Private Parties and the Revised Standing Criteria under Article 263 TFEU: Dawn of Effective Judicial Protection or a False One?

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ABSTRACT

This thesis examines the effect of the Lisbon Treaty reform of the locus standi criteria in Article 263(4) TFEU on the EU judicial review system and its compliance with the right of private parties to effective judicial protection. The force of the criticism against the EU judicial review system focused upon the restrictive interpretation of the standing criterion of individual concern and the insufficiency of the preliminary reference route of challenging acts of the EU, advocating that only a direct action for annulment ensures respect of the right to effective judicial protection. The Lisbon Treaty relaxed the locus standi criteria for regulatory acts not entailing implementing measures. The interpretation of the notion of a "regulatory act" by the CJEU was rather unsurprising. However, the notion of "implementing measures" was given a very restrictive interpretation by the CJEU, despite early expectations and a forceful Opinion by AG Cruz Villalon. This thesis records some contemporary realities related to the judicial review system and considers issues of judicial policy choice, the academic reception and the possible justifications of the locus standi rules as developed by the CJEU, questioning the interpretative choices of the CJEU. The effects of the reform are further examined by a review of a sample of the pre-Lisbon Case-Law under the post-Lisbon rules and a quantitative study of a sample of post-Lisbon EU measures. Both offer comparisons of the results reached under the interpretation of the notion of implementing measures adopted by the CJEU with the results that could have been reached under the interpretation proposed by AG Cruz Villalon. This thesis argues that the Lisbon Treaty reform offered a great opportunity for significant improvement in judicial protection. One that the CJEU regrettably missed.

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CHAPTER 1: INTRODUCTION

1. Reverse impressions of the CJEU

The Court of Justice of the European Union (hereinafter: CJEU)[1] has undoubtedly been a key player when it comes to the many achievements of European integration and the successes of the European Union (hereinafter: EU) as a union on which the Member States confer competences to attain objectives they have in common.[2] Indeed, whole sectors of European Union Law were developed almost exclusively on the back of some rather bold judicial thinking by the Luxembourg Court. To give a single example, the development of the common market, now called the internal market, has been decisively helped by the CJEU's Case-Law.

The CJEU embraced the role of judicial guardian of the Treaties and protector of the rights of European citizens very early on. The impression of the CJEU as a protector of rights, a bold court willing to strike down the behaviour of powerful commercial players and states in order to uphold the Treaties and individual rights is perhaps the most established in public opinion. And indeed, European citizens have seen and continue to see some remarkable defences of their rights before the CJEU, irrespective of the state or commercial interests at stake.

If one is asked to justify this impression of the CJEU as a protector of rights to a lay person, leaving out all legal terminology, this proves to be a challenge. A good

[1] Under Article 19(1) TEU, the Court of Justice of the European Union (hereinafter: CJEU) includes the Court of Justice (hereinafter "ECJ"), the General Court (hereinafter: GC) and specialised courts. Before the entry into force of the Treaty of Lisbon on 1/12/2009, the General Court was called the Court of First Instance (hereinafter: CFI). These commonly used abbreviations are employed herein. The ECJ and the GC (previously the CFI) shall also be collectively referred to as "the EU Courts".
[2] Article 1 TEU.

answer seems to be that this is so because the CJEU upholds EU Law and all rights and obligations created or derived thereof, and even goes beyond what is written in the Treaties for this purpose. One can readily cite for example, the principles of direct effect, supremacy and state liability which the CJEU derived from the Treaties notwithstanding the lack of any explicit Treaty basis.[3]

On the issue of standing of private parties in actions for annulment of EU acts under what is now Article 263 TFEU (ex Article 230 EC), this impression is however reversed. By contrast to its generally expansive reading of EU primary law, the CJEU generally refused to entertain direct actions for annulment by private parties through a restrictive interpretation of the standing criteria. In other words, the CJEU has repeatedly proved unwilling to go beyond a very strict reading of the Treaties in order to ensure the protection of legality and individual rights derived from the Treaties. Due to the resulting general unavailability of an action for annulment and the consequent need to use the preliminary reference route, which is a relatively cumbersome route, in order to challenge via the national courts the validity of acts before the CJEU, there has been widespread criticism that this did not afford effective protection to private parties as against EU institutions and bodies. As notably put by J. Schwarze, the discussion about the lack of legal protection against Community (now Union) measures is as old as the Court of Justice itself.[4]

The force of the criticism was mostly centred on the CJEU's interpretation of the locus standi requirement of individual concern in what is now Article 263(4) TFEU, and on the inadequacy of the preliminary reference procedure in what is now Article

[3] A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p. 90.
[4] J. Schwarze, "The Legal Protection of the Individual against Regulations in European Union Law" (2004) 10(2) *EPL* 285, at p. 287.

267 TFEU as a route of challenging EU acts. It was generally the restrictive interpretation of individual concern that dictated use of the preliminary reference route, so calls for reinterpretation and reform mainly centred on that criterion.

2. The problem with standing

The EU Courts interpreted other elements of the action for annulment quite liberally, displaying their usual rigorousness in subjecting all institutions,[5] bodies, offices and agencies to judicial review despite the fact that some of them were not listed as possible defendants in the text of the predecessors of Article 263(1) TFEU,[6] considering that it cannot be acceptable, in a community based on the Rule of Law, that acts of such bodies escape judicial review.[7] And in the case of acts of the European Parliament, they did so even though the intergovernmental conference that drafted the Single European Act had rejected the Commission's proposal to so amend Article 173 EEC as it then stood.[8]

Similarly, they looked into the substance rather than the form of an act to determine whether an act is reviewable, generously holding as reviewable all measures, whatever their nature or form, which are intended to have legal effects, that is when they are binding on and capable of affecting the interests of the applicant by bringing

[5] As to acts of the European Parliament, see K. St. Clair Bradley, "The Variable Evolution of the Standing of the European Parliament in Proceedings Before the Court of Justice" (1988) 8 *YEL* 27, and G. Bebr, "The Standing of the European Parliament in the Community System of Legal Remedies: A Thorny Jurisprudential Development" (1990) 10 *YEL* 171.
[6] Articles 173 EEC and 230 EC.
[7] See Case T-411/06 *Sogelma-societa generale lavori manutenzioni appalti Srl v. European Agency for Reconstruction* [2008] ECR II-2771. See further P. Craig & G. DeBurca, *EU Law: Text, Cases and Materials* (OUP, 5th edition, 2011), at p. 486.
[8] See G. Bebr, "The Standing of the European Parliament in the Community System of Legal Remedies: A Thorny Jurisprudential Development" (1990) 10 *YEL* 171, at p. 187, referring to Case 294/83 *Les Verts v. European Parliament* [1986] ECR 1399, para 25. See further K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1, at p. 2, and A. Arnull, "Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty" (1995) 32 *CMLRev* 7, at p. 19.

about a distinct change in his legal position.[9] And did so by ignoring at the same time the explicit use of the word "decision" in the predecessors of Article 263(4) TFEU, aiming to prevent the institutions from limiting review by their choice of measure.[10] The CJEU even went as far as effectively crossing out the requirement that the contested decision is in the form of a regulation from the text of the predecessors of Article 263(4) TFEU, holding that despite an act's legislative nature and general application, this may nevertheless be of direct and individual concern to some persons.[11] In these respects, EU Courts have significantly enhanced judicial review, legal accountability and effective judicial protection, with the relevant Lisbon Treaty amendments only codifying these developments rather than bringing about ground-breaking reform.

Direct access to the EU system of judicial review was, on the other hand, severely restricted for private parties as the CJEU was hardly generous or bold in its interpretation of the two main standing criteria of direct and individual concern. The test for direct concern, requiring an applicant to show that an EU measure directly affects his legal situation and its implementation is purely automatic and results from EU rules alone without the application of other intermediate rules, focusing generally on whether another party, usually an institution or a Member State, has discretion in implementing a measure,[12] did not occupy as central a position in this criticism of the system. However, it cannot be readily considered as unproblematic or universally

[9] See Case 22/70 *Commission v. Council ("ERTA case")* [1971] ECR 263, para 42, and Case 60/81 *IBM v. Commission* [1981] ECR 2639, para 9.
[10] See, for example, Case 101/76 *Koninklijke Scholten Honig v. Council and Commission* [1977] ECR 797, paras 5-7.
[11] Case C-309/89 *Codorniu v. Council* [1994] ECR I-1853. See also A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p. 90, and generally also A. Arnull, "EU Recommendations and Judicial Review – ECJ 20 February 2018, Case C-16/16P *Kingdom of Belgium v. European Commission*" (2018) 14 *European Constitutional Law Review* 609, at p.p. 620-621.
[12] See for example Case T-69/99 *Eurotica v. Commission* [2000] ECR II-4039, para 24.

acceptable since, generally, it never played a central role in filtering actions for annulment by private parties as these casually failed under individual concern,[13] so its full effect may have remained unexplored. After the Lisbon Treaty reform in Article 263(4) TFEU, it was foreseen that the interpretation of direct concern would inevitably be tested to its limits, since for regulatory acts not entailing implementing measures it is rendered the only standing criterion that private parties will need to satisfy.

The test developed for individual concern remains one of the most uneasy issues of EU Law. It has been graphically said that this created an awkward tightrope on which the ECJ had to walk.[14] The classical and well known formulation in *Plaumann*,[15] requiring persons who are not the addressees of a measure to show that they are affected by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, sets a very high hurdle in itself. Its vagueness has resulted in even higher hurdles being set in its application. With the exception of the more generous approach adopted in the areas of competition, anti-dumping and state aid, where complainants of competition violations, producers and exporters of goods subject to anti-dumping duties and persons affected by the grant of state aid were more readily found to be individually concerned, a private party succeeding under the *Plaumann* test has been rather the

[13] Something indirectly recognised by AG Jacobs in Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, para 79 of his opinion. See also M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p. 131, and A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p. 75 where the same view is expressed.

[14] M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p. 132.

[15] Case 25/62 *Plaumann v. Commission* [1963] ECR 95, para 9.

exception to the rule, and was more or less limited to measures that had some retroactive effect on a closed class of private parties.[16]

The EU Court's application of the *Plaumann* test was accordingly based on this distinction between open and closed categories, expecting an applicant to belong to a closed class that is fixed by the time a measure is adopted and cannot be enlarged afterwards. In *Plaumann* itself, the contested measure affected all present and future importers of clementines in the same manner and the applicant, although one of the few and known importers at the given time, belonged to an open class because the list of importers could change at any time. What was on its own very restrictive, was subsequently rendered even more restrictive by a clarification that belonging to a closed class is not enough, as there must be a specific connection between the applicant's situation and the contested measure.[17]

The exceptions to this closed class requirement of the *Plaumann* test were extremely limited. It could only be bypassed in the very limited cases where a legal provision required an institution to take into account the interests of the applicant before adopting a measure[18] and in the even more limited and rare cases where a measure was found to have exceptional economic impact on an applicant[19].

As a result, a highly decentralised system of validity challenges was put in place, where private parties were generally forced to bring proceedings before national

[16] See for example M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p. 133.
[17] See for example Case 26/86 *Deutz und Geldermann v. Council* [1987] ECR 941.
[18] See, typically, Case 11/82 *Piraiki-Patraiki v. Commission* [1985] ECR 207 and Case C-152/89 *Sofrimport v. Commission* [1990] ECR I-2447.
[19] Case C-358/89 *Extramet v. Commission* [1991] ECR I-2501 and Case C-309/89 *Codorniu v. Council* [1994] ECR I-1853. See also M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p.p. 133-136.

courts and seek to induce a preliminary reference to the ECJ on the validity of the measure they sought to contest, since national courts lack jurisdiction to rule on the validity of an EU measure themselves.[20] The shortcomings of this system led to heavy criticism which culminated in two forceful calls for reform in the year 2002, from AG Jacobs in *UPA*[21] and the CFI[22] in *Jego Quere*[23], reflecting the almost universal outcry for a reinterpretation of the *Plaumann* test for individual concern on the grounds of the principle of effective judicial protection.

And no doubt the concerns expressed were significant. According to AG Jacobs in *UPA*, effective judicial protection was argued to dictate that applicants have access to a court that can grant remedies capable of protecting them against the effects of invalid acts, and national courts, being unable to rule on the validity of an EU act themselves, were not the appropriate forum for such cases. A preliminary reference is not a remedy available as of right, as the national court decides whether to refer and on the grounds of the reference. As a result, it is inevitable that national courts, even at the highest level notwithstanding their obligation to refer, may err in their preliminary assessment of the grounds of invalidity put forward and refuse to refer.[24] Lower courts would further be very reluctant to refer and inclined to leave the matter to the highest courts of their jurisdiction, which means increased costs and delays which could also be contrary to the principle of effective judicial protection. And the gravest concern was that in the case of acts of general application which do not need

[20] Case 314/85 *Foto Frost v. Hauptzollampt Lubeck-Ost* [1987] ECR 4199.
[21] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677.
[22] Now the General Court under the TFEU.
[23] Case T-177/01 *Jego Quere v. Commission* [2002] ECR II-2365.
[24] For example, France has been recently found to be in breach of its obligations under Article 267(3) TFEU for a failure of the Conseil d'Etat to send a preliminary reference to the ECJ. See Case C-416/17 *Commission v. France* EU:C:2018:811, at paras 105-114 of the judgment.

implementing measures, an individual may not be able to reach the national courts unless he breaks the law.[25]

In view of all these shortcomings, it was strongly argued that the interpretation of individual concern did not provide an effective remedy in the light of Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter: the Charter),[26] and that effective judicial protection could only be ensured through direct actions for annulment. The proposal of AG Jacobs was that an applicant should be considered as individually concerned where, by reason of his particular circumstances, the measure has or is liable to have a substantial adverse effect on his interests[27]. The CFI, heavily influenced by AG Jacobs and joining the call for reinterpretation, considered that individual concern should be satisfied where a measure affects an applicant's legal position in a manner which is both definite and immediate, by restricting his rights or imposing obligations on him.[28]

The ECJ remained unfazed and refused to revisit the *Plaumann* test for individual concern, maintaining that, by Articles 230 EC (now Article 263 TFEU) and Article 241 EC (now Article 277 TFEU) on the one hand, and Article 234 EC (now Article 267 TFEU) on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions. It was, according to the ECJ, for the Member States to establish a system which ensures respect for the right to effective judicial protection, and this required national courts to

[25] Opinion of AG Jacobs in Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677.
[26] OJ 2010 C83/02.
[27] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, para 60 of his opinion.
[28] Case T-177/01 *Jego Quere v. Commission* [2002] ECR II-2365.

interpret and apply national procedural rules in a way that enables private parties to bring challenges before the European courts against the legality of any Community measure of general application.[29] In other words, the ECJ expected national courts to make the preliminary reference route of validity challenges work in a way that would ensure the effective judicial protection of individuals.

While the ECJ did not change its approach, these calls for reform were not left unanswered. The proposals of the Working Group on Reform of the Court of Justice,[30] set up by the Secretariat of the European Convention for the purposes of the drafting of the now failed Constitutional Treaty, were incorporated into Article III-365 of the Constitutional Treaty, and then into the Lisbon Treaty, in what has become Article 263 TFEU. This resulted in private parties being granted standing to bring an action for annulment against a regulatory act that does not entail implementing measures and which is of direct concern to them, without the need to show individual concern. In addition, the duty of Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU Law has been incorporated in Article 19(1) TEU.[31] In effect, it incorporates the right to effective judicial protection from one general principle of EU Law into the Treaty, as also

[29] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, paras 40-42, and Case C-263/02P *Commission v. Jego Quere* [2004] ECR I-3425, paras 30-31. For detailed reviews of the reform proposals see, among others, A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 6, C. Kombos, "The Recent Case Law on Locus Standi of Private Applicants under Art. 230(4) EC: A Missed Opportunity or A Velvet Revolution" (2005) 9 *EIoP* No. 17; M. Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jego-Quere et Cie SA v. Commission* and *Union de Pequenos Agricultores v. Council*" (2003) 66 *MLR* 124; A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72; J. Manuel et al, "*Ubi ius, Ibi Remedium*? – *Locus Standi* of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads" (2004) 11 *MJ* 233.

[30] See, in particular, Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice of 25/3/2003, CONV 636/03, and Cover Note from the Praesidium to the Convention of 12/5/2003, CONV 734/03.

[31] On the effect of Article 19 TEU, see generally L. Pech and S. Platon, "Judicial Independence Under Threat: The Court of Justice to the Rescue in the *ASJP* Case" (2018) 55 *Common Market Law Review* 1827, and A.M. Van Den Bossche, "Private Enforcement, Procedural Autonomy and Article 19(1) TEU: Two's Company, Three's a Crowd" (2014) 33 *Yearbook of European Law* 41.

effected by Article 47 of the Charter of Fundamental Rights. This change proved significant, as in the recent ground breaking *ASJP*[32] ruling, the ECJ accepted that Article 19(1) TEU empowers it to review a national measure temporarily reducing the remuneration of judges for a possible violation of the independence of the judiciary, which is an aspect of the principle of effective judicial protection, so extending the reach of the EU principle of effective judicial protection to national measures which could potentially affect national courts and their independence or capacity to act as ordinary courts of EU Law.

