Inuit Tapiriit Kanatami and Microban: Two Important Steps to Legal Certainty for Individuals’ Access to the Forum of the CJEU of the European Union

By

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This case study provides an analysis of the 3rd alternative of Article 263(4) TFEU: “Any natural or legal person may...institute proceedings against...a regulatory act which is of direct concern to them and does not entail implementing measures”, based on Inuit Tapiriit Kanatami, T18/10, order of 6 September 2011 and Microban, T-262/10, judgment of 25th October 2011. The paper focuses on the interpretation of the notion of a regulatory act, discussed controversially since the adoption of the Treaty of Lisbon, arguing that the cases discussed do indeed form a fundamental step towards legal certainty for individual applicants seeking the annulment of acts of EU law of general application.

KEYWORDS: Regulatory Act; Locus Standi; Direct Concern; Judicial Review

The Treaty of Lisbon introduced a fundamental change concerning the admissibility of actions for annulment of individuals. Henceforth, Article 263(4) TFEU (ex-Article 230(4) TEC) enables any natural or legal person to bring an action for annulment “…against a regulatory act which is of direct concern to them and does not entail implementing measures.” Thus, the Treaty of Lisbon added a third alternative to the two possibilities of locus standi of former Article 230(4) TEC.

This change of primary law is rooted in the UPA1 judgment of the CJEU. In this case, the appellants were denied access to national courts for claiming the invalidity of the contested regulation. Notwithstanding, the GC dismissed their
action on grounds of admissibility. The Court upheld the ruling of the GC by underlining the validity of the notorious Plaumann formula. It is sufficient that the criterion of individual concern is not fulfilled in order to declare inadmissible the action for annulment against a measure of general application brought by a natural or legal person. Thus, no effective legal remedy was available to the appellants who were not individually concerned by the contested Regulation. In the light of Article 6 ECHR such a situation is more than questionable. For the applicants in the UPA case, the only way to gain access to justice would probably have been the infringement of EU law in order to trigger procedures against them.

The Court indicated that “it is for the MS to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.” In a case where an action for annulment is barred for reasons of admissibility, MS must provide for the possibility to access national courts in order to “…ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 Foto-Frost [1987] ECR 4199, paragraph 20), to make a reference to the CJEU for a preliminary ruling on validity.” The question, whether the possibility to ask for a preliminary ruling is sufficient to guarantee effective legal protection in the sense of Article 6 ECHR remains unanswered. At this place it should, however, be recalled that in principle the right to issue a preliminary ruling is a discretionary power of the national Courts. Individuals have no right on such a reference to the CJEU.

MS reacted to the Court’s ruling in UPA and introduced two provisions in the Constitutional treaty: first, Article I-29 which constitutionalised the obligation of the MS to ensure effective legal protection; and second, Article III-365 (4), third alternative: “Any natural or legal person may…institute proceedings against a regulatory act which is of direct concern to him or her and does not entail implementing measures.” The second provision expresses the desire of the MS to facilitate in certain cases the standing of individuals to bring an action for annulment against a measure of general application. The GC in the Inuit case acknowledges that factual background by holding that “the purpose of that provision [Article 263 para. 4, 3rd alternative] is to allow a natural or legal person to institute proceedings against an act of general application, which is not a legislative act, which is of direct concern to them and does not entail implementing measures, thereby avoiding the situation in which such a person would have to infringe the law to have access to the court…”

Without paying attention to inconsistencies in the terminologies used, Article 263(4) TFEU was phrased exactly the same way as Article III-365(4) of the Constitutional Treaty. The latter treaty, however, was designed to introduce a new nomenclature of secondary law, whereas the TFEU is based on its
predecessor, the TEC and its terms. Consequently, the notion of a regulatory act is even more mysterious in the TFEU than it was already in the Constitutional Treaty, which neither contained any definition. The lack of this definition is the point of departure of both, the Inuit and the Microban case.

In addition to the question, whether a legal measure is a regulatory act, the GC faced two other important questions: the application of Article 263 (4), 3rd alternative TFEU requires the interpretation of the notions of direct concern and of implementing measures.

