Repasi v. Commission and the legal protection of minority rights in the European Parliament

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A Chernobyl Case for our Times

On 10 October 2022, René Repasi, a member of the European Parliament (MEP), brought a case against the European Commission before the EU General Court (registered as Case T-628/22). The key question of the case is procedural: Does an individual MEP have standing to claim before the Court that an EU act has been based on the wrong legal basis, if the choice of legal basis affects an MEP's participatory rights. If Mr. Repasi succeeds, his case could significantly strengthen the Court's role in protecting the rights of the minority in the European Parliament. It could introduce a new type of player to EU institutional legal battles – the MEP – and establish a sort of *Organstreitverfahren* for individual MEPs.

In a blogpost and a short Q&A Mr. Repasi (who is also a professor of EU law) explained his case. Some first reactions were skeptical (see here and here). However, as I will argue in this post, winning the case might be less of an uphill battle as one might think at first sight. A standing right for MEPs, as demanded by Mr. Repasi, would fit into the nascent case law on the third limb (the one for "regulatory acts") of Article 263 paragraph 4 TFEU.

More than that, if successful, the case might be an important development to better protect the democratic character of EU decision-making. This becomes apparent if we draw a parallel to the seminal 1990 *Chernobyl Case*. In *Chernobyl*, the ECJ developed an unwritten right of standing for the European Parliament to protect its institutional prerogatives. *Chernobyl* was a reaction to a major challenge for EU democracy in the 1990s: a weak Parliament that needed to assert its place in the EU's institutional system. At the present state of EU democracy, with the ordinary legislative procedure being the rule, protecting the rights of the parliamentary minority is an increasingly important concern. By addressing this new challenge, *Repasi v. Commission* could potentially become a *Chernobyl Case* for our times.

But first things first. What is the case about? Just like in *Chernobyl,* nuclear energy also plays an important role in *Repasi v. Commission*.

The context: Is gas and nuclear energy "green"?

Repasi v. Commission concerns one of the most heatedly fought over issues of EU politics in recent times: The question to what extent – if at all – economic activities related to nuclear energy and gas can be defined as "green". The EU Taxonomy Regulation, adopted by Parliament and Council in 2020, aims to provide a common EU-wide understanding of what makes an economic activity environmentally sustainable. While the Regulation provides a basic methodology, the key role of deciding which economic activities precisely can be considered "green" was delegated to the European Commission.

In a first delegated act adopted in 2021 the Commission covered a wide range of economic activities in the field of climate change mitigation and adaptation. They can be considered at the core of a mainstream understanding of "green" economy. Yet, the most controversial issues were left to a second delegated act, adopted on 9 March 2022. It addressed so-called transitional activities, i.e. activities that cannot be replaced by low-carbon alternatives yet but should nevertheless contribute to the transition to a climate-neutral economy. Under this heading, activities related to nuclear energy and gas were included, with caveats and conditions.

The opposition was massive. NGOs complained of greenwashing. Business insiders suggested that investors conscious of climate change will not find a taxonomy that includes gas and nuclear energy convincing, and that the taxonomy might lose its purpose to direct capital flows towards sustainable energies. The Commission's own advisory group argued that the taxonomy may provide the wrong incentives, leading to an increase in climate gas emissions.

How did the EU legislator react? Parliament and Council could have vetoed the Commission's delegated regulation (Article 23 paragraph 6 Taxonomy Regulation). However, in Parliament, a majority, mainly composed of MEPs from the European People's Party, Renew, the European Conservatists and Reformists Party and the Identity and Democracy Party, chose not to raise objections. The decision was made by 328 votes in favor against 278 votes (with 33 abstentions). The Council did not object either.

The margins of "green" are essentially political: Article 290 TFEU

The political opposition translated into legal action. Several NGOs started a complaint procedure with the European Commission. On 7 October 2022, Austria brought an action for annulment challenging the inclusion of activities related to nuclear energy into the taxonomy.

The action by Mr. Repasi takes a different angle. He claims that the decision to include gas and nuclear energy is so controversial that it needs to be decided in the ordinary legislative procedure by Parliament and Council and not through a delegated act by the Commission.

Mr. Repasi relies on Article 290 paragraph 1 TFEU in this regard, which reserves the essential elements of an area to the European legislator. In my view, he has good arguments on his side. For the ECJ, the concept of essential elements primarily has a democratic orientation. Essential elements are those that entail “political choices”, political meaning those choices that “[require] the conflicting interests at issue to be weighed up on the basis of a number of assessments.” (Case C-355/10, paragraph 76).

It is hardly contestable that the place of nuclear energy and gas in the transition to a climate-neutral economy is currently one of the most contested political issues (although one might concede that it was not *that* political when the delegated act was adopted in March 2022). While the Commission’s first delegated act applies the Taxonomy Regulation’s methodology to the uncontroversial core of the meaning of “green”, the second delegated act tests the margins of the methodology. Defining the margins is an essentially political exercise the legislator cannot shy away from if he wants to respect Article 290 TFEU.

Parliament and MEPs: separate grounds for legal standing

If one accepts that the Commission’s second delegated act is (at least) shady from the perspective of Article 290 TFEU, the question remains of who may bring a challenge.

Certainly, the European Parliament could do so under Article 263 paragraph 2 TFEU. It has an unconditional right to bring an action for annulment. However, Parliament did not use its right in this case. Taking legal action requires a majority in Parliament. MEPs from the same political groups, that had decided not to object to the delegated act, opposed bringing an action for annulment.