A significant debate came to the forth as to the proper interpretation of the term "regulatory act", which is to be found in Article 263(4) TFEU but not elsewhere in the TFEU. The term has now been firmly defined by the ECJ as including all acts of general application other than legislative acts, in its much anticipated judgment in *Inuit*.[33] In doing so, the ECJ refuted the alternative, and broader, interpretation covering legislative acts as well. The ECJ remained firm to its traditional position that a complete system of legal remedies and procedures ensuring review of the legality of EU measures was in place and rejected once again any further extension or reinterpretation of individual concern on the basis of effective judicial protection and the right to an effective remedy under Articles 6 and 13 ECHR and 47 of the Charter.

The effect of the requirement that the contested act does not entail implementing measures, being the second constituent of the reform in Article 263(4) TFEU, was somehow overlooked following the entry into force of the Lisbon Treaty. A possible reason for this might be the partial resemblance of this phrase to the test for direct

[32] Case C-64/16 *Associacao Sindical dos Juizes Portugueses* EU:C:2018:117.
[33] Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625, paras 58-61, affirming the Order of the General Court at first instance, Case T-18/10 *Inuit Tapiriit Kanatami and others v. European Parliament and Council* [2011] ECR II-5599.

concern, which the CJEU considered as satisfied if any intermediate act or action by an EU or Member State body does not encompass the exercise of any real discretion. This was corroborated to a significant extent by the early judgment of the General Court in *Microban*,[34] where the contested measure was considered as a regulatory act of direct concern to the applicant and standing was accorded without dealing with the requirement of entailing implementing measures any differently. The CJEU however adopted the strictest possible interpretation in terms of locus standi, ruling that any degree of action taken by the national authorities would constitute implementing measures for the purposes of Article 263(4) TFEU, and that this is not to be called into question by the mechanical nature of the measures taken at national level.[35]

Although the relaxation of the standing criteria brought about by the Lisbon Treaty was apparently in favour of private parties and a step towards a more centralised system of judicial review, this reform proved ultimately quite limited following the interpretation adopted by the CJEU post Lisbon, so the question whether the system affords effective judicial protection or an effective remedy to private parties remains.

3. Contemporary realities and challenges

The 2002 calls for reform and the related discussion accordingly still have their place in any review of the system, and the question marks over the compliance of the system with these fundamental rights will continue to constitute a challenge for EU and national courts. Any contemporary review or discussion should, in my opinion, however henceforth take into account some undeniable realities.

[34] Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v. Commission* EU:T:2011:623.
[35] Case C-456/13 P *T & L Sugars and Sidul Acucares v. Commission* EU:C:2015:284.

3.1. *The first reality*

The first such reality is that the *Plaumann* test for individual concern is here to stay. The CJEU implicitly stressed that any reform of this test should come by way of a Treaty amendment and the EU Courts would not alter it on the premise of effective judicial protection or on any other ground.[36] The discussion that followed in the preparation of Article III-365(4) of the draft treaty establishing a Constitution for Europe did not envisage a change in the test applied for individual concern, but only the removal of this criterion for a certain type of acts,[37] a change which found its way in the Lisbon Treaty. With the Member States, in their capacity as Masters of the Treaties, having decided to proceed as they did and only relax the conditions for regulatory acts not entailing implementing measures, realistically it can strongly be argued that the *Plaumann* test has been expressly, or at least impliedly, confirmed by the Lisbon Treaty. It is hard to flaw the reasoning of the CJEU in this regard.[38] It can possibly even be argued that such a confirmation, at least implicitly, could also be found in the previous revisions of the Treaties and the predecessors of Article 263 TFEU, being Article 173 EEC and Article 230 EC, which again did not result in any alteration of the test for individual concern.[39] It seems highly unlikely that the *Plaumann* test will be revisited by the EU Courts in the near future. This is why it may not be worth suggesting a different test apart for the sake of academic discussion. With EU accession to the European Convention on Human Rights (hereinafter: ECHR) seemingly at a halt, it also remains highly doubtful whether there can be any

[36] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, paras 44-45.
[37] See, in particular, Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice of 25/3/2003, CONV 636/03, and Cover Note from the Praesidium to the Convention of 12/5/2003, CONV 734/03.
[38] Case C-583/11P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625, paras 70-71.
[39] See also S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, 2002), at p. 369.

contribution or effect of the existing Case-Law of the European Court of Human Rights on the interpretation of individual concern.[40] No doubt, the proposal of AG Jacobs for a test based on substantial adverse effect, and that of the General Court based on the alteration of the legal position of the applicant, will continue to be mentioned from time to time, but it seems unlikely that arguments for such reinterpretation will ever succeed under the present circumstances.

3.2. *The second reality*

The second reality is that the test for direct concern will also remain the same. Any concerns for a more restrictive interpretation of this test after the Lisbon Treaty reform were dismissed by the GC rather quickly, recognising that the aim of the reform was the relaxation of the standing criteria for regulatory acts not entailing implementing measures, for which it remains the sole criterion.[41] The ECJ also confirmed the existing interpretation in its later orders and judgments.[42]

3.3. *The third reality*

The third reality is that legislative acts are not regulatory acts so the Lisbon Treaty relaxation of the locus standi criteria does not encompass actions for annulment against legislative acts.[43] Any degree of action required of any EU or national body, irrespective of its automatic or mechanical nature, is also taken as constituting

[40] The possible contribution and effect of the ECHR to the locus standi conditions and the EU judicial review system is further discussed in Chapters 3 and 7.
[41] See for example, Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v. Commission* EU:T:2011:623, para 32.
[42] See for example Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625 and Case C-456/13 P *T & L Sugars and Sidul Acucares v. Commission* EU:C:2015:284.
[43] Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625.

implementing measures.[44] For all legislative acts and for regulatory acts entailing implementing measures, a direct action for annulment will continue to be unavailable apart from exceptional circumstances. For these types of acts of general application, private parties will still be required to go through national courts in order to challenge validity via a preliminary reference and will continue to face the shortcomings of that procedure. In effect, although the reform could be seen as a step towards a more centralised model of remedies, the judicial review system remains largely decentralised. It follows that the *UPA* obligation for Member States and national courts to establish a system of legal remedies and procedures which ensures respect for the right to effective judicial protection by means of access to the preliminary reference mechanism for validity challenges will still constitute a requirement and a challenge for national legal systems to meet.[45]

3.4. *The fourth reality*

The fourth reality is that the *TWD*[46] rule, rendering a measure definitive against a private party who undoubtedly had standing to bring an action for annulment to challenge it but failed to do so within the time limit, is still alive and extends to regulatory acts not entailing implementing measures.[47] With the possibility of increased availability of an action for annulment under the Lisbon Treaty, it is foreseeable that this rule will play an increasing role and act as a restriction on the use

[44] Case C-456/13 P *T & L Sugars and Sidul Acucares v. Commission* EU:C:2015:284.
[45] See Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625, at paras 89-107.
[46] Case C-188/92 *TWD Textilwerke Deggendorf v. Germany* [1994] ECR I-833. See A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 6, at p.p. 321-329. See also D. Wyatt, "The Relationship Between Actions for Annulment and References on Validity After *TWD Deggendorf*" in J. Lonbay and A. Biondi, *Remedies for Breach of EC Law* (Wiley, 1997), Chapter 6.
[47] See Case C-550/09 *E, F* [2010] ECR I-6209, para 46, as well as the Opinion of AG Sharpston in Case C-158/14 *A, B, C and D v. Minister van Buitenlandse Zaken* ECLI:EU:C:2016:734, paras 58-88. See also R. Schwensfeier, "The *TWD* principle post-Lisbon" (2012) *ELRev* 156.

of the preliminary reference procedure, the desirability of which is debatable.[48] The rule also poses new challenges for national courts, which will be required to consider, at first instance, whether an applicant could have lodged an action for annulment against the measure for which a preliminary reference is sought. Where the criterion of individual concern is still required, the Lisbon Treaty reform has not made any difference as far as national courts are concerned. Generally, a private party that is not the addressee of an act is not regarded as being undoubtedly able to lodge a direct action for annulment under Article 263 TFEU, due to the difficulty in satisfying individual concern. On the other hand, where individual concern is not required, in order to fulfil their task under the *TWD* rule, national courts will be required to readily recognise the new requirements of Article 263(4) TFEU, and, in particular, be able to judge whether the contested measure is a regulatory act and whether it entails implementing measures. National courts are accordingly faced with new challenges in this respect, while their need for clear guidance and clear rules to follow in order to perform their tasks in light of the reformed locus standi criteria is, on the other hand, a challenge for the CJEU. Under these revised criteria and the *TWD* rule, challenges against regulatory acts not entailing implementing measures will not, in principle, be maintained before national courts, and although the potential opening of an action for annulment in relation to such acts is welcome in terms of effective judicial protection, concern develops that the consequent restriction of the use of a national forum for an applicant as a result of the *TWD* rule may not prove to be so welcome.

[48] Note AG Jacobs in Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, para 65 of his Opinion.

3.5. *The fifth reality*

The fifth reality is that the CJEU has constantly found that effective judicial protection has always been guaranteed in the EU judicial review system. The CJEU's consistent view on this leaves little hope of any further relaxation of the standing conditions without further Treaty amendment. Indeed, in its judgment in *Inuit* the ECJ seemed to be smoothly integrating the TFEU reform into its existing view of the system, and totally at ease in accommodating the relaxed standing conditions within it, without any admission that greater compliance with the principle of effective judicial protection has been achieved. The ECJ's stance was rather that there was nothing wrong with the pre-Lisbon system of judicial review as it did provide a complete system of legal remedies and procedures which was open for private parties to use, but nevertheless, the Member States in their capacity as Masters of the Treaties, more as a policy choice, decided to allow private parties to challenge a certain type of acts by means of a direct action for annulment.

3.6. *The sixth reality*

The sixth reality is that the principle of effective judicial protection is refined on case by case basis, and although its minimum core meaning can be deduced from the CJEU's well established Case-Law,[49] when it comes to questions of access to judicial review proceedings, it remains rather inconclusive as to whether a direct action for annulment should always be available, or whether the indirect challenge via the preliminary reference mechanism suffices. It has been noted that when asked to define the concept of effective judicial protection in the EU legal order, it would be trite for the CJEU to simply recall that the acts of the EU based on the Rule of Law are subject

[49] See Case C-64/16 *Associacao Sindical dos Juizes Portugueses* EU:C:2018:117.

to judicial review.[50] In this respect, it was also argued that there is no yardstick against which to measure effectiveness and this is reflected in the fact that the CJEU refers to it but never defines it.[51] Strikingly, it is a principle which, as understood by the CJEU, can tolerate the fact that a party may have to contravene a measure adopted at EU level in order to obtain access to justice and challenge it, whereas at the same time it cannot tolerate the same for a measure adopted at national level.[52] Although it is not unusual for courts not to define key concepts but to make explicit key facets on a case by case basis, the CJEU has left the content and requirements of this principle highly abstract,[53] and consequently this retracts from the strength of building a case for any further reform of the system on the basis of effective judicial protection.

3.7. *The seventh reality*

In addition to the above, the seventh reality is that the principle of effective judicial protection is not, in any event, competence conferring. This has always been the view of the CJEU, which consistently held that the EU courts cannot, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against an EU measure in such a way which has the effect of setting aside the conditions expressly laid down by the Treaty, even in the light of the principle of effective judicial protection.[54]

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[50] M. Safjan and D. Dusterhaus, "A Union of Effective Judicial Protection: Addressing a Multi-level Challenge Through the Lens of Article 47 CFREU" (2014) 33 *Yearbook of European Law* 3, at p. 3.
[51] See A.H. Turk, *Judicial Review in EU Law* (Elgar, 2009), at p.p. 326-328.
[52] Case C-263/02 P *Commission v. Jego Quere* [2004] ECR I-3425, compared with Case C-432/05 *Unibet v. Justitiekanslern* [2007] ECR I-2271. See A. Arnull, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" (2011) *European Law Review* 51, at p. 56.
[53] See T. Tridimas, *The General Principles of EU Law* (OUP, 2nd edition, 2006), Chapter 9, at p. 443.
[54] See for example Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, para 44, and Case C-583/11P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625, paras 81-83.

3.8. *The eighth reality*

The eighth reality is that, along with the right to effective judicial protection, the right to a fair trial and the right to an effective remedy under Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter have once again been rejected by the ECJ as bases for a more liberal approach on the standing criteria for annulment actions, with the ECJ repeating once again its consistent approach in this regard as well.[55] Notably, AG Kokott in *Inuit* also explicitly accepted that there are no precedents from the European Court of Human Rights requiring that individuals must be accorded a direct legal remedy against legislative acts.[56]

3.9. *The ninth and tenth realities*

This leads to the ninth reality, that direct challenges against legislation and other types of acts that are comparable to legislative acts or regulatory acts are not available in many Member States, and then on to the tenth reality, that reference systems to a superior or other competent court, with inevitable shortcomings similar to the ones highlighted for the Article 267 TFEU preliminary reference procedure, also exist in many Member States and beyond.[57] No such system has been declared incompatible with the ECHR by the European Court of Human Rights under Articles 6 and 13 ECHR on grounds that a direct challenge should always be available. In addition to this, the European Court of Human Rights considered the preliminary reference

[55] See again Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, paras 39-44, and Case C-583/11P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625, paras 81-84.
[56] Case C-583/11P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625, para 110 of her Opinion.
[57] See Study on Individual Access to Constitutional Justice of the European Commission for Democracy Through Law of the Council of Europe ("Venice Commission"), CDL-AD(2010)039rev. See also the example of Germany in A.H. Turk, *The Concept of Legislation* (Kluwer, 2006), Part 1, Chapter 3, at p. 56.

mechanism as compatible with Article 6 ECHR in *Bosphorus*.[58] Comparative studies also provide evidence that direct challenges against legislation are rather the exception than the norm,[59] while approaches to review of administrative action vary[60]. This ties up with the finding of AG Kokott that the jurisprudence of the European Court of Human Rights does not demand that private parties are accorded a direct remedy against legislative acts, not even against any kind of measure of general application. It further retracts strength from any argument that the constitutional traditions and values common to the Member States demand that such measures become challengeable by direct actions for annulment before the EU courts. And as a corollary, similarly to the lower courts' function in such reference systems, the statement made that each Member State contributes its own judicial system for the sake of ensuring the effective application and enforcement of EU Law[61] seems rightfully in place for the EU judicial review system.

3.10. *The eleventh reality*

Finally, the eleventh reality is quite similar to the first reality. The CJEU's view that the architecture of the judicial review system established a complete system of legal

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[58] *Bosphorus Hava Yollari Turizm v. Ireland* (2006) 42 EHRR 1. See Chapter 3.

[59] See Study on Individual Access to Constitutional Justice of the European Commission for Democracy Through Law of the Council of Europe ("Venice Commission"), CDL-AD(2010)039rev, and A.H. Turk, *The Concept of Legislation* (Kluwer, 2006), Part 1, Chapter 1, at p. 24 for the United Kingdom, Part 1, Chapter 2, at p. 43 for France (note however that recent reform is reported by the Venice Commission in France), Part 1, Chapter 3, at p. 56 for Germany, and Part 2, Chapter 2, at p. 173 for this conclusion. See also A.H. Turk, "Oversight of Administrative Rulemaking: Judicial Review" (2013) 19 *European Law Review* 126, and K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1, at p.p. 14-15. See further E. Barendt, *An Introduction to Constitutional Law* (OUP, 1998), Chapter 1, at p.p. 17-18.

[60] M. Eliantonio, C.W. Backes, C.H. Van Rhee, T.N.B.M. Spronken and A. Berlee, *Standing Up for Your Right(s) in Europe – A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts* (Intersentia, 2013), Chapters 4 and 6, and the Study on Individual Access to Constitutional Justice of the European Commission for Democracy Through Law of the Council of Europe ("Venice Commission"), CDL-AD(2010)039rev.

[61] K. Lenaerts, "The Rule of Law and the Coherence of the Judicial System of the European Union" (2007) *Common Market Law Review* 1625, at p. 1625. See also M. Safjan and D. Dusterhaus, "A Union of Effective Judicial Protection: Addressing a Multi-level Challenge Through the Lens of Article 47 CFREU" (2014) 33 *Yearbook of European Union Law* 3, at p. 9.

remedies and procedures designed to ensure review of the legality of EU acts, and that it is for the Member States to provide effective access to the preliminary reference procedure where a direct action for annulment is unavailable, is now corroborated, if not even confirmed by the Member States, through their inaction, or failure to effect further amendments of the Treaties. The Lisbon Treaty reform in Article 263 TFEU was passed with reference to the existing judicial review system and related Case-Law, and as AG Kokott noted, not least as a response to the well known calls for reform. The Member States had the opportunity to undertake a more ambitious reform of the locus standi rules, but, irrespective of whether this was due to lack of unanimity, eventually chose not to. Similar conclusions seem also valid in relation to previous Treaty reforms.[62]

4. Assessing the effects of the Lisbon Treaty reform

Building on the above, and with the stated realities in mind, the aim of this doctoral thesis is to assess the effect of the Lisbon Treaty reform in Article 263 TFEU and to consider the interpretative choices of the CJEU in the context of the need for effective judicial protection of private parties in an EU that is based on the Rule of Law.

