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Legal Standing in Europe

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Legal Standing

Who: everybody entitled by procedural law prerequisites

What: faulty regulation

Why: grounds for invalidation

When: before & after enactment

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Switzerland

Standing to challenge regulation …	… before or during enactment	… after enactment (abstract review)	… after enactment based on a case (concrete review)
Federal laws (primary legislation)	No but mandatory consultation procedure may apply	No	No
Federal ordinances etc. (secondary legislation)	No but mandatory consultation procedure may apply	No	Yes
Cantonal (state) laws (primary legislation)	No but mandatory consultation procedure may apply	Yes	Yes
Cantonal (state) ordinances etc. (secondary legislation)	No but mandatory consultation procedure may apply	Yes	Yes

Germany

Standing to challenge regulation …	… before or during enactment	… after enactment (abstract review)	… after enactment based on a case (concrete review)
Federal laws (primary legislation)	**No** but consultation established (advisory boards)	**Yes** Federal Constitutional Court (restrictive: Exhaustion of all legal remedies) Also on request of minority of parliament	**Yes** Review by Constitutional Court on request of lower court. Effect: abrogation.
Federal ordinances etc. (secondary legislation)	**No** but consultation established (advisory boards)	**Yes** Federal Constitutional Court (restrictive: Exhaustion of all legal remedies)	**Yes** Courts may not apply infringing regulations. Declaratory judgment for self-executing ordinances.

France

Standing to challenge regulation …	… before or during enactment	… after enactment (abstract review)	… after enactment based on a case (concrete review)
Laws (primary legislation)	**Partly** Review by Constitutional Court on request of minority of parliament/ government. Limited consultation procedure may apply.	**No**	**Yes** Review by Constitutional Court on request of lower courts. Effect: abrogation.
Normative administrative acts (regulations, decrees etc.)	**No** Limited consultation procedure may apply.	**Yes** "Ultra vires action" against normative administrative acts before administrative courts (standing broadly granted). Effect: annulment	**Yes** Courts may not apply infringing normative administrative acts.

EU

Standing to challenge regulation …	… before or during enactment	… after enactment (abstract review)	… after enactment based on a case (concrete review)
Treaties (Primary law)	**No**	**No**	**No**
Directives (secondary law)	**No** Consultation of involved groups	**Yes** Action for annulment. Standing strictly applied by ECJ („individual concern")	**Yes** Preliminary ruling by ECJ Concrete judicial review during procedure before EU-/national court
Regulations etc. (secondary law)	**No** Consultation of involved groups	**Yes** Action for annulment. Standing strictly applied by ECJ („individual concern") No "individual concern" needed for self-executing regulations.	**Yes** Preliminary ruling by ECJ Concrete judicial review during procedure before EU-/national court

Conclusions

Tentative List

- No court challenges before enactment (but established consultation procedures)
- No "due process of lawmaking".
- Judicial control safeguards basic principles but not overall quality.

Legal Standing in Europe

Standing is a notoriously complex question in administrative procedure. It involves the question of *who* is granted with it (everybody – [special interest groups – government / Parliamentarian minorities etc.), against *what* (individual acts based on regulation, regulation itself, primary legislation etc.), *why* (grounds for invalidation, e.g. errors in facts, law and administrative discretion) and *when* (before or after enactment of regulation).

I will narrow the focus of this presentation on the *what*. In particular, I will restrict my observations to cases where the legal remedy might affect a regulation, i.e. that a regulation is annulled or that it might no longer be applied as intended because of an opposing precedence. I do not deal with individual cases that stem from individual acts based on a misapplication of a proper regulation, rather with cases that arise from the faulty regulation itself.

Furthermore, I will structure my observations by reference to the *when*. I will look into the question whether there is standing before enactment of a regulation, right after enactment or any time later, if an individual case arises under the regulation. I will not go into the details of standing in terms of who is entitled to bring a case before the court but it is obvious that the circle of possible plaintiffs is drawn by the prerequisites of procedural law.

I will sketch out the legal situation in Switzerland, Germany, France, and the EU. I start out with Switzerland.

Switzerland

Federal laws are typically immune from court challenge and a regulation may only be challenged in individual cases. Plaintiffs have more options against cantonal laws and regulations. Both in the federal and cantonal system, participation of interest groups and experts before enactment is not required by courts but well established by tradition and laws on consultation. Some dark areas exist regarding the consultation of secondary legislation, where it is often at the discretion of the authorities to what extent they will engage with the public.

Germany

Laws may be challenged in court after enactment if constitutional questions are raised. In that case, the Federal or State Constitutional Courts review the provision upon request by the lower courts.[1] Both Federal and state ordinances may be reviewed after an individual application before the competent courts which, however, cannot annul them but only not apply them in the specific case.[2]

Direct challenges of laws and federal ordinances by individuals before the Federal Constitutional Court are only admissible if fundamental rights are violated and all other legal remedies before the competent courts have been exhausted.[3] In this context, the German Constitutional Court is rather restrictive with regards to standing in direct chal-

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[1] § 100 I GG; § 31 BVerfGG; *Lothar*, Normenkontrollen – Teil 1, S. 760.

[2] Beck'scher Online-Kommentar VwGO-*Posser/Wolf*, 38. Aufl., VwGO §47 N8; *Lothar*, Normenkontrollen – Teil 3, S. 357.

