctions.

Also, the Courts will need to determine whether the requirement to show that the regulatory act “does not entail implementing measures” adds anything to the direct concern test, and if so, what. In particular, the Courts will have to decide whether the fact that national implementing measures exist, or can be adopted, prevents a direct action, even in cases where the Member State has no discretion and where national implementing measures are purely automatic. Such an interpretation would subject the application of the new rules on standing to the arbitrary decision of a national authority to implement a Community rule, regardless of whether implementation was required. It would also result in an extremely narrow scope of application of the new rules.

EXTENSION OF JUDICIAL REVIEW TO BODIES, OFFICES AND AGENCIES OF THE UNION

The Lisbon Treaty amendments clarify the position with regard to actions brought against acts of bodies, offices and agencies of the Union, by providing that these can now be challenged before the Union Courts in a direct action (Article 263(1) TFEU). Although it was generally thought that acts of these bodies could be challenged directly before the Union Courts, in the same way as acts of the institutions, this was not clear. In addition, it will no longer be necessary to impute a measure of those bodies to one of the institutions. However, there is no change to the requirement to show that the challenged act was “intended to produce legal effects vis-à-vis third parties”—a requirement which is not met where those bodies merely provide opinions which then form the basis of subsequent acts of the institutions. Importantly, the acts establishing the Union’s bodies, offices and agencies can set out which acts are intended to produce legal effects and the specific conditions under which an action can be brought against them.

In a similar vein, the TFEU also allows national courts to submit requests for preliminary rulings to the Court of Justice in relation to the validity and interpretation of the acts of these Union bodies.

WITH GREATER ADVANTAGE COMES GREATER RISK

The new rules on judicial review open new opportunities for litigants to challenge the Union’s acts. Even if the meaning of “regulatory act” is confined to “non-legislative” acts under the new rules on standing, the new rules will nevertheless have potentially far-reaching effects in important areas such as environmental law, where broad principles are often laid down in a directive or regulation, while the detailed rules are left to the Commission to implement by way of, what are now, “non-legislative” acts.

However, there is also a potential downside. A direct action against an act of general application must be brought within roughly two months of publication of the act in the Official Journal. The Union Courts have ruled in a number of cases that a party that was clearly entitled to directly challenge a measure before the Union Courts is precluded from questioning the validity of such measure before a national court in a challenge concerning national implementation measures. It remains to be seen whether the Union Courts will maintain this case law, and, if so, how strictly they will apply it. In any event, companies should rethink their litigation strategies in light of the Lisbon Treaty amendments.

THE COVINGTON & BURLING EU LITIGATION PRACTICE

Our lawyers have appeared before the Court of Justice and the General Court in more than 100 cases on behalf of private and public sector clients. Our experience before the two Union Courts covers the whole spectrum of cases (e.g., direct actions for annulment, actions for damages, appeals against judgments of the General Court, and interim measures) as well as a broad range of subject matters (e.g., competition, merger control, state aid, anti-dumping and anti-subsidy, pharmaceuticals, air transport, agriculture, access to documents, environment, etc.).

If you have any questions concerning the material discussed in this client alert, please contact the following members of our EU litigation practice group:

Georg Berrisch
Peter Bogaert

32.2.549.5240
32.2.549.5243

gberrisch@cov.com
pbogaert@cov.com

This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP is one of the world's preeminent law firms known for handling sensitive and important client matters. This promotional communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts. Covington & Burling LLP is located at Kunstlaan 44 / 44 Avenue Des Arts, B-1040 Brussels.

© 2009 Covington & Burling LLP. All rights reserved.