Chapter 2 offers an outline of the EU judicial review system, and particularly the action for annulment and the locus standi criteria. It also covers other matters related to the action for annulment, such as the concept of reviewable acts and the abstract terminology test, as well as the issue of possible defendants, and shows how these developed in the Case-Law of the CJEU and then codified by the Lisbon Treaty into Article 263 TFEU. It further considers the alternative means of validity review, such as the plea of illegality under Article 277 TFEU, the preliminary reference mechanism

[62] See S. Douglas-Scott, *Constitutional Law of the European Union* (Longman, 2002), at p. 369.

of Article 267 TFEU and the action for damages under Articles 268 TFEU and 340(2) TFEU.

Chapter 3 explores questions of judicial policy and the possible justifications of the locus standi rules for actions for annulment as developed by the CJEU. It explores further the criticism of the EU judicial review system and the shortcomings of the preliminary reference mechanism for validity challenges against EU measures. A historical overview of the academic reception of the various developments in the locus standi rules is offered, starting from the very early years before *Plaumann* was decided and continuing up to the point of entry into force of the Lisbon Treaty. It will be shown, on the back of this historical overview, that most points of the criticism against the EU judicial review system that led to the 2002 forceful calls for reform in *UPA* and *Jego Quere*, are actually quite old. This chapter concludes with a summary of the relevant aspects of the European Convention on Human Rights, the Charter of Fundamental Rights and the Rule of Law.

Chapter 4 examines the extent and the effect of the Lisbon Treaty reform of the locus standi criteria in Article 263(4) TFEU and especially the relaxation of these admissibility conditions in relation to regulatory acts that do not entail implementing measures. It considers the interpretation of the notions of a regulatory act and of implementing measures by the CJEU, exploring also the possible alternative interpretations based on the travaux preparatoires of the Constitutional Treaty and the possible limitations in the CJEU's interpretative choices. It ends by considering how the Lisbon Treaty reform was rendered of very limited effect due to these interpretations by the CJEU, especially the interpretation of implementing measures.

This is related back to the discussion of judicial policy choice and its limits, first offered in Chapter 3.

Chapter 5 offers a review of a sample of the pre-Lisbon Case-Law in the light of the post-Lisbon locus standi criteria in Article 263(4) TFEU. The primary aim of this chapter is to demonstrate whether some of the key pre-Lisbon rulings would have been decided differently post-Lisbon. This involves consideration of the contested measure in each of the cases in this sample, and its possible classification as a regulatory act not entailing implementing measures under the Lisbon Treaty. The outcome reached under the interpretation of implementing measures adopted by the CJEU in *T & L Sugars*[63] is compared with the outcome that would have been reached under the interpretation proposed by AG Cruz Villalon in the same case.

Complementing this review of the older Case-Law, Chapter 6 offers a quantitative assessment of a sample of EU measures that were adopted after the entry into force of the Lisbon Treaty. The sample consists of the measures published in the Official Journal of the EU in 3 randomly chosen calendar months. The measures are classified in various categories, with the main question of course being which of those are likely to be interpreted as regulatory acts that do not entail implementing measures. The aim of this chapter is to provide a quantitative assessment of the effect of the Lisbon Treaty reform. The results reached under the interpretation of implementing measures adopted by the CJEU in *T & L Sugars* are once again compared with the results that would have been rendered under the interpretation proposed by AG Cruz Villalon. As the number of legislative acts in this sample of 3 months was small, this Chapter also proceeds with a similar analysis of all legislative acts adopted in an also randomly chosen calendar year, the year 2011. These legislative acts are classified into various

[63] Case C-456/13 P *T & L Sugars and Sidul Acucares v. Commission* EU:C:2015:284.

categories, and a brief overview of the content of some of them is also attempted. The key objective at this stage is to assess, based on their content, whether they are acts that would normally affect private parties without further implementation so as to question the choice of the CJEU or the Member States not to include them in the definition of a regulatory act.

Chapter 7 offers concluding remarks based on the findings of the previous chapters. My key submission is that the Lisbon Treaty reform of the locus standi criteria was transformed into a missed opportunity by the CJEU. In other words, Article 263(4) TFEU offered a great opportunity for significant improvement in judicial protection by means of increased availability of a direct action for annulment, which was unfortunately missed, mainly due to the overly strict interpretation of the notion of implementing measures by the CJEU. The need for higher levels in judicial protection is highlighted, as well as the fact that this can be achieved simply by a reinterpretation of the notion of implementing measures, without even touching any of the realities outlined in the present chapter. It will accordingly be submitted that the interpretation of the notion of implementing measures proposed by AG Cruz Villalon in *T & L Sugars* was capable of leading to such higher levels in judicial protection, and that the interpretative choice of the CJEU is to be regretted.

CHAPTER 2: THE EU JUDICIAL REVIEW SYSTEM AND LOCUS STANDI OF PRIVATE PARTIES

This chapter offers an overview of the EU judicial review system and the interpretation of the locus standi rules for direct actions for annulment as developed before the adoption of the Lisbon Treaty. The alternative routes of validity challenges are then outlined, and the chapter ends with a consideration of the 2002 calls for reform by way of reinterpretation of the test for individual concern.

1. The judicial review system and the action for annulment

An overview of the judicial review system, and mainly the action for annulment, is illustrative of the determination of the CJEU to eliminate the possibility that any EU measures escape judicial review, but also of the strictness and complexity of the Case-Law on the standing conditions that private parties need to satisfy in a direct action for annulment.[64]

The main vehicle for challenging validity of EU measures before the CJEU is of course the direct action for annulment under Article 263 TFEU. The text of Article 263 TFEU, as revised after the Lisbon Treaty, provides:

[64] For definitive detailed overviews see A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapters 6 and 7, A.H. Turk, *Judicial Review in EU Law* (Elgar, 2009), Chapter 1, A. Arnull, *The European Union and its Court of Justice* (OUP, 2nd edition, 2006), Chapter 3, T.C. Hartley, *The Foundations of European Union Law* (OUP, 8th edition, 2014), Chapter 12, L. Neville Brown and T. Kennedy, *Brown and Jacobs – The Court of Justice of the European Communities* (Sweet & Maxwell, 5th edition, 2000), Chapter 7, D. Edward and R. Lane, *Edward and Lane on European Union Law* (Elgar, 2013), Chapter 5, R. Schutze, *European Union Law* (CUP, 2015), Chapter 10, and A. Albors-Llorens, *Private Parties in European Community Law – Challenging Community Measures* (Clarendon Press, 1996). For a comparative study with some Member State judicial review systems see P. Birkinshaw, *European Public Law – The Achievement and the Challenge* (Wolters Kluwer, 2nd edition, 2014), Chapter 3, and see also J. Schwarze, "The Future of European Public Law" in P. Birkinshaw and M. Varney, *The European Union Legal Order After Lisbon* (Wolters Kluwer, 2010), Chapter 2.

"The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be".

Under Article 264 TFEU, a successful action for annulment leads to a declaration that the contested act, or the contested part of an act, is void ab initio, and this ruling has an effect erga omnes, not only between the parties.[65]

Article 265 TFEU supplements the action for annulment of EU measures, by providing for an action for failure to act. This provides that in case an EU Institution, body, office or agency has been called upon to act, but fails to act in infringement of the Treaties, Member States or other EU Institutions, bodies, offices or agencies may bring an action before the CJEU for this failure. A private party may, under the same conditions, also complain to the CJEU that an Institution, body, office or agency of the EU has failed to address to that party any act other than a recommendation or an opinion.

Complementing the action for annulment of Article 263 TFEU, are the indirect avenues of review, which are the plea of illegality in Article 277 TFEU, and the preliminary reference mechanism under Article 267 TFEU. This chapter will consider in some detail the action for annulment and the locus standi rules, and will then offer an overview of these indirect remedies, as well as the action for damages. The 2002 calls for reform will also be detailed, setting the background for further discussion in the following chapters.

[65] See for example Case C-228/92*Roquette Freres SA v. Hauptzollampt Geldern* [1994] ECR I-1445.

2. Possible defendants

The Rule of Law has been the key justification used by the ECJ to expand the list of possible defendants against which an action for annulment may be brought. This is an area where the EU courts notably went beyond the text of the Treaties in their attempt to ensure the highest degree of compliance with the Rule of Law and the promotion of legality and accountability of the various players in the EU administrative structure.

Article 263(1) TFEU, quoted above, empowers the CJEU to review the legality of legislative acts, acts of the Council, the Commission and of the European Central Bank, other than recommendations and opinions. It further empowers the Court to review the legality of acts of the European Parliament and of the European Council, and also the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-a-vis third parties.

The notable differentiation from the text of what was previously Article 230(1) EC is the express inclusion of the European Council and bodies, offices and agencies of the EU in the list of bodies whose acts are subject to review. This was not a real novelty but only a formal approval of the previous position taken by the EU courts that the Rule of Law dictated that any act of a Community (now Union) body intended to have legal effects vis-a-vis third parties must be subject to judicial review, notwithstanding the actual text of the Treaties.[66] As the General Court put it in *Sogelma v. EAR*,[67] it

[66] See Chapter 1. This was also recognised by AG Jaaskinen at para 6 of his Opinion of 12/9/2013 in Case C-270/12 *United Kingdom v. European Parliament and Council*, not yet reported.
[67] Case T-411/06 *Sogelma-societa generale lavori manutenzioni appalti Srl v. European Agency for Reconstruction* [2008] ECR II-2771. See further P. Craig & G. DeBurca, *EU Law: Text, Cases, and Materials* (OUP, 5th edition, 2011) at p. 486. See also Chapter 1.

cannot be acceptable, in a community based on the Rule of Law, that such acts escape judicial review.[68]

In any event, especially in view of the increased use of delegation of authority to agencies and generally the increased role of bodies other than the institutions, this amendment was a welcome clarification and a clear contribution of the EU courts to the development of the judicial review system, in the name of further enhancing the EU's compliance with one of the key values on which it is said to be founded, namely the Rule of Law.

For the sake of completeness, it should be noted that this express inclusion in the revised text of Article 263 TFEU was not entirely unconditional, since Article 263(5) TFEU provides that acts setting up such bodies, offices and agencies may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies intended to produce legal effects in relation to them. As it appears from the text of this provision, the position of privileged and semi-privileged applicants cannot be affected by conditions put in place under Article 263(5) TFEU. Such conditions can only affect challenges by natural or legal persons, being non privileged applicants, who need to satisfy the standing criteria in Article 263(4) TFEU. Depending on the case, this can be both a good thing and a bad thing for private applicants. On the one hand, such conditions or arrangements may restrict challenges even further than the standing criteria of direct and individual concern already do. On the other hand, such conditions or arrangements may however provide for more relaxed standing criteria than those of Article 263(4) TFEU. Paragraph (5) does not seem to be dependent on paragraph (4) of Article 263 TFEU and this does

[68] *Sogelma*, ibid, para 37. See also Case C-15/00 *Commission v. European Investment Bank* [2003] ECR I-7281, particularly paras 74-75.

seem to enable acts setting up such bodies to even bypass the general standing criteria completely. This provision could accordingly play an increasingly important role depending on the use made of it.

The actual effect of Article 263(5) TFEU remains to be seen. As P. Craig points out,[69] some Regulations, like the one regulating the Office for Harmonisation of the Internal Market (OHIM), contain detailed provisions on legality review, with a system of internal appeal followed by legality review by the EU Courts, whereas the Regulations in relation to some other agencies such as the European Maritime Safety Authority (EMSA), the European Network and Information Security Agency (ENISA) and the European Railway Agency (ERA) have no provisions at all in relation to legality review. A rather pessimistic view is expressed by A. Turk,[70] according to whom, these provisions would have a rather limited effect since most agencies would not produce acts with legal effects, and the provisions of Article 263(5) TFEU merely sanction the already existing practice of agency regulations to provide for such judicial review procedures. This view does appear realistic, as it is rather doubtful that any attempt to seriously bypass the general standing criteria of Article 263(4) TFEU will become the norm, despite any possible justifications based on the fact that such bodies, offices and agencies lack any democratic representation since they are unelected.[71] It is even doubtful whether such an attempt will ever be made in the absence of an express Treaty authorisation.

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[69] P. Craig, *EU Administrative Law* (OUP, 2nd edition, 2012), at p. 157-158.
[70] A. Turk, *Judicial Review in EU Law* (Edward Elgar, 2009), at p. 11.
[71] See generally P. Craig, "Comitology, Rulemaking, and the Lisbon Settlement: Tensions and Strains" in C.F. Bergstrom and D. Ritleng, *Rulemaking by the European Commission* (OUP, 2016), Chapter 9, P. Craig, "Legal Control of Regulatory Bodies: Principle, Policy, and Teleology" in P. Birkinshaw and M. Varney, *The European Union Legal Order after Lisbon* (Wolters Kluwer, 2010), Chapter 5, A.H. Turk, "The Role of the Court of Justice" in M. Andenas and A.H. Turk, *Delegated Legislation and the Role of Committees in the EC* (Kluwer Law International, 2000), Chapter 8, T. Larsson and G.F. Schaefer, "The Problem of Democratic Legitimacy in a Supranational Government" in H.C.H.

3. Acts not subject to review

The Lisbon Treaty has extended the scope of judicial review to cover acts adopted under Articles 67-89 TFEU in the Area of Freedom, Security and Justice. The EU Courts can now review the legality of all measures adopted in this area, with the exception of measures concerning the validity of police or enforcement agency operations and the responsibilities of Member States in the safeguarding of internal security and maintenance of Law and order.[72]

On the contrary, the jurisdiction of the EU Courts has not been extended to measures adopted under the Common Foreign and Security Policy, despite the abolition of the pillar structure of the EU. They are however granted limited jurisdiction in this area under Article 275 TFEU, to monitor compliance with Article 40 TEU and to rule on proceedings instituted under Article 263(4) TFEU reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the TEU.

4. Reviewable acts

As also previously touched upon,[73] driven by considerations of the Rule of Law and the need to provide effective judicial protection,[74] the EU Courts looked into the substance and not the form of an act to determine whether it is reviewable, and did so

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Hofmann and A.H. Turk, *EU Administrative Governance* (Elgar, 2006), Chapter 16, R. van Schendelen and R. Scully, *The Unseen Hand – Unelected EU Legislators* (Frank Cass, 2003), C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (Hart, 1999), T. Christiansen, J.M. Oettel and B. Vaccari, *21st Century Comitology – Implementing Committees in the Enlarged European Union* (EIPA, 2009), C.F. Bergstrom, *Comitology – Delegation of Powers in the European Union and the Committee System* (OUP, 2005), T. Christiansen and T. Larsson, *The Role of Committees in the Policy-Process of the European Union – Legislation, Implementation and Deliberation* (Elgar, 2007), D. Geradin, R. Munoz and N. Petit, *Regulation Through Agencies in the EU* (Elgar, 2005), and E. Madalina Busuioc, *European Agencies – Law and Practices of Accountability* (OUP, 2013).

[72] See also L. Pech, ""A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principe of EU Law" (2010) 6 *European Constitutional Law Review* 359.

[73] See Chapter 1.

[74] See F.G. Jacobs, *The Sovereignty of Law: The European Way* (CUP, 2007), Chapter 4, at p.p. 42-45.

by ignoring at the same time the use of the word "decision" in the predecessors of Article 263(4) TFEU, namely Article 173 EEC and Article 230 EC, aiming to prevent the Institutions from limiting review by their choice of measure.[75] This is another area where the relevant Lisbon Treaty amendments came only as a confirmation of the position taken by the EU Courts.

The text of Article 263(1) TFEU, quoted above, provides that the CJEU shall review the legality of legislative acts and other acts of the institutions and other bodies intended to produce legal effects vis-a-vis third parties. In *Commission v. Council*[76] the ECJ had generously held that the acts that are reviewable via an action for annulment are all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects, clarifying further in *IBM*[77] that this is satisfied when the measure is binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position. The Case-Law does not even exclude the possibility that an oral decision can be a reviewable act for the purposes of an action for annulment.[78] Even recommendations can be challenged if it can be shown that the particular act, although entitled a recommendation, was intended to have binding legal effects and accordingly would not constitute a true recommendation.[79]

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[75] See, for example, Case 101/76 *Koninklijke Scholten Honig v. Council and Commission* [1977] ECR 797, paras 5-7.
[76] Case 22/70 *Commission v. Council ("ERTA case")* [1971] ECR 263, para 42.
[77] Case 60/81 *IBM v. Commission* [1981] ECR 2639, particularly para 9. See also A. Arnull, "When is an Act not an Act?" (2007) *European Law Review* 1.
[78] Case T-85/03 R *Government of the Cayman Islands v. Commission*, judgment of 26/3/2003, unreported, at para 60; Joined Cases 316/82 and 40/83 *Kohler v. Court of Auditors* [1984] ECR 641, para 9; Case T-113/95 *Mancini* v *Commission* [1996] ECR-SC p. I-A-185 and p. II-543, para 23.
[79] Case C-16/16 P *Kingdom of Belgium v. Commission*, judgment of 20/2/2018. See also A. Arnull, "EU Recommendations and Judicial Review – ECJ 20 February 2018, Case C-16/16P *Kingdom of Belgium v. European Commission*" (2018) 14 *European Constitutional Law Review* 609.