[3] § 90 BverfGG; Merkblatt Verfassungsbeschwerde, S. 4; *Lothar*, S. 763

lenges. Besides, laws may also be reviewed by the Constitutional Court upon request by a minority of the national parliament or the government.[4]

Before enactment, court access is limited. However, participation of special interest groups is established, while an active role is accorded to independent advisory boards as well (e.g. Ethics Board, Board for working conditions), who, as a counterpart to lobbying, introduce interests of non-organized population groups.[5]

France

Since 2010, litigants may, in all ordinary courts, invoke in their favor the unconstitutionality of statutes after their enactment. The matter may then be referred to the Constitutional Court, which in the course of a judicial review on constitutionality, may abrogate the legislative provision.
Standing for direct challenges in terms of an abstract control is only provided, by means of an "*ultra vires* action"[6],against normative administrative acts[7] by national or local entities such as regulations (*règlements),* as well as governmental decrees (*ordonnances*) not yet ratified by parliament[8]Although they are not a "public action" (meaning: standing even without personal interest), the required special interest for "ultra vires actions" is broadly granted[9] and interested third parties may intervene in the ongoing process.[10]

Before enactment, Laws may be reviewed by the Constitutional Court upon request by a minority of the national parliament or the government.

French law does not require broad-based consultation for policymaking. Consultation with expert bodies established by the state or labor unions (*consultations)* may be mandatory whereas open-ended consultation (*concertations*) is established only for major infrastructure projects.[11]

European Union

Primary law (treaties) is immune from court review but directives and regulations may be challenged before the European Court of Justice (ECJ).[12] However, the ECJ applies a strict doctrine on standing: whilst the first requirement of "direct concern" is broadly granted, the second necessary, that is "individual concern", is narrowly understood.[13]
As an exemption, regulations which do not require implementation measures may be challenged without the requirement of „individual concern", as long as „direct concern" is given. [14]
Due to the strict doctrine on standing for direct challenge, most challenges of EU law go through national courts, which may then ask the ECJ for a preliminary ruling if the validity of EU law is put into question.[15]

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[4] Art. 93 Abs. 1 Nr. 2 GG i.V.m. § 13 Nr. 6 BVerfGG
[5] *Wissenschaftliche Dienste Deutscher Bundestag,* Einzelfragen zur Beteiligung von Bürgern und ihren Interessenverbänden im Gesetzgebungsverfahren vom 29.05.2009, S. 4 ff.
[6] „Recours pour excès de pouvoir", Gaudemet, droit administrativ, Rz. 266 ff.
[7] „Acte administratif unilatéral"; Gaudemet, droit administrativ, Rz. 275, Rz 624 ff.
[8] Gaudemet, droit administrativ, Rz 279, Rz. 619.
[9] Gaudemet, droit administrativ, Rz 283, Calmes-Brunet, S. 111.
[10] *Calmes-Brunet*, The Principle of effective legal protection in French administrative law, S. 111 / Fn 47.
[11] *Rose-Ackermann*, Policymaking in France, Columbia Law Journal, S. 256.
[12] Art. 263 TFEU
[13] Oesch, S. 372; art. 263 para. 4 TFEU
[14] Oesch, S. 372.

Before enactment, court access is limited, but participation of special interest groups is typically established as the European Commission consults administrations, involved groups and experts.[16]

Conclusions

Let me draw some tentative conclusions: The legal battleground in challenging legislation in Europe is *after enactment* of new regulation. I have found hardly any cases directed *to prevent* undesired new regulation, let alone primary law. Judicial review is retrospective, most commonly in the form that individual cases may lead indirectly to a challenge of the regulation applied. There is often standing in cases challenging regulation directly and sometimes also challenging primary laws but it is difficult to draw a clear pattern from the countries I have looked at.

The phase before enactment resembles mostly to unchartered waters as far as legal challenges are concerned. It seems to me that this phase is understood as part of the political process. Many countries establish procedures of consultation or participation with civil society including various interest groups. There are countries that attach consequences to the violation of such procedures (e.g. France). Still, the process of enacting regulation falls short of the standards met when ruling on an individual case. . It seems to me that a "due process of lawmaking" (LINDE) is still rather undeveloped, at least if one defines this process as court-developed and court-enforced.

Does judicial control help the quality of regulation? I have not found any reliable data to answer this question. It has also to be asked in what terms we define quality. There is no generally accepted benchmark. Quality may refer to drafting, namely clarity, but also to effectiveness, administrative costs or overall fairness. Hence, I may only speak from personal experience and I will limit myself to some observations mainly on Swiss law:

I believe that judicial control affects the quality of regulation. It will set some – although loose – standards on overall effectiveness and fairness. It will also ensure that some legal principles, closely related to the quality of the law, are observed. For example, I can think of proper delegation clauses and the almost universally accepted principle that regulation may not be unduly vague. In these terms I would say that in Switzerland, cantonal authorities are more aware of possible court challenges than authorities on the federal level, namely the federal legislator whose legislation is mostly immune from court control.

It is more difficult to speculate on other elements of good regulation. I assume that legislative quality and overall fairness depend more strongly on other factors, such as the education and the morale of civil servants as well as the general quality of the political process. I suspect that courts have only limited powers to influence authorities that are either unwilling or unable, or both, to produce good regulation.

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[15] Oesch, S. 382; Art. 267 TFEU

[16] Oesch, S. 288; Consultation procedure (Art. 11 Abs. 3 EUV).