Case Summaries

In order to place the questions on the interpretation of Article 263 (4), 3rd alternative TFEU in their context, a brief summary of the two cases dealing with it will be given. The real importance of the present cases lie not in their substance, but concerns the formal question of admissibility.

The Inuit Case

In the Inuit case, by application lodged on 11th January 2011, a number of legal and natural persons sought annulment of the Regulation No 1007/2009/EC of the European Parliament and of the Council of 16 September 2009 on trade in seal products. After a long struggle for interim measures which would have had suspended the application of the Regulation, the GC finally dismissed the action for annulment on grounds of admissibility.

The Microban Case

In 1998, Ciba requested the inclusion of a substance called triclosan in the positive list of the Commission Directive No 2002/72/EC of 6 August 2002 relating to plastic materials and Articles intended to come into contact with foodstuffs. In 2009, CIBA withdrew its application whereupon the Commission adopted in 2010 a decision not to include triclosan in the positive list. The non-inclusion into the list caused an automatic prohibition on the marketing of triclosan. At the same time, the decision contained a provision allowing for a derogation concerning triclosan placed on the market before November 2010. Its marketing could continue until November 2011, subject to national law.

Microban filed an action for annulment of the Commission’s decision in June 2010 and applied for priority treatment pursuant to Article 55(2) of the Court’s Rules of Procedure in March 2011. By its judgment from the 25th October 2011, the GC annulled the Commission’s decision.
The New Alternative of Locus Standi of Individuals – Opening Pandora’s Box?

The added value of the *Inuit* and *Microban* cases lies in the interpretation of the requirements of locus standi, which the GC is obliged to examine ex officio. In both cases, the GC is faced with a possible application of Article 263(4), 3rd alternative TFEU to the action for annulment. In the *Inuit* case, measures of general application which were adopted before the entry into force of the Treaty of Lisbon are challenged: the first case concerns a Regulation adopted under the co-decision procedure; the second concerns a decision of the Commission not addressed to the applicants but to the MS. The approach of the GC to deal with the admissibility of the actions resembles in both cases, although it is different. On the one hand, this is explained by the different factual background of the cases; on the other hand, the GC profited in *Microban* from the ground prepared in the *Inuit* case. Thus, for instance, only in the first case the GC rules on the applicability of the TFEU as such, whereas in *Microban*, this question is not even raised.

Applicability of the TFEU – Problem of Treaty Succession

As mentioned above, in the *Inuit* case the GC rules on the question which legal basis has to be used in order to assess the admissibility of the application. In order to do so, it recalls the Court’s case law on admissibility of an action for annulment. The CJEU repeatedly held that the admissibility of such an action had to be examined in the light of the conditions in force, when the application was lodged. In both, the *Inuit* and the *Microban* cases, the actions were brought after the entry into force of the Treaty of Lisbon. Thus, the conditions of admissibility are governed in both cases by Article 263(4) TFEU.

The Criteria of Article 263(4), 3rd Alternative – Three Criteria, Two Mysteries?

Having established the applicability of the TFEU, the GC continues in both cases with the examination of the admissibility of the actions for annulment. The nature of the contested acts rules out the “easiest” alternative permitting access to the forum, namely the possibility to institute proceedings against an act addressed to the claimant. Therefore, the GC, guided by the principle of procedural economy, proceeds to examine the 3rd alternative of Article 263(4) TFEU. If the contested acts were regulatory acts (1) which directly concern the applicants (2) without entailing implementing measures (3), there would be no
need to analyse the criterion of individual concern required under the second alternative.xxxi

The following analysis of the three criteria of the third alternative of Article 263(4) TFEU follows the GC’s approach to the matter. By combining the findings of both cases, a picture of the new admissibility criterion will be drawn to the extent that this is possible based on the rulings given by the GC.