The position is however more complicated when the act sought to be challenged is a refusal to a request. The general rule is that an act which amounts to a rejection must be appraised in the light of the request to which it constitutes a reply, meaning that if the requested act would not be a reviewable act, this rejection will also not be regarded as reviewable.[80] The application of this general rule seems cumbersome. In *Eurocotton*[81] for example, the ECJ found that the refusal of the Council to adopt an anti-dumping regulation was a reviewable act as it affected the interests of the applicants and the requested act would also be a reviewable act. Whereas in *T-Mobile Austria*,[82] a refusal by the Commission to take action against Austria under Article 86(3) EC (now Article 106 TFEU) did not produce legal effects and was not a reviewable act, because that Treaty Article did not oblige the Commission to bring such proceedings against a Member State.

It is also clear that only final acts of an institution or other body of the EU can be considered as reviewable acts. A classic example comes from *IBM*,[83] where a letter to the applicants containing the Commission's statement of objections in an Article 82 EC (now Article 102 TFEU) investigation procedure and inviting them to respond in writing, was held not to be reviewable. It was held to be simply a preliminary act and not the Commission's final decision in the investigation. Such preliminary or preparatory acts can only be reviewable where they affect the applicants

[80] See Case C-150/06P *Arizona Chemical BV and others v. Commission* [2007] ECR I-39, paras 22-25; Case 42/71 *Nordgetreide v. Commission* [1972] ECR 105, para 5; Joined Cases C-15/91 and C-108/91 *Buckl and Others v. Commission* [1992] ECR I-6061, para 22.
[81] Case C-76/01 P *Eurocotton and others v. Council* [2003] ECR I-10091.
[82] Case C-141/02 P *Commission v. T-Mobile Austria GmbH* [2005] ECR I-1283.
[83] Case 60/81 *IBM v. Commission* [1981] ECR 2639.

independently of the final decision.[84] Similarly, internal rules of the institutions and other bodies of the EU do not produce legal effects and are not reviewable.[85]

Acts simply confirming previous acts are also not reviewable, unless the later act creates new rights and obligations. A good example comes from *AssiDoman*,[86] where the applicants had requested the Commission to waive the fines that were imposed on them, based on the fact that that other companies that were affected by the same measure succeeded in annulment proceedings and invalidated the measure as far as they were concerned. The Commission refused to waive the fines imposed on the applicants in view of the fact that they had failed to challenge them in annulment proceedings as other companies had done. The ECJ on appeal decided that by this decision the Commission simply confirmed its previous decision imposing the fines, and was accordingly not a reviewable act.[87]

5. Non existent acts

Where an act has so serious defects that can be considered as non existent, then the general rule is that an action for annulment will be declared as inadmissible because such an act will not produce any legal effect.[88] It has rightly been pointed out however, that such a finding of inadmissibility will have the same effect in practice as a finding of invalidity[89] and the applicant would effectively have succeeded.

[84] See for example Case 53/85 *AKZO Chemie v. Commission* [1986] ECR 1965.
[85] See for example Case 78/85 *Group of the European Right v. Parliament* [1988] ECR 1753.
[86] Case C-310/97P *Commission v. AssiDoman and others* [1999] ECR I-5363.
[87] See also D. Leczykiewicz, ""Effective Judicial Protection of Human Rights After Lisbon: Should National Courts be Empowered to Review EU Secondary Law?" (2010) *European Law Review* 326.
[88] See Case C-137/92P *Commission v. BASF* [1994] ECR I-2555.
[89] See P. Craig & G. DeBurca, *EU Law: Text, Cases, and Materials* (5th edition, OUP, 2011) at p. 489.

6. Applicants

The Treaties have always distinguished between privileged, semi-privileged and non privileged applicants. The list of privileged applicants changed over time, particularly in relation to the position of the European Parliament. Now Article 263(2) TFEU lists Member States, the European Parliament, the Council and the Commission. Privileged applicants are considered to be the guardians of the Treaties and are entitled to bring an action under Article 263 TFEU without satisfying any locus standi conditions, irrespective of whether the act is addressed to them or to any other person.[90] They are presumed to have an interest in the legality of all EU acts and have no standing criteria to satisfy.[91] This could in certain circumstances be an indirect benefit for private parties who, despite being unable to bring an annulment action themselves, may nevertheless lobby the competent bodies of their Member States to challenge a measure on their behalf in order to safeguard their interests. This may not be realistic in individual cases, but it could well be appropriate where a sector of the economy of a Member State would be affected by an EU act.[92] It has become clear however after *Ten Kate*[93] that Member States are not obliged to bring an action for annulment upon the request of a private party, but on the other hand, a national provision stipulating such an obligation would be acceptable.[94]

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[90] See J. Schwarze, "The Legal Protection of the Individual against Regulations in European Union Law" (2004) 10(2) *EPL* 285, at p. 288.
[91] See A. Arnull, "Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty" (1995) 32 *CMLRev* 7, at p. 13.
[92] For a study of annulment actions initiated by Member State governments, see C. Adam, M.W. Bauer and M. Hartlapp, "It's Not Always About Winning: Domestic Politics and Legal Success in EU Annulment Litigation" (2015) 53 *Journal of Common Market Studies* 185.
[93] Case C-511/03 *Netherlands v. Ten Kate Holding Musselkanaal BV* [2005] ECR I-8979
[94] See P. Craig & G. DeBurca, *EU Law: Text, Cases, and Materials* (5th edition, OUP, 2011) at p. 490. For general commentary see C. Kombos, "A Paradox in the Making: Detecting Something Positive in *UPA* Under the *Ten Kate* Effect" (2009) 15 *European Law Journal* 506.

The Court of Auditors, the European Central Bank and the Committee of the Regions are considered as semi privileged applicants as they can only bring an action for annulment for the purpose of defending their prerogatives. P. Craig does point out that oddly the European Council and bodies, agencies and offices of the EU are neither privileged nor semi privileged applicants, despite the fact that their acts are susceptible to review.[95]

All other natural or legal persons, including territorial units of a Member State,[96] are non privileged applicants and can only bring an action for annulment if they satisfy the standing criteria of Article 263(4) TFEU.

Under Article 263(6) TFEU, an action for annulment must in all cases be lodged within two months of the publication of the measure, or of its notification to the plaintiff, or in the absence thereof, of the day on which it came to the knowledge of the plaintiff, as the case may be.

7. Private parties and standing

The original provisions of the Treaty of Rome of 1957 setting out the conditions under which private parties could challenge acts of the EU, contained in Article 173 EEC, remained in effect the same ever since, despite the revisions in other parts of Article 173 EEC and Article 230 EC. The first substantial reform was only brought with the adoption of the Lisbon Treaty.

Before the Lisbon Treaty, Article 230(4) EC provided:

[95] P. Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (OUP, 2010), Chapter 4. See also P. Craig & G. DeBurca, *EU Law: Text, Cases, and Materials* (5th edition, OUP, 2011) at p. 490-491.
[96] See for example Case C-417/04P *Regione Siciliana v. Commission* [2006] ECR I-3881, at para 24.

> *"Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former".*

Following the adoption of the Lisbon Treaty, Article 263(4) TFEU, also quoted above, reads:

> *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".*

7.1. *The abstract terminology test*

The first criterion that the ECJ required private parties to satisfy was that an act is in substance a decision and not a regulation. This derived directly from the actual text of Article 230(4) EC. In relation to this, it developed the so called "abstract terminology test" in *Producteurs de Fruits*.[97] The ECJ emphasised in this test that the essential characteristics of a decision arise from the limitation of the persons to whom it is addressed, whereas a regulation, being essentially of a legislative nature, applies not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety.[98] This was further supplemented by

[97] Joined Cases 16/62 and 17/62 *Confederation Nationale des Producteurs de Fruits et Legumes and others v. Council* [1962] ECR 471.
[98] *Producteurs de Fruits*, ibid, at p. 478.

Zuckerfabrik Watenstedt,[99] where the CJEU clarified that a measure does not lose its character as a regulation simply because it may be possible to ascertain with a greater or lesser degree of accuracy the number or even the identity of the persons to which it applies at any given time.[100]

The Case-Law had become blurred as to the distinction between the abstract terminology test and the test for individual concern, something which was firmly recognised by AG Lenz in *Codorniu*.[101]

The abstract terminology test had come under heavy attack as perilously close to looking behind form to form, rather than looking behind form to substance, and entailed the danger that careful drafting of regulations could secure immunity from challenge, even if the task of the enactment were essentially administrative in nature.[102] The ECJ even applied the test to measures passed as decisions, further contributing to the blurring of the distinction between regulations and decisions. In *Spijker*,[103] for example, it had the effect of requiring the sole importer of Chinese made brushes into the Benelux to prove that a measure labelled as a decision was not in fact a regulation. It had been argued that the test appeared to even ignore the obvious dangers of effectively leaving access to judicial review in political as opposed to judicial hands.[104]

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[99] Case 6/68 *Zuckerfabrik Watenstedt v. Council* [1968] ECR 409.
[100] *Zuckerfabrik Watenstedt*, ibid, at p. 415. See A. Arnull, "Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty" (1995) 32 *CMLRev* 7, at p.p. 20-24, for general commentary on the abstract terminology test.
[101] See A. Arnull, "Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty" (1995) 32 *CMLRev* 7, at p. 38.
[102] P. Craig, "Legal Standing and Substantive Review in Community Law" (1994) *OJLS* 513. See also M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p. 138.
[103] Case 231/82 *Spijker Kwasten BV* [1983] ECR 2559.
[104] See M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p.p. 138-140.

In its judgment in *Codorniu*,[105] somehow surprisingly,[106] the CJEU in effect abandoned the abstract terminology test. It did so by holding that although an act may be by virtue of its nature and sphere of application of legislative nature in that it is of general application, this does not prevent it from being of individual concern to some persons. It has however convincingly been argued that if an act is recognised as being by nature a decision, it is more likely to affect someone individually than a true act of general application.[107]

Since *Cordorniu*, the main standing requirements for private applicants were those of direct and individual concern. This was confirmed by the Lisbon Treaty which deleted the words "although in the form of a regulation or a decision addressed to another person" from the text of Article 263(4) TFEU. This is yet another instance where the relevant Lisbon Treaty amendments came only as a confirmation of the Case-Law of the EU courts, which were apparently driven by considerations of effective judicial protection and compliance with the Rule of Law.

7.2. *Present and vested interest*

A further requirement was developed, that a private applicant must have an interest in seeing the contested measure annulled, which must be vested and present on the date the action is brought.[108] The test is said to presuppose that the action, if successful,

[105] Case C-309/89 *Codorniu v. Council* [1994] ECR I-1853.
[106] See also L. Neville Brown and T. Kennedy, *Brown and Jacobs – The Court of Justice of the European Communities* (Sweet & Maxwell, 5th edition, 2000), Chapter 7, at p.153.
[107] See M. Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jego-Quere et Cie SA v. Commission* and *Union de Pequenos Agricultores v. Council*" (2003) 66 *MLR* 124, at p. 129.
[108] Case T-141/03 *Sniace v. Commission* [2005] ECR II-1197, at para25.

will procure an advantage to the applicant.[109] This seems to serve as a safeguard that pointless actions will be excluded as an abuse of process.

7.3. *Direct concern*

As previously noted,[110] virtually all criticism focused on the interpretation of individual concern, and direct concern did not occupy as central a position in this discussion.[111]

Direct concern is satisfied where the contested measure directly affects the legal situation of the applicant and its implementation is purely automatic and results from Community rules alone without the application of other intermediate rules.[112] The deciding factor is whether a party, usually another EU institution or a Member State, has discretion in implementing a measure. Where there is no discretion, direct concern is normally satisfied.[113]

Where there is discretion, the general rule is that direct concern cannot be satisfied.[114] However, exceptions have been recognised, such as in cases where a confirmation by an institution renders valid a measure which was at the discretion of a national authority as in *Toepfer*,[115] or where the national authorities already informed the applicant of their intention and requested the authorisation from an EU institution with reference to his position as in *Bock.*[116] Even where such intention had not been

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[109] See Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, para 42, and Case C-183/08 P *Commission* v *Provincia di Imperia*, Order of 5/3/2009, at para 19. For a more extensive analysis see Case C44/14 P *Mory v. Commission* at paras 55-59.
[110] See Chapter 1.
[111] See also J.D. Cooke, "*Locus Standi* of Private Parties Under Article 173(4)" (1997) 6 *Irish Journal of European Law* 4, at p. 9.
[112] See for example Case T-69/99 *Eurotica v. Commission* [2000] ECR II-4039, at para 24.
[113] Cases 41-44/70 *International Fruit Company v. Commission* [1971] ECR 411. See also Case T-16/04 *Arcelor v. European Parliament and Council*, judgment of 2/3/2010, para 97.
[114] Case 69/69 *Alcan Aluminium v. Commission* [1970] ECR 385, for example.
[115] Cases 106/63 and 107/63 *Toepfer v. Commission* [1965] ECR 405.
[116] Case 62/70 *Bock v. Commission* [1971] ECR 897.

communicated to the applicant but there was no doubt as to how the national authority intended to exercise its discretion when an authorisation from an EU institution was requested, *Piraiki-Patraiki*[117] shows that direct concern may still be found if the possibility of the national authority not using the authorisation was entirely theoretical.

When directives are contested, the general rule is that direct concern cannot be satisfied,[118] but could exceptionally be found when the discretion conferred is entirely theoretical.[119]

The rationale of the test for direct concern seemed clear to A. Albors-Llorens, in that the exercise of any real discretion by the addressee of a measure would cause a private applicant to be directly concerned not by the Community measure, but by the act of the addressee, and therefore it is the act of the addressee that should be challenged instead.[120] In this sense, it appeared as a rather logical criterion, which is also based on substance rather than in form when it comes to the determination of the existence of any discretion in the implementation of a measure.

7.4. *Individual concern*

The requirement for individual concern constitutes in effect the main filter for actions for annulment lodged by private parties.

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[117] Case 11/82 *Piraiki-Patraiki v. Commission* [1985] ECR 207.
[118] Joined Cases T-172/98 and T-175/98 *Salamander v. European Parliament and Council* [2000] ECR II-2487; confirmed in relation to Article 263(4) TFEU in Case T-441/08 *ICO Services v. European Parliament and Council*, judgment of 21/5/2010.
[119] See Case T-223/01 *Japan Tobacco v. European Parliament and Council* [2002] ECR II-3259.
[120] A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p. 75.

The classical and well known formulation in *Plaumann*[121] reads:

> *"persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed".*

One of the former judges of the GC described this cited passage as a good example of one of the more regrettable aspects of EU jurisprudence, namely a statement which has, by mere force of repetition, achieved the status of a classic definition, notwithstanding its obvious grammatical deficiencies.[122]

The gist of this vague formulation seems to be that a private applicant needs to differentiate himself from all other persons. It hardly provides any helpful guidance as to what can constitute such differentiation since very general phrases were used. It is indeed difficult to discern any useful guidance from the phrases "certain attributes which are peculiar to them" or "by reason of circumstances in which they are differentiated from all other persons" from this formula itself. Four categories of application of this test can nonetheless be discerned from the Case-Law.[123]

7.4.1. *The open and closed class category*

The first is the "open and closed class" category and an example can be found in *Plaumann* itself. An applicant will need to show that he belongs to a closed class

[121] Case 25/62 *Plaumann v. Commission* [1963] ECR 95, at para 9.
[122] J.D. Cooke, "*Locus Standi* of Private Parties Under Article 173(4)" (1997) 6 *Irish Journal of European Law* 4, at p. 9.
[123] For a useful theoretical examination of certain categories of access under the standing rules as applications of the *Plaumann* test, see C. Harlow, "Towards a Theory of Access for the European Court of Justice" (1992) 12 *Yearbook of European Law* 213. Further Case-Law on individual concern is analysed in Chapter 5.

which was fixed at the time the contested measure was adopted and could not be enlarged afterwards. In *Plaumann*, the measure affected all present and future importers of clementines in the same manner, and the applicant, although one of the few and known current importers, belonged to an open class since the list of importers could change at any time. In *Toepfer*[124] on the other hand, the measure affected only those importers of cereals who had applied for an import licence on a specific date. This was clearly a closed class that could not be enlarged afterwards, and individual concern was satisfied.

