A Taxonomy of Standing

On René Repasi v the European Commission

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On June 21, the General Court handed down its order in T-628/22 *René Repasi v the European Commission*. Repasi had challenged the validity of the Commission Delegated Regulation 2022/1214, a complementary taxonomy regulation on nuclear energy and natural gas. The General Court dismissed the action due to lack of standing. To surmount the notoriously strict standing requirements before the CJEU, Repasi relied on his position as a Member of Parliament (MEP) and argued that a claim of a wrong choice of the legal basis that leads to deviation from the ordinary legislative procedure (OLP) gives an MEP standing before the EU courts. This touches on the question of interinstitutional balance, which is relevant in light of the controversy surrounding the disputed delegated regulation, and highlights the politics within the Parliament that motivate the quest to gain recognition of MEPs' right of standing. The difficulties that MEPs encounter while fulfilling their legislative responsibilities make Repasi's argument appealing. However, creating a new semi-privileged standing category through the Union courts could also present its own set of difficulties.

The order

Repasi alleged that the Commission had overstepped its authority as defined in Article 290 TFEU when it adopted the disputed regulation (paras 12 & 22). The Commission demanded that the General Court declare the case inadmissible due to a lack of standing (para 13). On the issue of standing, the applicant argued that his position as an MEP grants him, *inter alia*, the right to vote on and to table amendments to legislative proposals, the right to participate in the OLP, certain procedural rights, and the right to defend the democratic prerogatives of the European Parliament (para 20). By adopting the disputed regulation, the Commission had transgressed upon the legislative rights of the European Parliament, and thus, also the rights of the applicant as a member of said Parliament when it mistakenly adopted the disputed act as a delegated regulation (para 22). The General Court found in favor of the Commission and declared the case inadmissible, as the applicant could not prove the regulatory act was of direct concern to him (para 39).

Arguments on standing

The General Court's dismissal of the action is rather routine and does not much explicate Repasi's arguments, which are detailed elsewhere. To have standing, a so-called non-privileged applicant must demonstrate that the challenged measure is of "direct and individual concern" to them (Art. 263(4) TFEU; para 23). This entails two cumulative conditions: the disputed act must bring about a change in the applicant's legal position directly; and, the act "must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules" (para 24). This is the case when an act of Parliament affects the conditions under which MEPs exercise their rights and duties in the Parliament (para 30). Repasi argued that this was the case when the Commission chose to use a delegated act as the legal basis for its legislative proposal, as this choice severely limited MEPs' ability to participate in the legislative process by preventing them from proposing amendments and forcing them to accept or reject a package deal.

The question of validity is closely linked to the standing argument in this respect, because the latter is contingent on the former. Repasi argued that if the Commission had indeed chosen the wrong legal basis,

this would give MEPs standing to challenge the regulation, as it would mean that the Commission had exceeded its mandate under Article 290(1) TFEU. Conversely, simply the fact that the Commission adopts a delegated regulation is not sufficient. To determine whether the claim is admissible, it is necessary to evaluate whether the legal basis was appropriate. In Repasi's case, this means determining whether the subject matter of the disputed regulation should have been left to the EU legislature. However, against previous case-law standing seems rather cut and dry. Direct concern has only been recognized in the context of internal measures of organization that cannot create rights against other institutions (paras 31-32). In contrast, the Commission's choice of legal basis is not an internal measure, and any change in the applicant's legal position as an MEP would then be merely incidental. The General Court then saw the validity question as separate, and unable to influence the question of standing because of its indirect link. While this is a logical consequence of the direct concern test, it nonetheless again illustrates that the 'system of complete judicial remedies' at the Union level is perhaps not so complete after all – at least if one believes that MEPs should have privileged standing due to their position.