**Regulatory Act – Terminological Confusion**

The notion of a regulatory act is not defined in the TFEU, and its exact meaning is subject to controversy. Academic opinions are ranging from a very inclusive approach to a quite restrictive interpretation.xxxii The different possibilities to interpret the notion can be seen as three concentric circles. The inmost circle comprises only delegated acts, adopted pursuant to Article 290 TFEU and implementing acts, adopted pursuant to Article 291TFEU.xxxiii The second circle comprises all acts which are not legislative acts and thus comprises logically the first circle.xxxiv The outmost circle embraces not only the first two circles, but also includes all Regulations, whether they are of a legislative nature or not, within the notion of regulatory acts.xxxv The third opinion roots mainly in the fact that there is a similarity of terminology between the notions of Regulation and regulatory act in several languages,xxxvi whereas the first interpretation is based on a classic conception of national public law, which distinguishes between acts of the legislator and acts of the administration.xxxvii The GC follows neither of these two approaches, but opts for the different interpretation after a thorough legal analysis in three steps.

**Scope of Regulatory Acts**

First, the GC establishes that a regulatory act is necessarily of general application.xxxviii This finding is not only based on the literal interpretation of the term regulatory act, but it is also corroborated by the grammatical structure of Article 263(4) TFEU. This provision creates a dichotomy of acts addressed to the applicant and acts not addressed to that person. In addition, it establishes a sub-category of acts of general application concerning regulatory acts. Clearly, such an interpretation narrows down the application of the 3rd alternative of Article 263(4) TFEU it excludes decisions of individual scope, addressed to another person, from its scope of application.xxxix For these acts, the Court’s judgment in Plaumann must be upheld: “…private individuals may institute proceedings for annulment against decisions which, although addressed to another person, are of direct and individual concern to them...” xl
This leads de facto to a situation where it is easier to challenge an act of general application than a decision. An example to illustrate such a situation constitutes the judgment of the CJEU of 23rd May 2000 in Comité d’entreprise de la Société française de production. In this case, the works council of a French company, SFP, brought an action for annulment against a decision of the Commission, ordering the French Government to recover the state aid granted to the SFP. Finding that the applicants were lacking individual concern, the Court dismissed the action as inadmissible. If the 3rd alternative of Article 263(4) TFEU was applicable, the action probably could have been admissible.

Interestingly, when reading the decision in the Inuit case, the impression prevails that the GC does not consider the possibility to attack decisions of individual scope addressed to a person other than the applicant. In paras. 45 and 47, the GC establishes an enumeration of all alternatives where an action for annulment of a natural or legal person is admissible. However, it does not include decisions addressed to another person in that list. This is all the more surprising, as in para. 44 of the same order, the GC still correctly determines all “…categories of acts of the European Union which may be subject to a review of legality, namely, first, legislative acts and, secondly, other binding acts intended to produce legal effects vis-à-vis third parties, which may be individual acts or acts of general application.”

Distinguishing Regulatory Acts

Having established that regulatory acts are of general application, the GC proceeds to the second step of its analysis concerning the distinction between legislative and regulatory acts. As explained in the introduction above, Article 263(4), 3rd alternative TFEU was created as part of the Constitutional Treaty. The treaty differentiated between two types of acts in Article I-33 para. 1 legislative acts and non-legislative acts. Non-legislative acts are the European Regulation, which is per definition an act of general application, and the European decision, which constitutes an act binding its addressees. It is safe to say that the European Regulation was without doubt a regulatory act in the sense of Article III-365 of the Constitutional Treaty, the ancestor of Article 263(4) TFEU. As regards the European decision, academic opinions express doubts, whether they are regulatory acts or not.

It results from the mandate of the IGC 2007 that the terminology of the Constitutional Treaty was given up in the Treaty of Lisbon, while “…the distinction between what is legislative and what is not and its consequences…” was maintained. Non-legislative acts, including regulatory acts, are adopted if there is no legislative procedure foreseen in the treaty.
This finding is true for the Constitutional Treaty as well as for the TFEU. Article I-35(2) of the Constitutional Treaty names “in particular” delegated acts and implementing acts. Therefore, within the TFEU, a regulatory act is necessarily an act which is not adopted pursuant to a legislative procedure in the sense of Article 289 TFEU. This definition comprises delegated and implementing acts within the meaning of Articles 290 and 291 TFEU, without being limited to them. An example for regulatory acts which do not fall within the scope of Article 290 and 291 TFEU are Regulations adopted pursuant to Article 215 TFEU.