Belonging to a closed class is a necessary precondition but does not on its own establish individual concern. In *Deutz und Geldermann*,[125] a regulation prohibited references to a method of wine production containing geographical designations if a product did not qualify for this designation. The applicants were affected as producers who had traditionally used such a reference. Although they seemed to belong to a closed class of producers traditionally using such references, the ECJ considered this irrelevant as the measure concerned them in just the same way as any other producer in the same position. There has to be a specific connection between the applicant's position and the contested measure, something which obviously leads to a very restrictive test.[126]

7.4.2. *Procedural guarantees*

The second category of applications of the *Plaumann* test is where there are procedural guarantees or other legal provisions protecting the interests of an individual or requiring an institution to take his interests into account. In

[124] Cases 106/63 and 107/63 *Toepfer v. Commission* [1965] ECR 405.
[125] Case 26/86 *Deutz und Geldermann v. Council* [1987] ECR 941.
[126] See also A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p.78.

Sofrimport,[127] the Commission had a legal obligation to consider the special position of products in transit before adopting the contested measure. The applicant who had goods in transit was considered as individually concerned.[128] Obviously, it is in limited cases that an applicant will fall within this category.

7.4.3. *Exceptional economic impact*

The third category includes the exceptional economic impact cases of *Codorniu*[129] and *Extramet*[130]. In *Codorniu*, an amendment of a regulation prevented the largest European producer of sparkling wines from using the designation "cremant" and consequently a trademark it held since 1924. The ECJ found individual concern since the deprivation of this trademark would result in considerable benefit to the applicant's competitors and this distinguished the applicant from other traders.

In *Extramet*, the applicant was the largest importer of the product for which an anti-dumping duty was applied and also the end user. The applicant's business was severely affected as it would consequently have to obtain supplies from its main competitor. The ECJ accepted that such severe economic impact distinguished the applicant from other importers so as to be individually concerned by the contested measure.

The decision in *Codorniu* led to hopes of a more liberal approach to individual concern which however never materialised.[131] The post-*Codorniu* approach was

[127] Case C-152/89 *Sofrimport v. Commission* [1990] ECR I-2447.
[128] Case 11/82 *Piraiki-Patraiki v. Commission* [1985] ECR 207 is another example.
[129] Case C-309/89 *Codorniu v. Council* [1994] ECR I-1853.
[130] Case C-358/89 *Extramet v. Commission* [1991] ECR I-2501.
[131] It was "a false dawn" according to A. Arnull, *The European Union and its Court of Justice* (OUP, 1999), p. 44.

purely based on the traditional application of the *Plaumann* test.[132] Both *Codorniu* and *Exramet* were treated as exceptional and limited to their own facts.[133] They have remained just special strands of the Case-Law.[134]

The case of *Pfizer Animal Health SA v. Council*[135] is cited by A. Ward[136] as a good example of the methodology employed by the Community Courts in assessing individual concern, by examining the general rule first and then moving on to consider the exceptions. This was an action for annulment of Council Regulation (EC) 2821/98, amending Directive 70/524/EEC. The contested regulation actually withdrew from an annex of this Directive some antibiotics and thereby revoked the authorisation for their use in feeding stuffs. Direct and individual concern were found to be satisfied in this case. The applicants were the only manufacturers of virginiamycin in the world, and this substance was prohibited by the contested measure. The CFI found the contested Regulation to apply to objectively determined situations and to have legal effects with respect to categories of persons viewed generally and in the abstract, rendering it general in nature. It then noted that the general application of this measure does not preclude it from being of direct and individual concern to certain natural or legal persons.[137] In these circumstances, a Community measure can be of general nature and at the same time in the nature of a

[132] See, among others, Case C-209/94P *Buralux v. Council* [1996] ECR I-615 and Case C-321/95P *Greenpeace v. Commission* [1998] ECR I-1651. See also A. Adinolfi, "Admissility of Action for Annulment by Social Partners and "Sufficient Representativity" of European Agreements" (2000) *European Law Review* 165.
[133] See for example, Case T-268/99 *FNAB v. Council* [2000] ECR II-2893.
[134] A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p.p. 80-81.
[135] Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR II-3305.
[136] A. Ward, *Judicial Review and Rights of Private Parties in EU Law* (Oxford, 2nd edition, 2007), at p. 300.
[137] Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR II-3305, at paras 82-84 of the judgment.

decision in respect of some traders. Direct concern was conceded by the Council and accepted by the CFI.

Pfizer, the applicants, belonged to an open class and did not satisfy individual concern on that ground, despite being the only manufacturer of virginiamycin in the world, the CFI repeating that the fact that it is possible to determine the number or even the identity of the persons to whom a measure applies does not render it of individual concern to them. It was however necessary, in the words of the CFI, to analyse the provisions under which the contested regulation was adopted in so far as the latter concerns virginiamycin in order to ascertain whether Pfizer was affected by the adoption of the measure by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons.[138] In the circumstances, the applicants were the only persons who, at the time the contested Regulation was adopted, were in a legal position which would have enabled it to obtain, under the existing procedural provisions and through a Commission or Council regulation, authorisation to market virginiamycin as the person first responsible for putting it into circulation. Furthermore, if following the examination of the withdrawal of the product provided under the contested regulation, the product had been authorised again, only the applicants would have been in a position to obtain a new authorisation of virginiamycin as an additive linked to a person responsible for putting it into circulation. Consequently, although at the time when the contested regulation was adopted, it had not acquired the status of person first responsible for putting virginiamycin into circulation, since the evaluation procedure was still continuing the applicants were already able to rely on an inchoate right in that regard. Additionally, by virtue of having made an application for further authorisation, the

[138] Ibid, at para 90 of the judgment.

applicants had obtained a position in respect of which Directive 70/524 offered legal safeguards. The CFI concluded that in the particular circumstances of this case, certain elements of Article 9 of this Directive closely resembled a specific right comparable to the right on which the applicants in *Codorniu* could rely.[139] This differentiated the applicants from all other persons.

The CFI then considered the argument in relation to the participation of Pfizer in the procedure leading to the adoption of the contested Regulation. It observed that the procedure laid down in Article 24 of Directive 70/524 did not entitle the traders concerned to take part in the procedure for the adoption of the contested measure[140]. According to settled Case-Law, the fact that a person is so involved in some way or the other is capable of distinguishing that person individually only if the applicable Community legislation grants him certain procedural rights, which was not the case here for Pfizer. However, it was nevertheless the case that the adoption of the contested Regulation terminated or at least suspended the procedure of Article 9 of Directive 70/524 which had been instigated by Pfizer's application for a new authorisation. In such a context, by terminating or at least suspending this procedure which had been opened at Pfizer's request and in the course of which the applicants had the benefit of procedural guarantees, the contested Regulation affected the applicants by reason of a legal and factual situation which differentiated them from all other persons. The applicants' were accordingly held to be individually concerned, but their application failed on its substance.

[139] Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR II-3305, at para 98 of the judgment.
[140] Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR II-3305, at para 101.

7.4.4. *Anti-dumping, competition and state aid*

As a fourth category of application of the *Plaumann* test one can list the more generous approach taken in the special areas of anti-dumping, competition and state aid.[141] In anti-dumping cases, measures imposing duties are generally of individual concern to producers and exporters who are identified in the measures or concerned in the preliminary investigations, since these persons do not have an alternative remedy. On the other hand, they are normally not of individual concern to importers.[142] Complainants of competition violations are also often individually concerned to challenge a negative finding of the Commission.[143] In state aid investigations, the CJEU found individual concern even in cases where the applicant did not participate in the investigation if his position was substantially affected by the aid.[144]

8. Unpredictability and a brief look in numbers

The characteristic sketch illustration of Nik Baker shows two angry security guards at the entrance of the Court asking a private plaintiff how he got in.[145] As A. Albors Llorens put it, the overall picture that emerged from the Case-Law on individual concern is one of bleak predictability.[146] And M. Granger also thought that the Case-Law was as notorious for its restrictive nature as it was for its unpredictability and

[141] See generally M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p.p. 142-147.
[142] Case C-358/89 *Extramet v. Commission* [1991] ECR I-2501.
[143] Case 26/76 *Metro v. Commission* [1977] ECR 1875.
[144] Case C-260/05P *Sniace v. Commission* [2007] ECR I-10005.
[145] Illustration by Nik Baker published in the Financial Times on 31/3/1995, reproduced in L. Neville Brown and T. Kennedy, *Brown and Jacobs – The Court of Justice of the European Communities* (Sweet & Maxwell, 5th edition, 2000).
[146] A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p. 81.

even inconsistency,[147] while A. Ward concluded that the rights of the individual have taken second place to the cardinal value which was the promotion and protection of the EU institutions and the measures they promulgate.[148] Notably, D. Waelbroeck has characterised the EU judicial review system as a meaningless "judicial carrousel" with unnecessary costs and burdens for applicants and national courts.[149] T.C. Hartley went as far as to say that the ECJ's jurisprudence makes it hard to avoid feeling that the Court decides first whether it wants the application to be admissible and then applies whichever test will produce the desired result.[150] An argument that has been corroborated by C. Harlow, in that many courts choose to blur the distinction between standing and justiciability, in the sense that if the judge scents a justiciable issue, standing can be overlooked and even an actio popularis be allowed, whereas otherwise the court can stand firmly on the strict rules of locus standi, and the ECJ would not be alone in adopting this fluid discretionary model.[151] To H. Rasmussen, this inconsistency could be attributed to the Court being internally divided on this point of judicial protection and locus standi.[152]

A very interesting study by T. Tridimas and G. Gari,[153] offers a statistical analysis of judicial review proceedings between the years 2001 and 2005. This interestingly

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[147] M. Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jego-Quere et Cie SA v. Commission* and *Union de Pequenos Agricultores v. Council*" (2003) 66 *MLR* 124, at p. 128.
[148] A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 8, at p. 406.
[149] D. Waelbroeck, "The Workload of the EU Courts and the Citizen's Right to Have Access to Justice" in D. Curtin et al, *The EU Constitution: The Best Way Forward?* (Asser Press, 2005), p. 367.
[150] T.C. Hartley, *The Foundations of European Community Law* (OUP, 2nd edition, 1988), at p.p. 345-346, as quoted in C. Harlow, "Towards a Theory of Access for the European Court of Justice" (1992) 12 *Yearbook of European Law* 213, at p. 231.
[151] C. Harlow, "Towards a Theory of Access for the European Court of Justice" (1992) 12 *Yearbook of European Law* 213, at p. 231.
[152] See also H. Rasmussen, *European Court of Justice* (Gadjura, 1998), Chapter 6, at p.p. 179-180.
[153] T. Tridimas and G. Gari, "Winners and losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance (2001-2005)" (2010) 35 *European Law Review* 131. See also the older studies in C. Harding, "Who Goes to Court in Europe? An analysis of Litigation Against the European Community" (1992) 17 *European Law Review* 105, K.

reports a result that 113 out of a total of 340 actions for annulment initiated before the CFI were dismissed as inadmissible, which is a percentage of 33.2%, something which comes naturally as a result of the restrictive standing conditions. The study further reports that the chances of an action for annulment being dismissed as inadmissible are much higher, at a percentage of 63.8%, where the contested act is a measure of general application, like a directive or a regulation, than where it is a decision, in which case the percentage reported is at 28.3%. All actions against directives were dismissed as inadmissible, whereas actions against regulations were admissible in 43.5% of the cases.[154] Their conclusion is that these results are in accordance with the general stance of the Case-Law on the locus standi conditions, and as far as regulations are concerned, while the rate of admissibility in relation to anti-dumping measures reaches a high 80%, it drops to 32.1% in relation to other types of regulations.[155]

The corresponding analysis of direct actions for annulment before the ECJ reports that only 9 out of 140 such actions were dismissed as inadmissible which is a percentage of 6.5%. The difference with the GC is however easily explained by the fact that direct actions before the ECJ were initiated only by privileged applicants and Community institutions.[156]

Preliminary references on validity were limited. There were only 44 in this sample, with a minimum of 6 in 2001 and a maximum of 12 in 2004, while the rate of success in establishing invalidity was at 13.6%. This compares unfavourably with the rate of

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Heede, "Who Litigates at Union Level and Where?" (2001) *European Law Review* 509, H. Schepel and E. Blankenburg, "Mobilising the European Court of Justice" in G. De Burca and H.H. Weiler, *The European Court of Justice* (OUP, 2001), Chapter 2, and A. Arnull, "The Law Lords and the European Union: Swimming With the Incoming Tide" (2010) *European Law Review* 57.

[154] T. Tridimas and G. Gari, ibid, at p.p. 155-158

[155] T. Tridimas and G. Gari, ibid, at p. 156.

[156] T. Tridimas and G. Gari, ibid, at p. 146.

success of privileged applicants in direct actions before the ECJ, which was 30.7%, and also with the rate of success of private parties before the CFI, which was 31.8%.[157]

These results seem to be in line with the criticism, that the standing criteria rendered direct actions for annulment inadmissible to their vast majority in respect of challenges against measures of general application, while at the same time it seems difficult to induce a preliminary reference on validity.

9. Alternative means of review

The insistence of the CJEU that the Treaty establishes a complete system of remedies and procedures designed to ensure judicial review of EU acts is based on the interrelation of direct actions for annulment under Article 263 TFEU with the plea of illegality in Article 277 TFEU on the one hand, and the preliminary reference mechanism under Article 267 TFEU on the other.

9.1. *The plea of illegality*

Under Article 277 TFEU, the plea of illegality can be invoked by an applicant against any act of general application which is at issue in other proceedings properly instituted before the EU courts, pleading its invalidity under the same grounds as under an action for annulment, as these are specified in Article 263 TFEU. It is a form of collateral review, and not an independent action, as it presupposes the proper existence of other proceedings pending before the EU courts. The obvious benefits are that there is no limitation period for lodging a plea of illegality and it is also possible

[157] T. Tridimas and G. Gari, "Winners and losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance (2001-2005)" (2010) 35 *European Law Review* 131, at p. 140 and at p.p. 172-173.

to challenge any acts, legislative or regulatory, irrespective of whether they entail implementing measures.[158]

9.2. *The preliminary reference on validity*

Likewise, the preliminary reference procedure is available in any proceedings before national courts.[159] Any private party, however distant from a measure in terms of the standing requirements of Article 263(4) TFEU, can put forward his arguments for the invalidity of that EU measure if it is relevant to the proceedings and the national court, lacking jurisdiction to rule on the validity of the EU measure itself,[160] cannot decide the case without the answer to such claims.[161] The national court has to consider such claims, and if it is convinced that they are unfounded, may dismiss them and consider the EU measure as perfectly valid. If the national court considers the claims for invalidity to be founded, it can send a reference to the CJEU on the validity, itself effectively acting as a filter.[162] The benefits are obvious, in that challenges can be indirectly made by anyone, without satisfying any standing conditions and without any time limit. Article 267 TFEU allows the review of acts of the institutions as well as bodies, offices and agencies of the EU.

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[158] See generally K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (OUP, 2014), Chapter 9, G. Bebr, "Judicial Remedy of Private Parties Against Normative Acts of the European Communities: The Role of Exception of Illegality" (1966-1967) 4 *CMLRev* 7, at p.p. 29-31, R. Schutze, *European Union Law* (Hart, 2015), at p.p. 363-364, D. Sinaniotis, "The Plea of Illegality in EC Law" (2001) 7 *EPL* 103, and M. Vogt, "Indirect judicial protection in EC law – the case of the plea of illegality" (2006) *European Law Review* 364.

[159] See generally A.H. Turk, *Judicial Review in EU Law* (Elgar, 2009), Chapter 3, A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 7, and R. Schutze, *European Union Law* (Hart, 2015), at p.p. 364-365.

[160] Case 314/85 *Foto Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199.

[161] See Case C-341/01 *Plato Plastik* [2004] ECR I-4883.

[162] See K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1, at p. 13.

The range of reviewable acts under the preliminary reference procedure is also wider than under Article 263 TFEU. In *Grimaldi*,[163] the CJEU explicitly accepted that unlike the case of a direct action for annulment which excludes recommendations,[164] the then Article 177 EEC, now Article 267 TFEU, confers jurisdiction to give a preliminary ruling on the validity and interpretation of all acts without exception.