The politics of an action by the Parliament

It bears mentioning that the Parliament has the right to bring an action for annulment (Rule 149(3) EP Rules of Procedure). As a result, the General Court determined it lacks no legal protection (para 35). However, the feasibility of using this institutional right should be understood against the tumultuous background of adopting the disputed regulation. The Commission's decision to group natural gas, a fossil fuel, and nuclear energy together, despite their differences in greenhouse gas emissions, was intended to pressure the Parliament into accepting a controversial compromise – a goal it achieved. Using a delegated regulation meant that MEPs were forced to accept or reject the solution in its entirety, and as the Parliament chose not to object to it, the only way for those MEPs who nonetheless were convinced the issue was worth pursuing were forced to turn to the Union courts. Herein lies the second hurdle: the same absolute majority necessary to sustain an objection to a delegated regulation is also needed to take the issue to the CJEU, effectively closing off avenues for recourse for the parliamentary minority unless a significant number of MEPs change their minds. From this perspective, recognition of standing adds the benefit of more easily attainable legality review.

For these reasons Repasi attempted to gain recognition of a minority standing right. The General Court deemed it sufficient to say that no such right is recognized under Article 263(4) TFEU and that it is not for it to create rights not recognized in the Treaty (para 38). Unfortunately, the reasoning of the Court on this point is limited to the above observation, and offers no insight into how it might have engaged with Repasi's legal reasoning. What is visible is more akin to a lack of engagement. Given the CJEU's extremely restrictive track-record on issues of standing, prudent observers will have expected no major breakthrough before the General Court on this front. Nonetheless, one may find the insistence on not reading new rights into the Treaties ironic in light of the Union courts' controversial interpretation of standing requirements, particularly that of "individual concern" as laid down in the *Plaumann* test. The test has come under pressure, particularly in the context of environmental measures, but the Court of Justice has refused to budge so far.

The lack of engagement is regrettable, for Repasi presented the General Court an argument that that could have helped mitigate some of the interinstitutional imbalances faced by MEPs. Standing would apply to situations like the one at hand, or when a special legislative procedure is chosen in lieu of the OLP, with limitations to grounds invoked. However, as pointed out in this blog by Chamon, Eliantonio and Volpato, standing granted following Repasi's arguments could (and most likely would) be used by MEPs in a vast array of other constellations, such as when the decision between a Commission delegated or implementing act is made. The Parliament famously favors the former, whereas the Council favors the latter. Limiting the influence of a new semi-privileged

standing category is no small feat then, against which the General Court's dismissal of the action appears understandable and opening up the categories undesirable. Its brevity may also reflect this difficulty, in addition to the general attitude of the Union courts on questions of standing.

Interinstitutional balance

The case has implications for questions of interinstitutional balance between the European Parliament and Council as well. If the General Court had accepted Repasi's standing arguments, this would have strengthened the Parliament's role as an equal of the Council. As the Parliament's role is weaker in special legislative procedures, MEPs could have challenged this weaker position by challenging the Commission's choice of legal basis. This would also have challenged the dominance of Member States' national interests on these issues by giving the Parliament more say. This was at the heart of the controversy surrounding the disputed delegated regulation as the compromise was meant to appease both France and Germany, and thus speaks to Commission-Council negotiations that leave the Parliament's interests at a disadvantage. Repasi's arguments called on the courts to assume a larger role in arbitrating these imbalances, a responsibility the General Court was hesitant to assume.

The jury is still out

Ultimately, the difficult question prompted by this case is whether the recognition of MEPs' standing would be desirable. Though Repasi's argument is interesting, its acceptance is not automatic nor should it be. The standing conditions have long been criticized, but changes could also be made through political channels rather than the courts, whose suitability to effect such changes could be debated. It is still a democratic decision of the Parliament to not object to the delegated regulation, and though an MEP's right may be conceptualized as separate from that of the Parliament, channeling the recognition of this adjacency to standing requirements seems to require similar political decisions as those required by the delegated regulation according to Repasi. For the courts to read them into the Treaties will probably require more time and discussion, if they will ever be ready to do so.

For Repasi, the fight may not be over: the General Court's order can be appealed to the Court of Justice. It would be interesting to see whether the Court of Justice keeps to the General Court's tight-lipped approach, or whether it is more willing to entertain the arguments put forth by the MEP and theorize a little on the values invoked. The disputed delegated regulation is also not out of hot water yet, as not only Austria, but also a group of environmental NGOs have raised an action for its annulment. Thus, the Union court(s) will have the opportunity to examine its validity in another case and indirectly (partly) resolve the question of Parliament's prerogatives in this case.

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