The GC conducts a similar analysis and comes to the same conclusion. It bases its arguments, especially on a document of the European Convention dealing inter alia with the proposed changes to Article 230 TEC, where it is stated that the regulatory acts are distinct from legislative acts, which permits to maintain "...a restrictive approach in relation to actions by individuals against legislative acts (for which the "of direct and individual concern" condition remains applicable) while providing for a more open approach to actions against regulatory acts."

Additionally, the GC refutes categorically any tentative to interpret the notion of regulatory acts more broadly. Neither international obligations, nor the principle of effective judicial protection allows for an interpretation which goes beyond the substance fixed by the provisions of the Treaty.

**Acts Adopted on the Basis of the TEC – A Temporary Problem**

Once the GC has fully determined the notion of regulatory acts within the framework of the TFEU, another problem arises out of the fact that the contested Regulation was adopted under the legal regime of the TEC. The latter did not distinguish between legislative and regulatory acts. That does not mean that the new admissibility criterion laid down in the 3rd alternative of Article 263(4) TFEU would not apply to acts adopted prior to the entry into force of the Treaty of Lisbon. This finding is not only corroborated by the case law cited by the GC but also by title VII, Articles 9 and 10 of Protocol No 36 on transitional provisions annexed to the TEU and to the TFEU. These provisions provide inter alia for an express derogation from the principle according to which the admissibility of an action is judged pursuant to the rules in force when the action was brought.

In the Microban case, the GC has no difficulties in determining whether the contested decision of the Commission constitutes a legislative or a non-legislative act. Without any doubt, the “...decision was adopted by the Commission in the exercise of implementing powers and not in the exercise of
legislative powers." In addition, it is of general application, and thus the contested decision constitutes a regulatory act in the sense of the 3rd alternative of Article 263(4) TFEU. In the Inuit case, the position of the GC seems to be equally obvious. The contested act was a Regulation adopted on the basis of Article 95 TEC pursuant to the co-decision procedure. This procedure coincides largely with the ordinary legislative procedure laid down in Article 294 TFEU. Furthermore, “... it is apparent from Article 289(1) and (3) TFEU that legal acts adopted according to the procedure defined in Article 294 TFEU, referred to as ‘the ordinary legislative procedure’, constitute legislative acts.” Thus, the GC concludes that the contested Regulation has to be seen as such an act, by applying a reasoning based on the parallelism of procedures.

However, the reasoning that the “…categorisation as a legislative act or a regulatory act according to the FEU Treaty is based on the criterion of the procedure, legislative or not, which led to its adoption” requires some explanation as regards acts adopted under the regime of the TEC. While it is indeed coherent that measures adopted pursuant to the co-decision procedure are equivalent to legislative acts, the characterisation of measures adopted according to other procedures is less clear. In fact, the TFEU recognises three types of procedures: first, the ordinary legislative procedure; second, the special legislative procedure; and third, non-legislative procedures. An act is of legislative nature on the condition that its legal basis in the TFEU states that the procedure is legislative. This express recognition is the only criterion that permits to distinguish special legislative procedures from non-legislative procedures.