The grounds of validity review under Article 267 TFEU are also the same as under Article 263 TFEU.[165] If there is a finding of invalidity by a preliminary ruling, the national court referring the matter is bound to treat the contested measure as invalid. However, such a ruling also constitutes sufficient reason for any other national court to regard that measure as void, and there is a further obligation on the institution that adopted the measure so held invalid to take all necessary measures to comply with such ruling.[166] A declaration of invalidity normally takes retroactive effect from the date of entry into force of the invalid measure,[167] although there have been cases where the declaration made was set to take effect as from the date of the judgment[168] or even exempted certain categories of persons from such limits on the temporal effects of invalidity.[169]

Although national courts have no competence to rule on the validity of an EU act themselves, they are nevertheless competent to issue interim measures against the

[163] Case 322/88 *Grimaldi v. Fonds de Maladies Professionnelles* [1989] ECR 4407, at para 8.
[164] Note however Case C-16/16 P *Kingdom of Belgium v. Commission*, judgment of 20/2/2018, which permits challenges under Article 263 TFEU if the measure is passed as a recommendation but is not in substance a true recommendation. See also A. Arnull, "EU Recommendations and Judicial Review – ECJ 20 February 2018, Case C-16/16P *Kingdom of Belgium v. European Commission*" (2018) 14 *European Constitutional Law Review* 609
[165] See A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 7, at p.p. 339-340, and H.C.H. Hofmann, G.C. Rowe and A.H. Turk, *Administrative Law and Policy of the European Union* (OUP, 2011), Chapter 25, at p. 871.
[166] Case 66/80 *International Chemical Corporation v. Amministrazione delle Fianze dello Stato* [1981] ECR 1191.
[167] See Case C-212/94 *FMC* [1996] ECR I-389.
[168] See Case 4/79 *Providence Agricole de la Champagne* [1980] ECR 2823.
[169] See Case C-228/92 *Roquettes Freres* [1994] ECR I-1445.

effects of such acts. In *Zuckerfabrik*,[170] the ECJ set uniform conditions for the grant of such interim relief by national courts, which must be satisfied that serious doubts exist as to the validity of contested act. In its later judgment in *IATA*,[171] the ECJ rephrased this to a condition that the national court considers the arguments as to invalidity to be well founded. The need for uniformity also drove the ECJ in *Zuckerfabrik* to point national courts to the Case-Law on interim measures in direct actions for annulment which are now found in Article 278 TFEU and Article 279 TFEU, taking into account the main requirements of urgency, irreversible damage from the immediate application of the measure, and the interest of the EU that measures should not be set aside without proper guarantees.

The known shortcomings of the preliminary reference mechanism for validity challenges against EU measures have been extensively highlighted in the Opinion of AG Jacobs in *UPA*[172] and have been the basis of the criticism that this indirect remedy is insufficient to ensure effective judicial protection.[173]

9.3. *The TWD rule*

Both these indirect avenues of validity review are subject to the procedural limitation set by the *TWD*[174] rule, rendering a measure definitive against a private party who undoubtedly had standing to bring an action for annulment to challenge it but failed to do so within the time limit. Effectively, this rule precludes an individual from raising

[170] Joined Cases 143/88 and C-92/89 *Zuckerfabrik Suderdithmarschen and Zuckerfabrik Soest v. Hauptzollamt Itzehoe and Hauptzollamt Paderborn* [1991] ECR I-415.
[171] Case C-344/04 *International Air Transport Association and European Low Fares Airline Association v. Department for Transport* [2006] ECR I-403.
[172] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677. See further below.
[173] See also A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 7.
[174] Case C-188/92 *TWD Textilwerke Deggendorf v. Germany* [1994] ECR I-833. See also M. Hoskins, "Case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Bundesrepublik Deutchland*, Judgment of 9 March 1994, [1994] ECR I-833" (1994) 31 *Common Market Law Review* 1994.

a plea of illegality for such a measure or from contesting its validity in national proceedings in order to seek a preliminary reference on this issue, but does not preclude a national court from referring the question of its validity of its motion.[175]

After extensive examination and elaboration on the Case-Law related to the *TWD* rule, R. Schwensfeier concludes that the true position is that the rule does not apply to measures of general application unless the party relying on the invalidity of a contested measure was its addressee or fulfilled the standing criteria to challenge it. And, further, the criteria for the rule's application can be reduced to a premise that a measure becomes definitive against those parties who could have been expected to have knowledge of the measure as well as their standing to challenge it.[176]

This rule is still alive under the reformed Article 263(4) TFEU,[177] and this was recorded as the fourth reality that should be taken into account in this review of the Lisbon Treaty reform of the locus standi conditions.[178] The concerns that emerged post-Lisbon were that with the potential increase in the availability of an action for annulment for regulatory acts that do not entail implementing measures, this rule would play an increasing role and act as a restriction on the use of the preliminary reference procedure, the desirability of which would be debatable.[179] As also mentioned when examining this fourth reality, the rule would also pose new challenges for national courts, which are required to consider whether an applicant could have lodged an action for annulment against the measure for which a

[175] Case C-222/04 *Ministero dell' Economia e delle Finanze v. Cassa di Risparmio di Firenze SpA* [2006] ECR I-289.
[176] R. Schwensfeier, "The *TWD* principle post-Lisbon" (2012) *ELRev* 156, at p. 175.
[177] See Case C-550/09 *E, F* [2010] ECR I-6209, para 46, as well as the Opinion of AG Sharpston in Case C-158/14 *A, B, C and D v. Minister van Buitenlandse Zaken* EU:C:2016:734, paras 58-88. See also R. Schwensfeier, "The *TWD* principle post-Lisbon" (2012) *ELRev* 156.
[178] See Chapter 1.
[179] With further reference to AG Jacobs in Case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, para 65 of his Opinion.

preliminary reference is sought. Where the criterion of individual concern is required, the reform would not have made any difference as far as national courts are concerned. A private party who is not the addressee of an act, cannot be regarded as being undoubtedly able to lodge a direct action for annulment under Article 263 TFEU, due to the difficulty in satisfying individual concern. However, where individual concern is not required, national courts will be required to recognise whether the contested measure is a regulatory act and whether it entails implementing measures in order to enforce the *TWD* rule.

As also mentioned above, these were new challenges for the national courts, and called for clear guidance and clear rules to follow in order to perform their tasks in view of the reformed locus standi conditions, something which constitutes a challenge for the EU courts. Under the revised Article 263(4) TFEU, challenges against regulatory acts not entailing implementing measures will not, in principle, be maintained before national courts, and although the anticipated opening of an action for annulment in relation to such acts is welcome in terms of effective judicial protection, the consequent restriction of the use of a national forum for an applicant as a result of the *TWD* rule does not appear so welcome.[180]

9.4. *The action for damages*

The action for damages under Articles 268 TFEU and 340(2) TFEU complements these routes of validity review. It is an independent action that can be lodged by any party that has suffered damage or loss as a result of illegal action by an EU institution or civil servants, and leads only to an award of damages. There are no standing

[180] See also R. Schwensfeier, "The *TWD* principle post-Lisbon" (2012) *ELRev* 156, at p.p. 156-157.

conditions, but under a rather restrictive test pronounced in *Lutticke*,[181] an applicant needed to show the existence of an unlawful act or conduct on the part of the defendant, actual damage suffered by the applicant, and a causal link between the illegality of the act and the damage suffered by the applicant. In *Bergaderm*,[182] the CJEU abandoned its earlier narrow approach on the first condition, that of the existence of an unlawful act, requiring a flagrant violation of a superior rule of Law for the protection of the individual,[183] and adopted a line where now liability arises where the rule of Law infringed by an act was intended to confer rights on individuals, the breach is sufficiently serious, and there is a causal link between the breach and the damage suffered by the applicant.[184]

10. The calls for reform

The calls for reform in 2002, contained in the Opinion of AG Jacobs in *UPA*[185] and the judgment of the Court of First Instance in *Jego Quere*[186], can be seen, as previously mentioned,[187] as a summary of all the main arguments comprising the criticism of the system as it then stood under Article 230 EC. These centred upon the premise that effective judicial protection dictated that applicants should have access to a court that can grant remedies capable of protecting them against the effects of invalid acts, and national courts, being unable to rule on the validity of an EU act themselves, were not the appropriate forum for such cases. In the words of AG Jacobs

[181] Case 4/69 *Lutticke v. Commission* [1971] ECR 325.
[182] Case C-352/98 P *Laboratoires Pharaceutigues Bergaderm SA and Jean-Jacques Goupil v. Commission* [2000] ECR I-5291.
[183] See also Case 5/71 *Aktien-Zuckerfabrik Schoppenstedt v. Council* [1971] ECR 975.
[184] See generally K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (OUP, 2014), Chapter 11, A. Albors-Llorens, "Judicial Protection Before the Court of Justice of the European Union" in C. Barnard and S. Peers, *European Union Law* (OUP, 2014), Chapter 11, at p.p. 282-284, and P. Craig and G. De Burca, *EU Law – Text, Cases and Materials* (OUP, 6th edition, 2015), Chapter 16.
[185] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677.
[186] Case T-177/01 *Jego Quere v. Commission* [2002] ECR II-2365.
[187] See Chapter 1.

in *UPA*[188], a preliminary reference is not a remedy available as of right, as the national court decides whether to refer and on the grounds of the reference, and as a result, it is inevitable that national courts, even at the highest level which have an obligation to refer, may err in their preliminary assessment of the grounds of invalidity put forward and refuse a reference. Lower courts would further be very reluctant to refer and inclined to leave the matter to the highest courts of their jurisdiction, something which means increased costs and delays which could also be contrary to the principle of effective judicial protection.[189] And the gravest concern was that in the case of acts of general application without the need for implementing measures at national level, an individual may not be able to reach the national courts unless he breaks the Law.

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[188] Case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, at paras 40-45 of his Opinion.

[189] See generally A. Arnull, "National Courts and the Validity of Community Acts" (1988) *European Law Review* 125, G. Tesauro, "The Effectiveness of Judicial Protection and Co-operation Between the Court of Justice and the National Courts" (1993) 13 *Yearbook of European Law* 1, at p.p. 15-16, H.G. Schermers and D.F. Waelbroeck, *Judicial Protection in the European Union* (Kluwer, 2001), at p.p. 907-914, A. Biondi, "The European Court of Justice and Certain National Procedural Limitations: Not Such a Tough Relationship" (1999) 36 *Common Market Law Review* 1271, W. Van Gerven, "Of Rights, Remedies and Procedures" (2000) *Common Market Law Review* 501, M. Claes, "Judicial Review in the European Communities: The Division of Labour Between the Court of Justice and National Courts" in R. Bakker, A. Willem Heringa and F. Stroink, *Judicial Control – Comparative Essays on Judicial Review* (Metro, 1995), at p.p. 109-131, T. Tridimas, "The ECJ and the National Courts – Dialogue, Cooperation and Instability" in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), Chapter 16, R. Barents, "The Preliminary Reference Procedure and the Rule of Law in the European Union" in R.H.M. Jansen, D.A.C. Koster and R.F.B Van Zutphen, *European Ambitions of the National Judiciary* (Kluwer, 1997), at p.p. 61-73, P. Allott, "Preliminary Rulings – Another Infant Disease" (2000) *European Law Review* 538, A. Arnull, "References to the European Court" (1990) *European Law Review* 375, C. Barnard and E. Sharpston, "The Changing Face of Article 177 References" (1997) 34 *Common Market Law Review* 1113, F.G. Jacobs, "Enforcing Community Rights and Obligations in National Courts: Striking the Balance" in J. Lonbay and A. Biondi, *Remedies for Breach of EC Law* (Wiley, 1997), Chapter 3, A. Arnull, "Judicial Architecture or Judicial Folly? The Challenge Facing the European Union" (1999) *European Law Review* 516, P.J.G. Kapteyn, "Europe's Expectation of its Judges" in R.H.M. Jansen, D.A.C. Koster and R.F.B Van Zutphen, *European Ambitions of the National Judiciary* (Kluwer, 1997), at p.p. 181-189, A. Arnull, "The Law Lords and the European Union: Swimming With the Incoming Tide" (2010) *European Law Review* 57, M. Bobek, "Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice" (2008) 45 *Common Market Law Review* 1611. See also the statistical study in C.J. Carrubba, M. Gabel and C. Hankla, "Judicial Beharior Under Political Constraints: Evidence From the European Court of Justice" (2008) 102 *American Political Science Review* 435.

In addition to these shortcomings, AG Jacobs argued that an actions for annulment is generally more appropriate for determining issues of validity than reference proceedings because the institution which adopted the impugned measure is a party to the proceedings from beginning to end and because a direct action involves a full exchange of pleadings, as opposed to a single round of observations followed by oral observations before the Court. The availability of interim relief effective in all Member States, also constitutes a major advantage for individual applicants and also serves the need for uniformity. Further, where a direct action is brought, the public is informed of the existence of the action by means of a notice published in the Official Journal of the EU and third parties may, if they are able to establish a sufficient interest, intervene in the proceedings. On the other hand, in preliminary reference proceedings interested individuals cannot submit observations unless they have intervened in the action before the national court. According to AG Jacobs, that may be difficult since, although information about reference proceedings is published in the Official Journal, individuals may not be aware of actions in the national courts at a sufficiently early stage to intervene.

He also considered that it is manifestly desirable for reasons of legal certainty that challenges to the validity of EU acts be brought as soon as possible after their adoption. While direct actions have a time limit of two months, the validity of EU measures may, in principle, be questioned before the national courts at any point in time. The strict criteria for standing for individual applicants make it necessary for such applicants to bring issues of validity before the Court via the preliminary reference procedure, and this may have the effect of reducing legal certainty.[190]

[190] Case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, at paras 45-48 of his Opinion.

Both AG Jacobs and the CFI accordingly concluded that the ECJ's interpretation of individual concern deprived private parties of any effective remedy, in the light of Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the EU,[191] and that effective judicial protection could only be ensured through direct actions for annulment. The proposal of AG Jacobs was that an applicant should be considered as individually concerned where, by reason of his particular circumstances, the measure has or is liable to have a substantial adverse effect on his interests.[192] The CFI in its turn, heavily influenced by AG Jacobs and joining the call for reinterpretation, considered that individual concern should be satisfied where a measure affects an applicant's legal position in a manner which is both definite and immediate, by restricting his rights or imposing obligations on him.[193]

The ECJ however maintained its previous interpretation, stating that by Article 230 EC (now Article 263 TFEU) and Article 241 EC (now Article 277 TFEU) on the one hand, and Article 234 EC (now Article 267 TFEU) on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions. This moved the responsibility onto the Member States to establish a system which ensures respect for the right to effective judicial protection. It was accordingly required that national courts interpret and apply national procedural rules in a way that enables private parties to bring challenges before the EU courts against the legality of any EU measure of general application.[194]

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[191] Although not legally binding at the time.
[192] Case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, para 60 of his Opinion.
[193] Case T-177/01 *Jego Quere v. Commission* [2002] ECR II-2365. See also A. Arnull, "April Shower for Jego-Quere" (2004) *European Law Review* 287.
[194] Case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, paras 40-42, and Case C-263/02 P *Commission v. Jego Quere* [2004] ECR I-3425, paras 30-31.

In other words, the ECJ expected the Member States and their national courts to make the preliminary reference route of validity challenges work in a way that ensures effective judicial protection of individuals.

Following these judgments, the issue appeared to have settled. The ECJ would not consider or accept any reinterpretation of individual concern in the absence of express Treaty amendment by the Member States.

As previously mentioned, these calls for reform were not however left unanswered. The proposals of the Working Group on Reform of the Court of Justice,[195] were incorporated into Article III-365 of the Constitutional Treaty, and then into the Lisbon Treaty, in what has become Article 263 TFEU, relaxing the locus standi conditions for regulatory acts not entailing implementing measures.

The following chapter explores issues of judicial policy, the possible justifications of the locus standi rules for actions for annulment, the criticism of the EU judicial review system and the shortcomings of the preliminary reference mechanism for validity challenges against EU measures. The key aims are to consider the possible reasons for the development of the restrictive test for individual concern and the criticism, as well as the theoretical background for the justification of locus standi rules, before proceeding to the effects of the Lisbon Treaty reform.

[195] See, in particular, Secretariat of the European Convention, Final Report of the discussion circle on the Court of Justice of 25/3/2003, CONV 636/03, and Cover Note from the Praesidium to the Convention of 12/5/2003, CONV 734/03.

CHAPTER 3: POLICY CHOICES, JUSTIFICATION AND CRITICISM OF THE EU JUDICIAL REVIEW SYSTEM

This chapter will begin with a consideration of the policy choice given to the ECJ by the Treaties and the limits within which it had to be exercised. It will then move to consider the academic reception of the various developments in relation to the locus standi rules. This will be followed by a consideration of the relevant provisions of the ECHR, the Charter of Fundamental Rights and the Rule of Law, before moving to the possible justifications of the locus standi rules. The final part refers to the benefits of a private enforcement model in the area of judicial review.

1. Judicial policy choice and its limits

The development of the *Plaumann* test for individual concern, both in terms of its formulation as well as its application, was indeed very controversial. This also seems true in relation to the test for direct concern. To begin with, the text of the Treaty itself provided very little guidance, if any at all, as to what the notions of direct and individual concern were intended to mean or how they should have been interpreted. They simply appeared in the text of Article 173 EEC in the Treaty of Rome as the standing criteria for private parties to challenge an act not addressed to them, without any further explanation or indication, apart from their dictionary definitions. And perhaps also the somehow restrictive effect their combined use obviously conveyed, by requiring a person to be both directly and individually concerned by an act.

It was also highly unclear what the background of the particular phrases actually was, since there was no available record or travaux preparatoires to evidence the

discussions that led to their adoption.[196] And they could not either be linked or parallelised to any existing national or international judicial review system or model. Not even to the standing conditions under the pre-existing European Coal and Steel Community.

