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A ‘complete System of legal Remedies and Procedures’: Court of Justice defends but does not expand the Action for Annulment (Case C-121/23 P, Swissgrid)

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While the Court of Justice has consistently emphasised the necessity of a complete system of judicial review (most notably in *Les Verts*, [C-294/83](#), para. 23), it has also maintained a strict approach regarding the admissibility criteria of actions for annulment. Despite numerous attempts in literature, by Advocate Generals, and by the General Court to loosen the admissibility requirements for direct actions, the Court remained unwavering in its stance.

In *Swissgrid* ([C-121/23 P](#)), the Court of Justice set aside the order of the General Court ([T-127/21](#)) and affirmed that the contested measure constitutes a ‘challengeable act’ under Article 263 TFEU. Thereby, the Court prevented a further restriction of the scope of actions for annulment.

This judgment is substantially in line with the previous jurisprudence of the Court of Justice in this field, but it provides nonetheless crucial clarifications regarding the procedural requirements for bringing an action for annulment, in particular by shedding light on some of the uncertainties surrounding the meaning and the scope of a ‘challengeable act’ under Article 263 TFEU.

Background of the Case

By a letter from the director of the Commission’s Directorate-General for Energy, Switzerland was excluded from participating in European platforms for the exchange of standard products for balancing energy (‘European balancing platforms’), particularly the TERRE platform. The question arose whether the refusal to authorise Switzerland’s participation in the TERRE platform represents a ‘challengeable act’ under Article 263 TFEU and whether affected companies, which were not the immediate addressees of the letter mentioned, were allowed to challenge this measure.

According to Regulation [2017/2195](#), Switzerland’s participation in European balancing platforms is possible if ‘its national law implements the main provisions of Union electricity market legislation and there is an intergovernmental agreement on electricity cooperation between the Union and Switzerland, or if the exclusion of Switzerland may lead to unscheduled physical power flows via Switzerland endangering the system security of the region’. The decision shall be taken by the Commission based on an opinion given by ACER and all Transmission System Operators (TSOs). Even though the delivered opinions were all in favour of Switzerland’s participation in European balancing platforms, the director of DG Energy refused the authorisation arguing *inter*

alia that it did not comply with the applicable EU law, *id est* with Regulation 2017/2195.

Swissgrid AG, a Swiss TSO, brought an action for annulment against the Commission's letter, which was, however, dismissed by the General Court.

Reasoning of the General Court – A Critical Assessment

The order of the General Court showcases that there is still – even within the EU Courts – much uncertainty surrounding the admissibility criteria of actions for annulment.

The General Court dismissed the action arguing that the contested letter does not constitute a challengeable act in the context of Article 263 TFEU. The criteria applied by the General Court for assessing the admissibility of the annulment action derive neither from the Treaties nor from the case-law of the EU Courts. In particular, the General Court analysed whether the contested letter constitutes 'a decision capable of producing legal effects vis-à-vis the applicant, such as to change its legal position'. As the Commission enjoys broad discretion and the applicant has no individual right to obtain the Commission's authorisation to participate in the TERRE platform, the General Court concluded that the contested letter cannot constitute a decision capable of producing binding legal effects vis-à-vis the applicant, such as to change its legal position.

Two aspects warrant close scrutiny, as also pointed out by the Court of Justice:

1. The direct addressee of the contested letter is not the applicant. Therefore, it is striking that the General Court assessed whether the measure has binding legal effects vis-à-vis the applicant. As will be shown below, this condition does not have to be met according to the jurisprudence of the Court of Justice.
2. The General Court required the existence of an individual right of the applicant to obtain the Commission's authorisation. As the applicant does not enjoy such a right, the letter cannot, according to the General Court, constitute a decision capable of producing binding legal effects vis-à-vis the applicant, such as to change its legal position. The General Court's attempt to introduce an additional admissibility requirement for annulment actions should set off alarm bells, as such an approach would further restrict direct access to the EU Courts.

Judgment

While the Court of Justice did not, unfortunately, dwell on the criterion of 'direct and individual concern', it provided, however, important clarifications of the definition and the scope of a 'challengeable act' under Article 263 TFEU.