Consequently, there are three different hypotheses governing the determination of the nature of an act adopted under the regime of the TEC. First, according to the ruling of the GC in the Inuit case, an act adopted pursuant to the co-decision procedure is of legislative nature. Second, a delegated or implementing act in the meaning of Article 202 TEC is of non-legislative nature. Third, the nature of any other act has to be ascertained by establishing its legal basis in the TEC and its successor in the TFEU. The legal basis in the TFEU, corresponding to the one used before the entry into force of the Treaty of Lisbon, determines the nature of the act concerned. If this provision foresees a legislative procedure, the nature of the act concerned is legislative. Whether a provision of the TFEU can be identified as the successor of a provision in the TEC has to be determined by Article 5 (1) of the Treaty of Lisbon, and the tables of equivalences referred to in Article 5 of the Treaty of Lisbon, contained in its annex. This approach is necessary, as there is no other criterion distinguishing special legislative and non-legislative procedures than the express recognition by the legal basis itself. There is, yet, another problem
connected to this finding. Three provisions of the TFEU allow for the adoption of legislative or non-legislative acts, namely Articles 203, 349 (1) and 352(1) TFEU. In these cases, the aforementioned test, relying on the express mentioning of the procedure in the TFEU, blatantly fails. In any case, however, the problem of identifying the nature of an act adopted on the basis of the TEC is of limited interest due to the short time frame allowing for situations like those in the Inuit and Microban cases. In fact, it has to be recalled that Article 263 (6) TFEU only foresees a delay of two months to attack directly an act of the institutions.

**Direct Concern – A New Interpretation?**

As shown above, the GC concludes in the Inuit case that the contested Regulation has to be seen as legislative act. Thus, it does not continue its analysis of the 3rd alternative of Article 263(4) TFEU, but applies the classic Plaumann test. In Microban, however, the GC has the chance to examine the notion of direct concern in the context of the 3rd alternative of Article 263(4) TFEU.

Article 263(4) TFEU mentions “direct concern” two times. First, a person may bring an action for annulment against all acts, if they are of direct and individual concern to that person. Second, a person may institute proceedings against a regulatory act of direct concern to that person, if it does not entail implementing measures. In the light of this finding, the GC faces essentially one question, namely whether the notion of direct concern contained in the 3rd alternative of Article 263(4) TFEU has to be interpreted in the same way as the concept of direct concern developed by the case law of the Court before the entry into force of the Treaty of Lisbon. Therefore, the GC analyses the purpose of the new provision. Based on the order in the Inuit case, the GC notes that the changes introduced by the Treaty of Lisbon pursue the “...objective of opening up the conditions for bringing direct actions.” In the light of this teleological interpretation, it concludes that the notion of direct concern contained in the 3rd alternative of Article 263(4) TFEU “cannot, in any event, be subject to a more restrictive interpretation than the notion of direct concern as it appeared in the fourth paragraph of Article 230 EC.”

According to the GC’s ruling, the concept of direct concern means that an act of secondary EU law “... must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Union rules without the application of other intermediate rules.”
In the light of the principle of procedural economy, this analysis of the only common criterion of the 2nd and the 3rd alternative of Article 263(4) TFEU, namely the direct concern of the applicant, should have been the first step of the GCs analysis. A natural or legal person, attacking an act not addressed to that person, cannot have a standing if the criterion of direct concern is not satisfied. In such a case, any further examination of the admissibility of the action is unnecessary. The GC, however, for the sake of legal certainty and presumably eager to clarify open questions, begins with the analysis of the question, whether the contested measure is a regulatory act.

**Absence of Implementing Measures: Conflict with the Concept of Direct Concern?**

As the GC found in *Microban* that the applicant was directly concerned, it continued to examine the meaning of the criterion contained the 3rd alternative of Article 263(4) TFEU requiring that the contested act does not entail implementing measures. It is apparent from the GC’s interpretation of the definition of direct concern that it relates to implementing measures. This reveals that there is a potential overlap of the scope of the two criteria. Thus, it has to be questioned whether there is a possible contradiction between the notion of direct concern, and the requirement that the contested act does not entail implementing measures. There are numerous possible hypotheses. Two of them will be identified in this Article.

On the one hand, the requirement could be seen as compatible with the Court’s interpretation of direct concern. In that case, the 3rd alternative of Article 263(4) TFEU is applicable, even if implementing or executing measures are adopted, as long as two conditions are fulfilled: first, the contested act does not leave any discretion to the authority concerned and, second, no other intermediate rules are adopted. The second condition applies to acts adopted by the European Union or by its MS. On the other hand, the notion of implementing measures could be interpreted strictly, thus limiting de facto the scope of the notion of direct concern. In that case, the application of the 3rd alternative of Article 263(4) TFEU is excluded by the adoption of any executing or implementing measure, whether it was adopted automatically without discretion or not.