In 1965, D.G. Valentine[197] notes that it is to be regretted that no record of the travaux preparatoires exists, and that only two glimpses can be obtained of the preliminary discussions in relation to the foundation and the jurisdiction of the Court of the then European Economic Community. The first comes from the Report of the French Delegation,[198] which declares that it was quite clear that the actions of the High Authority must be exercised with a respect for law, and especially for the rules set out in the Treaty, and that this forms the reason why the necessity of subjecting the High Authority to a judicial control was at once recognised. The second glimpse comes from the Expose de Motifs of the Luxembourg Government[199] which indicated that it was only despite certain hesitations that it was decided to institute a court rather than an arbitral tribunal.

On top of these also came the overall uncertainty as to what the nature of the then newly created European Economic Community actually was, or as to the extent of its activities or how these activities would actually.[200] The Treaty of Rome evidenced that it was intended to be an economic union of states, indeed unlike any other international body, but, as such a bold aspiration, it necessarily was at the time some sort of a journey to the unknown. Both as to whether it was going to succeed as such,

[196] See also H. Rasmussen, *European Court of Justice* (Gadjura, 1998), Chapter 6, at p.p. 173-176.
[197] D.G. Valentine, *The Court of Justice of the European Communities* (Stevens & Sons, 1965), Vol. 1, at p.p. 3-4.
[198] Rapport de la Delegation Francaise sur le Traite instituant la C.E.C.A. published by the French Ministry of Foreign Affairs in October 1951, as referenced by D.G. Valentine, ibid.
[199] Compte Rendu, Session ordinaire, 1951-1952, at p. 127, as referenced by D.G. Valentine, ibid.
[200] For an interesting historical overview see M. Avbelj, "Theory of the European Union" (2011) *European Law Review* 818.

but also as to its development. Likewise, the role of the Court, and within it the role of the action for annulment under Article 173 EEC, was also a journey to the unknown. These considerations offered little context in which to place the two standing criteria of direct and individual concern.

In these circumstances, the Court was forced to find a solution on its own and of its own. And it was, more or less, free to impose any solution it considered appropriate, effectively setting in accordance with its own judgment the standing criteria for an action for annulment, and consequently shaping the judicial review system of the then EEC. Arguably, any definition of direct concern and individual concern, from the most restrictive to the most liberal, was indeed possible.[201] The words "direct" and "individual" did not set any degree of required "directness" or "individuality",[202] so it was pretty much open to the Court to set any such degree it wished as the basis of these tests. Even if the contrary view could be expressed for the term "direct", whose meaning may arguably point to the non existence of intermediate or intervening acts, something which of course is still difficult to support, when it comes to the term "individual" such a contrary view or limitation seems almost untenable.

This can be rather easily illustrated by practical scenarios. If, for example, there is an EU act causing somehow an increase in the price of the most widely used computer processors, then there can be a range of private parties that can be affected by this. Local importers of those processors are affected, and taking the literal meanings of the phrases "direct concern" and "individual concern", could claim to be so affected

[201] See also H. Rasmussen, *European Court of Justice* (Gadjura, 1998), Chapter 6, at p. 174, and A. Arnull, "Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty" (1995) 32 *CMLRev* 7, at p. 13.
[202] Borrowing the words as used in E. Stein and G.J. Vining, "Citizen Access to Judicial Review of Administrative Action in a Trannational and Federal Context" (1976) 70 *American Journal of International Law* 219, at p. 240.

directly as a result of that increase, and also individually since they personally suffer a loss. Computer manufacturers could also claim that they are affected since their loss is directly flowing from the EU act, and also individually since, again, they personally suffer the loss. A business buying several computers every year cannot be excluded since their loss is still a direct result of the EU act, and also again individually since it personally suffers the loss. A consumer seeking to buy a computer that year cannot also be excluded since, again, the fact that he needs to pay more is a direct result of the EU act, and also individually since, again, he personally suffers the loss. All these private parties could argue that, but for the EU act, they would not have suffered such a loss. Or, put differently, that they cannot be excluded from the possible meanings of direct and individual concern.[203]

Limiting the persons who could satisfy those standing conditions accordingly involved a policy choice to be made by the Court, since this policy choice had not been made by the drafters of the Treaties. And this policy choice had to be exercised by means of the development of legal tests for the criteria of direct and individual concern. Unrestrained as this choice may have been by the text of the Treaties, it had to be exercised within certain limits.

The widest and most liberal definition would of course have been unwelcome, as this would have led to a full dilution of the standing rules. It is necessary in any judicial review system that there is some filtering of legal challenges against legislative and administrative acts, preventing the possibility of disruption of vital functions of the

[203] See also the example of John Smith, the turnip grower, in G.F. Mancini, Democracy and Constitutionalism in the European Union – Collected Essays (Hart Publishing, 2000), Chapter 3, at p. 47, as well as in G.F. Mancini and D.T. Keeling, "Democracy and the European Court of Justice" (1994) 57 *Modern Law Review* 175, at p. 188, and the example of car emission standards in K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1, at p. 20.

state or governmental policy implementation by judicial proceedings.[204] Accordingly, this could be seen as the first restraint or limit, advocating against the most liberal tests.

At the opposite end, the choice had to be limited by individual rights, the need for accountability of decision makers and the need to ensure compliance with the Rule of Law. The set of individual rights restraining this choice were, on the one hand, the rights of individuals to access to justice and an effective remedy, which were widely recognised by the Member States and also contained in Articles 6 and 13 of the ECHR, and on the other hand, the right of private parties to effective judicial protection which was one of the general principles of EU Law. The relevant aspect of the Rule of Law that again restrained this choice was the need to ensure that all acts of the institutions are subjected to judicial review. Closely related to all these, was the need to ensure legal accountability of the institutions and other decision making bodies within the EU.[205]

The definitions and tests for direct and individual concern had to be placed somewhere within this context. But still the policy choice remained an extremely difficult one as the ECJ was, in effect, building a judicial review system from scratch for a union of states that was still in its infancy.[206] And also at a time when even the above rights and principles had not been so developed in its Case-Law or even the Case-Law of the European Court of Human Rights, to which the European Economic

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[204] See also L. Pech, ""A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principe of EU Law" (2010) 6 *European Constitutional Law Review* 359, at p. 387. See further below.

[205] See generally A. Benz, C. Harlow and Y. Papadopoulos, "Introduction" (2007) 13 *European Law Journal* 441, and A. Benz, "Accountable Multilevel Governance by the Open Method of Coordination?" (2007) *European Law Journal* 505.

[206] For historical accounts on the development of the European Union, see D. McKay, *Federalism and European Union* (OUP, 1999), Chapters 2, 3 and 4, and G. Slynn, *Introducing a European Legal Order* (Stevens and Sweet & Maxwell, 1992), Chapter 1.

Community was not anyway a contracting party. Even today, the limits set by those rights and principles and the applications of those rights and principles are not entirely clear, especially in the context of restricting some right to take legal proceedings, such as is the function of standing rules for judicial review proceedings.

A further problem is created by a somehow natural realisation that it seems unrealistic to say that one general test or set of tests could always serve the purpose and ensure respect of those rights and principles or at least the same level of respect. Respect for those rights and principles necessarily demands a high degree of particularity, which transposes itself into a need to examine each case on its own merits and its own circumstances. A general test alone may have the result that in the context of one area of EU activity those rights may appear to have been respected, whereas not in another. Likewise, the European Court of Human Rights does not usually make general findings for the adequacy of compliance with the ECHR in a contracting state, but only examines compliance on a case by case basis.

The above considerations indeed seem to be reflected in the Case-Law of the CJEU. General tests were adopted for direct and individual concern, but their applications, especially the applications of the *Plaumann* test for individual concern, differed in some areas, such as competition, anti-dumping and state aid proceedings, or in even more specific cases such as *Codorniu* and *Extramet*. Both the formulation of the tests and the applications of the tests generally but also in particular areas, were policy choices of the CJEU. The CJEU of course never admitted that such choices were its own, with the ECJ firmly maintaining in *UPA*, and indeed throughout the Case-Law, that the judicial review system was set by the Treaties.

The fact that these choices were not expressly made by the drafters of the Treaties is not something uncommon, especially in the context of international agreements. The Treaties sought to establish, in the unique circumstances of the aftermath of the Second World War, a unique union of states. In the realities surrounding the conclusion of international agreements, the struggle for accord between the contracting states necessarily leads to ambiguities in the text, often even termed as "productive ambiguities". Such ambiguities can naturally be expected in an international agreement such as the Treaties, surrendering a part of state sovereignty and competences to an international body, such as the EEC, and submitting the state to the authority of an international court, as was the ECJ. The unavailability of travaux preparatoires leaves much to speculation as to the actual reasons why Article 173 EEC was so formulated, and as to whether the ambiguities surrounding the definitions of the standing criteria were the result of a deliberate decision of the founding states to leave this task to the ECJ, or just a matter that did not occupy a central role in the negotiation process. The first possibility would not anyway be strange at all, since the development of tests for criteria or specific terms used in legislation or set by legislation is something commonly left to the judiciary, especially in Common-Law jurisdictions.

The choice of the ECJ for the test for individual concern was undeniably a very restrictive one, leaving actions for annulment available only in exceptional circumstances, as discussed previously. This led A. Arnull to suggest that in direct actions the European Courts sometimes seem content to collude with other institutions to evade the requirements laid down by the Treaty and deny applicants the right to an effective remedy by showing reluctance in engaging directly in effective judicial

review.[207] In so shaping the judicial review system of the EU, the ECJ obviously considered as a safeguard the availability of the preliminary reference route of challenging EU acts, and the fact that this means of challenge was common in several Member States, and indeed, many states around the world.[208] The availability of the plea of illegality has also been considered as a safeguard by the ECJ, as was, although perhaps to a lesser degree, the action for damages. The ECJ appears to consider the EU judicial review system holistically, with the consequence that the interpretation of each form of action is not interpreted on its own right, but in light of the judicial review system as a whole.[209]

The preliminary reference route is not of course completely ineffective as a means of challenging validity of EU measures. It has the benefits of being a procedure that integrates into national proceedings, which are initiated in the applicant's Member State and therefore may be labelled a "familiar" legal system.[210] There are also further benefits such as no time limits and no locus standi requirements to satisfy, apart from national standing rules. The procedure may also lead to the invalidity of the contested EU measure inter partes, but such a ruling constitutes sufficient reason for any national court to regard the measure as invalid.

In theory, and in the view of the CJEU, the preliminary reference procedure may seem sufficient to mitigate the effects of the restrictive locus standi conditions in Article 263 TFEU, which result in limited availability of a direct action for annulment.

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[207] A. Arnull, "EU Recommendations and Judicial Review – ECJ 20 February 2018, Case C-16/16P *Kingdom of Belgium v. European Commission*" (2018) 14 *European Constitutional Law Review* 609, at p. 621.

[208] See Study on Individual Access to Constitutional Justice of the European Commission for Democracy Through Law of the Council of Europe ("Venice Commission"), CDL-AD(2010)039rev.

[209] See for example Case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677 and Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625.

[210] See also C. Harding, "The Impact of Article 177 of the EEC Treaty on the Treaty on the Review of Community Action" (1981) 1 *YEL* 93, at p. 96.

Theoretically, national courts are anyway considered as the ordinary courts of EU Law in other areas of remedies for breach of EU Law so why should they not be so considered for validity challenges as well. And in the reasoning of the CJEU, Member States can and should create remedies capable of protecting the interests of private parties and ensure that they are able to put their full arguments against validity of EU measures before national courts. The reality however is that this procedure is tormented with the problems highlighted by AG Jacobs, such as increased delays, costs, and possible errors by national courts in their assessment of the applicant's claims for invalidity. It is also not a remedy available as of right because it is the national court, and not the applicant, that decides what questions to refer and the ECJ answers only those.[211]

In addition to these inherent shortcomings, there is also the potential gap that national legal systems may not provide for challenges against certain types of measures which are taken at national level as a result of an EU measure. In such cases, the ECJ's answer in *UPA* was that it was up to the Member States to establish rules and procedures rendering such acts challengeable before national courts. Again, in theory, this may seem sufficient. In practice, however, this cannot be but another hurdle for private parties who may have to convince national judges to hear their claim, based only on the fact that they wish to contest an EU measure.[212] In this light, it cannot be excluded that the effectiveness of the preliminary reference mechanism for validity challenges, and consequently the level of judicial protection, may indeed differ from Member State to Member State. There is also the danger that there could be such

[211] Case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677, paras 40-48 of his Opinion.
[212] See also K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1.

different levels of judicial protection due to difference in competence of national judges, which can again vary from Member State to Member State.

It also seems difficult to find a compelling reason for choosing to have national judges reviewing claims for invalidity of EU measures, even if such assessment is only preliminary. The obvious purpose is to dismiss unmeritorious claims and avoid overburdening the CJEU. However, it seems questionable why this cannot be done within the procedure of an action for annulment.[213] Many systems hold preliminary reviews of cases, aimed at dismissing obviously unmeritorious claims before they reach a hearing, at a party's request or of their own motion. A similar procedure could be employed in the action for annulment. It may be argued that even the existing procedure for hearing objections of inadmissibility in actions for annulment[214] could be seen as not less burdening for the GC's resources than a procedure under which the GC considers whether to dismiss unmeritorious claims.

In any event, it is submitted that the possible lack of resources of the General Court to fulfil this task of filtering unmeritorious claims, should not be acceptable as an adequate justification for reductions in judicial protection or in the protection of individual rights, as they occur in the case of the EU judicial review system. And this should be so, in so much the same way as lack of resources does not constitute a justification for delays in national proceedings for the purposes of the right to a fair trial under Article 6 ECHR for example.

It can further be argued that national courts are not in the best position to judge such issues of validity, even preliminarily. There are differences between judging whether

[213] See also M. Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jego-Quere et Cie SA v. Commission* and *Union de Pequenos Agricultores v. Council*" (2003) 66 *MLR* 124, at p.p. 134-135.
[214] See Article 130 of the Rules of Procedure of the General Court.

an interpretation of an EU measure by the ECJ is necessary, on the one hand, and judging validity, on the other. The need for interpretation appears in a specific scenario, relevant to the pleadings and the procedure before the national court. In such cases, the question is naturally more specific. The judge acquires an understanding of what is needed to be interpreted, which is a task the judge would have done on his own had that been a national measure. The judge may even have an opinion as to the plausible interpretation, and is naturally in an excellent position to formulate questions to the ECJ on these matters.[215]

Considering the validity of an EU measure and drafting relevant questions are arguably wholly different issues. The judge will need to consider grounds of invalidity, not related to the case before him. This seems much different than considering acte clair, act eclaire and relevance to the proceedings in considering preliminary reference requests in the context of specific cases where interpretation is required. It requires a high degree of expertise on the grounds of invalidity of EU measures and the related Case-Law of the CJEU in order to consider such claims and formulate questions. And it can further be argued that the higher the degree of expertise needed, the higher becomes the risk of reluctance of national judges to send a request for a preliminary reference. Risk of criticism from higher courts or the CJEU are also factors that should be taken into account and naturally reduce willingness of a first instance national judge to send a reference, while increasing this judge's preference to dismiss a request or leave the matter to a higher court. This is not of course to say that errors could not go the opposite way, and there may well be cases where references are made where they should not have been. However, in such cases there is less at stake, in the sense that such errors do not endanger effective

[215] See also the Opinion of AG Jacobs in *UPA*, at para 41.

judicial protection. The risk in refusals to refer is much greater in terms of effective judicial protection and this needs to be avoided. And the problems continue, since failure to request a preliminary reference can only be remedied by appeals which mean further delays, while, as AG Jacobs recognised, even higher courts may err in their assessment and refuse to send a reference or even reformulate the questions and limit the applicant's claims.[216]

The European Court of Human Rights has demanded that national judges should give reasons for their refusals to request preliminary rulings from the ECJ.[217] While of course this is a positive step, promoting judicial protection, it is rather questionable whether it offers a solution to any of the above concerns. It enables review by higher courts and the European Court of Human Rights, possibly even the CJEU, especially if the *ASJP*[218] ruling is extended to all aspects of effective judicial protection, but adds very little in respect of the other shortcomings of the procedure.

All these are concerns that materialise in practice and are not obvious in the abstract. Even if the benefits of the preliminary reference procedure are real, it is very questionable whether they balance all these complications, costs and delays inherent in its use, compared to a direct action for annulment.

[216] See the Opinion of AG Jacobs in *UPA*, at para 42. See also for example Case C-416/17 *Commission v. France* EU:C:2018:811, at paras 105-114 of the judgment.
[217] *Schweighofer v. Austria*, No. 35673/97, judgment of 24/8/1999, *Matheis v. Germany*, No. 73711/01, 1/2/2005, *Lutz John v. Germany*, No. 15073/03, 13/2/2007, *Ullens de Schooten and Rezabek v. Belgium*, No. 3989/07, 20/9/2011. See J. Krommendijk, ""Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer" (2017) *European Law Review* 46, and C. Grabenwarter, *European Convention on Human Rights – Commentary* (C.H. Beck, Hart and Nomos, 2014), at p. 133.
[218] Case C-64/16 *Associacao Sindical dos Juizes Portugueses* EU:C:2018:117.