First of all, in order to assess whether an act is subject to review under Article 263 TFEU, a distinction must be made between cases in which the applicant is the addressee of the contested measure and situations in which this is not the case. If the second scenario arises, at that stage, it is not necessary to ascertain whether the contested measure produces binding legal effects vis-à-vis the applicant, such as to change his or her legal position. Rather,

it is sufficient that the contested measure is intended to produce binding legal effects vis-à-vis, in particular, its addressees. Whether the interests of the applicant are affected by bringing about a change in his or her legal position must be examined only at a later stage, *id est* when assessing the standing of non-privileged applicants. As in the present case the contested letter requires the EU TSOs to exclude the appellant from the TERRE platform and is thus capable of producing binding legal effects, the Court of Justice found that the Commission's letter constitutes a 'challengeable act' under Article 263 TFEU.

This approach confirms what has already been established in previous case-law and underscores the Court of Justice's intent not to further restrict direct access to the EU Courts, which is already fraught with significant difficulties under the current legal framework. To impose additional requirements at an early stage of the examination of actions for annulment, as suggested by the General Court, would unduly further limit the effectiveness of judicial protection under Article 263 TFEU.

Secondly, the Court of Justice insisted on a substantive reading of what qualifies as a decision capable of producing binding legal effects and, therefore, as a challengeable act under Article 263 TFEU. That the contested measure is contained in a letter and does not constitute a formal decision of the Commission is irrelevant – and rightly so. As the Court convincingly explains, if the situation were otherwise, EU institutions could easily circumvent judicial review by the EU Courts simply by disregarding formal requirements.

The Court of Justice, furthermore, strongly opposed the General Court's introduction of a new criterion for the admissibility of actions for annulment, one previously unknown in the jurisprudence of the Court of Justice: the existence of an individual right. The Court of Justice emphasised that the infringement of an individual right is not a precondition for the admissibility of such an action. As persuasively argued also by Advocate General Kokott, neither a broad discretion of the Commission nor the absence of an individual right to participate in the TERRE platform can justify an exclusion of the contested measure from judicial review. If that were the case, it would amount to a denial of justice.

While there were high expectations that the Court of Justice would go further by also examining the 'direct and individual concern' criterion, it did not seize the opportunity to provide clarifications in this regard. The Court of Justice confined itself to reiterating the well-known definition of 'direct and individual concern' and concluded that it lies now within the competence of the General Court to establish whether these criteria are met.

An important obiter dictum in this judgment should not be overlooked: As the EU is based on the rule of law, procedural rules must be interpreted in such a way as to guarantee effective judicial protection of individuals under EU law (para. 49). This underscores, once again, that ensuring effective judicial protection of individuals is of pivotal importance, and that procedural law represents the vehicle to guarantee such protection, rather than serving as a formalistic hurdle unduly restricting judicial review.

Conclusion

It may be contended that this judgment is not revolutionary in the sense that it does not reshuffle the system of legal remedies available in the EU to guarantee effective judicial protection. It is also true that *Swissgrid* would have offered, as many cases before, a good opportunity to extend individuals' rights protection in the EU procedural order by granting the action for annulment broader scope and firmer standing. Nonetheless, the clarifications made in *Swissgrid* are important to ensure that this action remains a valuable instrument to contribute to what the Court emphatically declared in *Les Verts* ([C-294/83](#), para. 23) as a 'complete system of legal remedies and procedures'.

If the Court of Justice once again refrained from taking a further step to substantially strengthen the reach of the action for annulment, this may serve as a reminder of what the Court already stated in *UPA* ([C-50/00 P](#), para. 41) – namely, that it is ultimately for the Member States 'to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'.

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Hilpold, T.; "A 'complete System of legal Remedies and Procedures': Court of Justice defends but does not expand the Action for Annulment (Case C-121/23 P, *Swissgrid*)", EU Law Live, 04/03/2025, <https://eulawlive.com/op-ed-a-complete-system-of-legal-remedies-and-procedures-court-of-justice-defends-but-does-not-expand-the-action-for-annulment-case-c%e2%80%91121-23-p-swissgrid/>