Unfortunately, the *Microban* judgment does not provide for a definition of the notion of implementing measures. As the decision of the Commission not to include triclosan in the positive list automatically leads to the prohibition of the marketing of the substance, no implementing measures were needed. The decision to delete triclosan from the positive list provided, however, for the possibility to prohibit the marketing of triclosan already before the end of the
transitional period. Thus, MS could intervene by adopting appropriate national measures. The GC denies that such an intervention could constitute an implementing measure within the meaning of the 3rd alternative of Article 263(4) TFEU as it “… is purely optional.”

In fact, optional measures of MS are not necessarily “entailed” by the contested act. In the light of the GC’s ruling in Microban, only if implementing measures have to be adopted, regardless whether any discretionary power is left to the adopting authority, they can be qualified as such. This finding is corroborated by the purpose of the requirement of the absence of implementing measures: whenever it is possible, applicants should address themselves to a national court where they can suggest a preliminary reference to the CJEU. The mechanism is designed to restrain the number of actions brought before the GC, while fully safeguarding the “complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions.” In order to guarantee full judicial protection and to avoid situations like in UPA, lacunae have to be excluded: a situation where a natural or legal person is required to break the law in order to gain access to justice should not arise. Thus, the division of tasks between national courts and the GC cannot be based on the optional possibility of a Member State to adopt “implementing measures.” Contrary to the ruling of the GC in Microban, it could, however, be justifiable to condition the admissibility of an action for annulment with the requirement that there are effectively no implementing measures adopted in the Member State, which would have jurisdiction. According to this interpretation, any measure which is de facto adopted based on a contested Regulation, qualifies as an implementing measure. Consequently, an action brought by a natural or legal person before the GC would be inadmissible in such a situation.

In any case, both interpretations of the notion of implementing measures have the consequence to limit the scope of the criterion of direct concern discussed above: the existence of measures adopted without any discretion by the adopting authority would exclude the application of the 3rd alternative of Article 263(4) TFEU.

**Conclusion**

The order of the GC in Inuit and its judgment in Microban are important milestones for the definition of the 3rd alternative of Article 263(4) TFEU, newly introduced by the Treaty of Lisbon. The interpretation of the notion of a regulatory act, discussed controversially since the adoption of the Treaty of Lisbon, was indeed a fundamental step towards legal certainty for individual applicants seeking the annulment of acts of EU law of general application.
There are, however, questions that remain unanswered: especially the relation between the criterion of direct concern and the requirement that a regulatory act does not entail implementing measures is not fully clarified yet. It will be interesting to see, which position the CJEU will take in this matter. In addition to the clarifications provided by the rulings of the GC, the Inuit and Microban cases illustrate a perfect example of problems related to the entry into force of the Treaty of Lisbon. The transition from the former legal regime of the TEC to the new regime of the TFEU is impossible without frictions. Moreover, the intermediary step which constitutes the Constitutional Treaty contributes in some cases to the difficulties to be dealt with by the CJEU. In fact, the IGC establishing the Treaty of Lisbon did not always manage to insert the substantial changes of the Constitutional Treaty into the framework of the TEU and the TFEU in a coherent way. Therefore, numerous inconsistencies exist and wait for solutions from the CJEU or ultimately from the MS.

Notes

i C-50/00, Unión de Pequeños Agricultores (UPA), [2002] ECR 2002 I-6677
ii UPA, C-50/00, para. 46
iii UPA, C-50/00, para. 33-37
iv Advocate General Jacobs gives a hint in this sense: Conclusions of AG Jacobs, 21st March 2002, C-50/00, Unión de Pequeños Agricultores (UPA), ECR 2002 I-6677, para. 102.
v UPA, C-50/00, para. 41
vi UPA, C-50/00, para. 40, Compare with Case GC, judgment, 3rd May 2002, T-177/01, Jégo-Quéré, para. 41.
ix Article I-29 para. 1, second subparagraph: “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”
x T-18/10, Inuit Tapiriit Kanatami, [released 2011], para. 49 - not yet published
xi Inuit, T-18/10
xii Inuit, T-18/10, para. 50
xiv J. Bast, pp. 886
xv Inuit, para. 38; T-262/10, Microban, [released 2011], para. 20 - not yet published
xvi Inuit, para. 1,2.
Inuit, para. 3-20; See also C-605/10 P, Inuit Tapiriit Kanatami, [released 2011] - not yet published