The crux of *Repasi v. Commission* will be whether Mr. Repasi, as an individual MEP, can do so instead. To be sure, an MEP does not have an unconditional right to bring a challenge. Article 263 paragraph 2 TFEU only speaks of Parliament as an institution. An MEP would need to fulfil the requirements laid down in Article 263 paragraph 4 TFEU. But does the fact that the majority in Parliament did not object to the delegated act affect the admissibility of the case? Or the fact that Parliament decided by majority vote not to bring a case?

Both questions are likely to be answered in the negative. According to the case law, Parliament itself is not prevented to challenge a delegated act, even if it has before decided not to object to that very act (Case C-355/10, paragraphs 37-41). If Parliament is not bound by its own decision, why should other claimants be?

There is also no reason why an MEP should be constrained by a decision of the parliamentary majority not to bring an action for annulment. While Parliament would have based its challenge on its unconditional right according to Article 263 paragraph 2 TFEU, an MEP has his or her own reasons and ground for legal action in Article 263 paragraph 4 TFEU.

Direct concern and the evolving case law on “regulatory acts”

It hence comes down to whether Mr. Repasi will pass the test laid down in Article 263 paragraph 4 TFEU. What will this test encompass? Since the Commission’s delegated act is a “regulatory act”, the third limb of paragraph 4 will apply. This means that an “individual concern” (necessary for legislative acts) does not need to be proven. Mr. Repasi will have to prove only that the act is of “direct concern” to him and does not entail implementing measures.

His line of reasoning in this regard is in my view by and large convincing. In the Court’s case law, “direct concern” means that a contested measure “must directly affect the legal situation of the individual” and, “leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules” (see, for instance, Joined Cases C-622/16 P to C-624/16 P, paragraph 42). Mr. Repasi argues that he is directly affected by the act in his legal position as an MEP because the Commission chose the wrong legal basis. Therefore, he cannot exercise certain participatory rights in shaping the definition of “green” economic activities that he could have used in in the ordinary legislative procedure. He mentions notably the right to tabling amendments (Rule 218 paragraph 1 of Parliament’s Rules of Procedure).

To be sure, this is not the standard case of “direct effect”, where a claimant is affected by a legal act’s substantive rules. However, it is an established principle of EU procedural law that the participation in the adoption of an act may lead to a right to challenge it. If a person has been equipped with procedural rights in the adoption of an act, he or she might – under certain conditions – be able to challenge it. However, that person will only be able to challenge an act alleging that his or her procedural rights have been infringed (see, for instance, Case C-355/08 P, paragraphs 44 to 48). This is precisely what Mr. Repasi wants to achieve. While this idea was developed in the context of the test for “individual concern”, it might be used to interpret “direct concern” in the third limb of Article 263 paragraph 4 TFEU as well. The Court’s approach to the third limb is still in the making. It has been observed that the Court in its recent case law tends to incorporate elements of “individual concern” into the test for “direct concern” (see this article by Roberto Caranta, in particular pp. 172-179).

Gaps in the protection of EU democracy: applying *Chernobyl* reasoning

To be sure, granting Mr. Repasi standing would be an innovation in EU procedural law. Arguably, legal innovation should not proceed on technical grounds only but requires principled reasoning. In that regard, *Repasi v. Commission* might gain conceptual depth and argumentative clarity if we compare it to the 1990 Chernobyl Case. In this milestone case, the Court granted Parliament standing to challenge a Council regulation because it was passed in the consultation procedure, which gave Parliament fewer possibilities to participate

in the drafting of the legal act than the so-called cooperation procedure. It did so although Article 173 EEC Treaty (today Article 263 TFEU) did not mention Parliament at all. *Chernobyl* was based on three considerations: a concern for European democracy, a gap in legal protection and finding someone who can effectively fill it.

In *Chernobyl,* the democratic problem was the “maintenance and observance of the institutional balance laid down in the Treaties”. Parliament required standing because it was uncertain whether someone else would step in to ensure that the right legal basis was chosen, and that Parliament’s participatory rights were protected. Whether a Member State or an individual would bring a case, the Court reasoned in *Chernobyl*, depends on “mere contingencies” (paragraph 18). And while the Commission was required to protect Parliament’s prerogatives, it is not obliged to bring a case, which it believes itself is unfounded (paragraph 19). Only Parliament itself could effectively protect its own prerogatives.

Parallel reasoning can be applied to *Repasi v. Commission*. As in *Chernobyl*, democratic concerns take center stage, in this case the definition of the essential elements of an area by the European legislator. A gap in protection exists, too. The procedure leading to the Commission’s delegated act has shown that the parliamentary majority might not defend Article 290 TFEU, even if there are credible claims that it has been breached. This should not surprise us. The majority in Parliament can revoke a delegation or object to it if it does not agree with the Commission on substance (Article 290 paragraph 2 TFEU). The essential elements rule in Article 290 paragraph 1 TFEU is therefore not so much a protection for Parliament as an institution being bypassed by the Commission, but a guarantee that a parliamentary process, a contest between majority and minority, takes place. The natural candidate to protect it is the parliamentary minority and individual MEPs. By adapting the *Chernobyl*-logic for our times the Court should provide a procedure to do so.

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