Inuit, para. 94

Microban, para. 2

Microban, para 7

Microban, para 8


Decision 2010/169, Art. 2

Microban, para. 11-15.

The question of the locus standi of the applicants is a question of public policy, which the Court has to examine in any case: C-305/86 and C-160/87, Neotype TechmasheXport, [1990] ECR 1990 I-2945, para. 17 - 18; see also with further references: Inuit, para. 69

Inuit, para. 59.

Microban, para.19

Inuit, para 34. The CFI makes reference to T-532/08, Norilsk, [2010] ECR II-03959


Expressly in Inuit, para. 35

E contrario Inuit, para. 47

A summary of different opinions can be found in Bast, pp. 899-900.

See Craig/De Burca, pp 508: the narrow interpretation “…best fits the intent of those who devised the Constitutional Treaty…”.


In French: “réglement” and “acte régulatoire”; in German: “Verordnung” und “Rechtsakt mit Verordnungscharakter”.

See also Inuit para. 46

Inuit, para. 42

Plaumann, para. 107; text underlined by the author.

C-106/98 P, para. xxxix


General Secretariat of the Council, IGC 2007 Mandate, 11218/07, para. 19, lit v.

See J. Bast, p 891

See Art. I-34, I-35.

See Art. 289 para. 3 TFEU.

Inuit, para. 48

Art. 215 TFEU does not foresee a legislative procedure. E contrario, measures adopted on this legal basis are non-legislative acts.

Inuit, para. 49

Secretariat of the European Convention, Cover note from the Praesidium to the Convention, CONV 734/03.

Inuit, para. 52-55: in para. 55, the CFI refers to ECJ, judgment, C-402/05 P and C-415/05 P, Kadi and Al Barakaat, [2008] ECR 2008 I-6351, para. 306 to 308


See note no xxix.

Microban, para. 22

See Art. I-34, I-35.

Inuit, para. 60; See also J. Bast, pp. 897: “...every act adopted in accordance with the ‘ordinary’ legislative procedure constitutes a legislative act.”

Inuit, para. 59-61

Inuit, para. 65

See for example J. Bast, pp. 890 et s.

In detail on this “oddity” of the TFEU: J. Bast, pp. 894 et s.

Microban, para. 26 et s.

Microban, para. 32: Interestingly the General Court refers to „case law“, as if there was another case than the Inuit case, which it cites.

Microban, para. 32

Microban, para. 32

C-386/96, Société Louis Dreyfus, [1998] ECR 1998 I-2379, para. 43; Cited in Microban, para. 27

Microban, para. 32

Microban, para. 32

Microban, para. 33 et s.

See Société Louis Dreyfus, para. 43


Inuit, para. 73
Microban, para. 36; The English version of the judgement is not clear on this point. However, the French and the German versions clearly support this interpretation of para. 36.

Microban, para. 38

Microban, para. 36

The notion “entail”, contained in Art. 263 para. 4 TFEU, and its equivalents in French and in German “comporter” and “nach sich ziehen” imply a certain degree of conditionality

See Microban, para. 34: the decision had immediate consequences, “...without the Member States needing to adopt any implementing measure.”

Advocate General Jacobs recognised in its conclusions in the UPA case that the legislator “...should be protected against undue judicial intervention...”. See C-50/00, Conclusions of AG Jacobs [2002], para 66

UPA, para. 40

Inuit, para. 50; See also above, text cited at note no xii.

See also J. Bast, pp. 904: Bast misses “…a more detailed analysis as to whether the decision entails any measures to be taken by the Member States...that could give rise to a preliminary reference....”