2. The reception of the interpretation of the locus standi rules

A historical search through the earlier commentaries proves highly revealing in terms of expectations and the reception of the various developments related to the locus standi rules for actions for annulment, and the consequent need to use national courts and the preliminary reference mechanism for validity challenges against EU measures.

2.1. *The world before Plaumann*

The unprecedented nature of the newly founded European Economic Community was readily recognised in an early article, before *Plaumann* was decided, on the judicial review powers of the ECJ by D.G. Valentine,[219] acknowledging that this was the first time that an international court is acting as a Conseil d'Etat, hearing actions for annulment lodged by States, the Council of Ministers but also enterprises and associations of individuals.[220] There is however, little mention of the then Article 173 EEC and no coverage of the standing criteria therein, the focus at the time being more on the European Coal and Steel Community than on the European Economic Community.

Expectations that the admissibility conditions for private parties would be very restrictive can be traced even in the world before *Plaumann*. G. Bebr readily considered in 1962 that private parties may appeal regulations but only under almost impossible conditions, and their strong quasi-legislative nature was, at least partly, an explanation for this extremely restricted appeal.[221] He also readily considered that the nature and type of an act determines the extent of the right of appeal of a person and

[219] D.G. Valentine, "The Jurisdiction of the Court of Justice of the European Communities to Annul Executive Action" (1960) 36 *Brit YB Intl L* 174.
[220] D.G. Valentine, ibid, at p. 175.
[221] G. Bebr, *Judicial Control of the European Communities* (Stevens & Sons, 1962), at p. 36.

the extent of the judicial protection individuals are to enjoy, but the acts of the Community have their own original character, so their nature can only be determined by their material content.[222] Even at this early stage, a distinction is made between Council regulations which were expected to bear an unmistakeable imprint of a quasi-legislative character, and those of the Commission, which resembled rather administrative regulations, and the form of an act already appeared irrelevant as to what could be subject to appeal.[223] It is however realised that the broader scope of acts subject to appeal for annulment may easily deceive, in that only the privileged applicants actually benefit from this, leading to weak spots in the judicial protection of private parties.[224] The point is made that it would be unrealistic if all private parties could exercise the right to appeal without any restrictions, as this would paralyse an effective administration. A reasonable balance must be struck between the higher Community interests and the protection of the interests of private parties, but the Treaties were thought as somewhat vague as to what the admissibility conditions may be.[225] However, even at the time when the admissibility tests were yet to be developed, the author does spot that the protection of individuals against general acts and regulations might well have to be reconsidered, and argues that the ECJ should develop, by its flexible judicial policy, a protection which would come close to a constitutional complaint. He regarded this as contingent on the development of certain fundamental rights at Community level, as only violation of such rights would fully justify a constitutional complaint against quasi-legislative acts beyond the protection already provided for by the Treaties.[226]

[222] G. Bebr, ibid, Chapter 4, at p. 37.
[223] G. Bebr, ibid, Chapter 4, at p.p. 52-54.
[224] G. Bebr, ibid, Chapter 4, at p.p. 55-56.
[225] G. Bebr, ibid, Chapter 4, at p.p. 68-72.
[226] G. Bebr, ibid, Chapter 11, at p. 243.

Some elements of the *Plaumann* test were already evident under the very early jurisprudence developed under the differently worded Article 33 of the Treaty establishing the European Coal and Steel Community. Writing in 1960, A. Wolters observed that the general or individual character of a decision does not depend on its form but on its substance, and that it does not matter whether that decision has particular effects on certain enterprises or on a certain number of enterprises grouped into one association, such a matter being incapable of transforming a general act into an individual decision. An individual decision is one that applies directly to certain enterprises and which is based on a special and concrete situation of those enterprises, even if this decision formally has another recipient.[227] Further, the author observed that the right of action under the ECSC was dependent on a need to show a special and individual interest, something feared to create uncertainty within the field of admissibility of annulment actions.[228]

It is interesting to note from the above, that a restrictive interpretation of the locus standi criteria for actions for annulment was rather expected from the very early years of the then EEC.

2.2. *The reception of Plaumann*

The first commentary on *Plaumann* seems to be the one by L. Goffin,[229] published in the very first volume of the Common Market Law Review journal. Ironically enough, the case that was destined to be the benchmark and landmark reference for the interpretation of the criterion of individual concern, is only analysed with respect to its aspects relating to non contractual liability claims under what are now Articles 268

[227] A. Wolters, "Les Recours en Annulation Devant la Cour de Justice des Communautes Europeennes" (1960) XXXVII *Revue de Droit International et de Droit Compare* 11, at p.p. 176-177.
[228] A. Wolters, ibid, at p.p. 178-179.
[229] L. Goffin (1963-1964) 1 *CMLRev* 353.

TFEU and 340 TFEU.[230] Only in one of the introductory paragraphs does it comment briefly that the Court has made an effort to limit the scope of the "regulation", which may not be attacked by private parties, to its proper field, namely acts of a legislative character which are applicable to a group of persons defined generally and in the abstract, with a further assertion that the conclusions that base the finding that the applicants were not individually concerned are "clearly enumerated" in the text of the judgment.[231] Important points are however made, although in the context of non contractual liability, as to the possible explanations of the restrictive approach of the ECJ, corroborating what has been said above, that this restrictive approach is driven by the need to allow the process of the building of the European Economic Community, the fact that the spirit of the Treaty imposed sacrifices in order to achieve this goal, and consequently some of the ECJ's inspirations may be heavily drawn from the needs of the Community.[232]

A footnote in an article by M. Lagrange[233] states that it is a pity that the drafters of the Treaty did not show the same wisdom in respect of applications for annulment by private parties, unlike in the case of non contractual liability where the drafters of the Treaty were wise enough to leave the conditions of such actions to the ECJ with a simple general conferral of jurisdiction. Such an approach, in the author's view would have been able to prevent those difficulties and injustices to which the application of those provisions has given rise, considering that those fields are by their nature, more suited to the judge than to the legislator. The contrary view was respectfully submitted above, as the interpretation of the admissibility criteria was quite open to the ECJ since all concepts were openly defined in Article 173 EEC and accordingly, the tests

[230] Then Article 215 EEC.
[231] L. Goffin (1963-1964) 1 *CMLRev* 353, at p. 354.
[232] L. Goffin, ibid, at p. 358.
[233] M. Lagrange, "The Non-Contractual Liability of the Community in the E.C.S.C. and in the E.E.C." (1965-1966) 3 *CMLRev* 10, at p. 11.

as developed, especially that for individual concern, were far from the only possible interpretation.

Evidence of early calls for reform is given by J. Linthorst Homan who refers to a colloquium organised by the University of Liege in 1965.[234] This reports that some speakers considered that all private persons should have the right to appeal EEC regulations, on the grounds that under some national legal systems private citizens can contest government administrative instruments, whereas others contended that the parallel was inaccurate, since EEC regulations have the force not of government orders but of Acts of Parliament, against which the individual cannot appeal.

Two other early commentaries, interestingly, and rather surprisingly, reveal pretty much what recent analyses and calls for reform of the locus standi criteria put forward.

The first is a review of the then known interpretation of the admissibility criteria by G. Raskin and R.M. Chevallier.[235] It notes that *Producteurs de Fruits* did not provide any helpful guidance as to the test for individual concern, the first "precise" guidance on which coming from *Plaumann*, the formula of which was repeated in all subsequent cases.[236] It is also noted that some commentators have, frequently orally, highlighted the irony of the statements of the ECJ in *Plaumann*, that the letter and grammatical meaning of Article 173(2) EEC justified the broadest interpretation, that the Treaty provisions concerning the right to bring an action cannot be interpreted restrictively, and that in the silence of the Treaty, such a limitation cannot be presumed. The first question that is identified is whether the ECJ could, with a bolder interpretation, render Article 173(2) EEC less restrictive than actually intended by the

[234] J. Linthorst Homan, "The Merger of the European Communities" (1965-1966) 3 *CMLRev* 397, at p. 414.
[235] G. Rasquin & R.M. Chevallier, "L' article 173, alinea 2 du Traite C.E.E." (1966) *Revue Trimestrielle de Droit Europeen* 31.
[236] G. Rasquin & R.M. Chevallier, ibid, at p.p. 38-40.

authors of the Treaties. But a simple reading of the text seemed to the authors to impose a negative answer. It also seemed difficult to the authors for a judge to distinguish between types of acts, a matter which was not in any case provided for in the Treaty. The second question is whether the ECJ could allow an action for annulment based on a simple interest alone in view of the text of the Treaty. But in their view, the answer pointed to the negative since the Treaty provides the qualifications of direct and individual concern. The third question is whether the Court could adopt a wider interpretation of the criteria in order to justify the need to avoid a denial of justice. It is argued that the administration may act in what way it likes and be immune from action for annulment or for damages. But the authors ask whether this is actually a fault of the ECJ, and why are not the authors of the Treaty equally to blame. It is highlighted that the ECJ regretted in *Producteurs de Fruits* being bound such a restrictive Treaty text. And has pointed out the alternative means available to unhappy applicants whose actions it had to declare inadmissible. Overall, the authors cannot attribute to the ECJ a process of intention and cannot concur with the criticism of a lack of boldness in the interpretation. They attribute the problem to the authors of the Treaty and call that the then Article 173(2) EEC is amended at the earliest convenience. They content that the ECJ had very well understood the intention of the authors of the Treaty, expressed regret about it, but had to follow it. Further, they observe that in all of the then Member States, applicants do need to satisfy certain interest criteria in order to bring challenges, so the question is asked whether citizens really expect to have a right of action against Community acts that they do not have in their national legal order. In effect, they note, the refusal of challenges by private parties is a characteristic of International Law. The existence of Community Law and the Community itself are the same thing. They further argue that

policies can battle over words and a revision of Article 173(2) EEC is indispensable. When the right to an action becomes open to private parties within reasonable limits, then, it is argued, there can be confidence in the ECJ for its application, which has already shown its wisdom.[237]

These realisations at such early stage are striking. Especially bearing in mind that at the time of writing in 1966, there were very limited examples of the application of the *Plaumann* test, a matter so evident that even a practitioner text then available only referred to the text of the *Plaumann* test, which was simply reproduced verbatim in other judgments.[238] Yet these realisations reflect, more or less, the basis of the criticism as developed through the decades that followed.

The second such commentary comes from D. Ehle and is another of the early attempts at a more detailed and comprehensive analysis of the legal protection afforded to private parties.[239] It starts with an assumption that the authors of the Treaty have deliberately limited individual actions for annulment, fearing that the ECJ would be overloaded by actions, especially in the initial stage of integration, something which would also impair the work of the Commission, but asserts that this limitation had already proved to be a misjudgment. It then provides an early sketch of the categories of admissibility, based on the judgments available at the time, which does in fact roughly correspond to the contemporary position.[240] The first category stated is that actions against Regulations of the Council or the Commission have been repeatedly declared inadmissible as they cannot possibly individually concern private parties. This was not considered to be unbearable, at least in comparison to national systems

[237] G. Rasquin & R.M. Chevallier, ibid, at p.p. 41-46.
[238] See E.H. Wall, *The Court of Justice of the European Community* (Butterworths, 1966), Chapter 2, at p.p. 83-89.
[239] D. Ehle, "The Legal Protection of Enterprises of the Common Market within the Jurisdiction of the European Court of Justice and of National Courts" (1968-1969) 6 *CMLRev* 193.
[240] D. Ehle, ibid, at p.p. 194-197.

of protection, in cases where Regulations demanded individual acts which could themselves be contestable, since an incidental challenge via a preliminary reference or a plea of illegality was possible. It did however recognise that a sensitive loophole existed in those cases where the Regulation did not need, legally or by administrative practice, an executing act for its application, citing *Producteurs de Fruits*[241] as such an acute example. The second category so recognised, was that decisions addressed to Member States were also fundamentally inadmissible under the authority of *Plaumann* itself, whose requirements had, at the time, only been affirmed in one case, *Toepfer*.[242] The commentary does note that the criteria of definition were, then, only barely outlined, and this affected such claims with a considerable risk that procedural requirements will not be satisfied, something equally true in later years, and to some degree even today. The third category stated was that of decisions addressed to natural or legal persons, which at the time were mainly issued in cartel proceedings, but equal protection in other fields where the Commission exercised its proper and administrative powers was also contemplated. The protection afforded in this category was widely elaborated, not least because of the already wide interpretation of the notion of reviewable act. And in view of this categorisation and routes of challenges against acts of the institutions, the author concludes that the legal system of Article 173 EEC and the experience in its application in practice, put in place a satisfactory system of legal protection against acts addressed to private persons.[243]

It then deals with challenges via preliminary references from national courts, as a means to challenge, as the author states, legislative acts, these being regulations, and other legal acts, such as directives or decisions addressed to Member States. It

[241] Joined Cases 16/62 and 17/62 *Confederation Nationale des Producteurs de Fruits et Legumes and others v. Council* [1962] ECR 471.
[242] Cases 106/63 and 107/63 *Toepfer v. Commission* [1965] ECR 405.
[243] D. Ehle, ibid, at p. 197.

concludes that the experience gained in this type of challenge was again satisfactory as such, not least because national courts quickly realised that direct legal protection of the individual before the ECJ does not correspond with the burden he has to bear as a result of integration, and made extensive use of their right to refer. It can respectfully be argued however that this seems of course to be a rather exaggerated conclusion, or at least one not corresponding to later experience. It does however further realise some of the inherent problems of the procedure, which flow naturally from the fact that the preliminary reference procedure is nothing more than a judicial dialogue, with the position of the individual remaining weak. Weak in the sense that he cannot force a reference or exercise a determining influence on the questions prepared for submission, change or complete them, but only to plead in the procedure before the ECJ.[244] The author thought this situation could be improved by the strengthening of the role of the individual in the process of the preliminary reference, and ultimately considered this method not sufficient in view of the need for legal protection of the individual as it requires improvement.[245] The author put forward two proposals.[246] The first is that where the challenge is against a regulation or a decision addressed to a Member State, the individual ought to be allowed a direct challenge, without the need for the preliminary reference detour. The second is that where the challenge concerns a directive which requires execution by the Member States, legal unity is ensured by the preliminary reference, but the individual must also have his own right of application and be able to force a preliminary reference. This demonstrates an early realisation of the problems of the system.

[244] For an early more critical view on preliminary reference validity challenges based on mainly the same arguments, see also G. Bebr, "Judicial Remedy of Private Parties Against Normative Acts of the European Communities: The Role of Exception of Illegality" (1966-1967) 4 *CMLRev* 7, at p.p. 29-31.
[245] D. Ehle, ibid, at p.p. 199-203.
[246] D. Ehle, ibid, at p.p. 203-204.

It is striking to say the least that most of the contemporary criticism against the system of judicial review remains similar to the criticism which surfaced by 1967.[247] With little exaggeration, the majority of the elements of the Opinion of AG Jacobs in *UPA* can be found in the aforementioned review by D. Ehle.

Another analysis of the standing criteria comes from A. Barav[248] in 1974. At the time of writing, regulations as such were still thought to be immune from attack, and the conclusion from the then available Case-Law, was that two considerations prevented private parties from establishing individual concern when a decision was not addressed to them, belonging to a category which could be defined in an abstract manner and the general scope of the provision under attack. Until then, it is recorded that only three cases had succeeded under individual concern, *Toepfer*, *International Fruit* and *Bock*, and in all three the element of retroactivity was the decisive factor. But a further point is made, that another element was taken into consideration, in that the Court wished to sanction a certain detournement de pouvoir.[249] And at the end, a question that is still relevant today is asked, whether the immunity of regulations is justified in cases of implementing regulations as distinct from basic regulations.[250]

Some very important issues are raised by C. Harding[251] in 1979. He finds the amount of time spent in arguing the admissibility of direct actions not surprising, certainly in those cases where a successful action would entail a review and recasting of measures of economic policy, which might lead to uncertainty or confusion amongst government agencies and individual traders. In these cases, he suggests that it is

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[247] See also J. Schwarze, "The Legal Protection of the Individual against Regulations in European Union Law" (2004) 10(2) *EPL* 285, at p. 287.
[248] A. Barav, "Direct and Individual Concern: An Almost Insurmountable Barrier to the Admissibility of Individual Appeal to the EEC Court" (1974) 11 *CMLRev* 191.
[249] A. Barav, ibid, at p.p. 196-197.
[250] A. Barav, ibid, at p. 198.
[251] C. Harding, "The Choice of Court Problem in Cases of Non-Contractual Liability Under E.E.C. Law" (1979) 16 *CMLRev* 389. This article primarily discusses the problems of the action for damages.

possible to detect an underlying principle, which informs many modern systems, that often the interests of individuals must give way to what is perceived as the more general good, and this may be seen as a necessary concomitant of state intervention in economic affairs.[252] The limited standing for direct actions has made, as the author suggests, the preliminary reference procedure fairly common, citing 11 references on validity in 1977 compared to only 2 admissible actions for annulment. He recognises on the other hand, still a good 23 years before *UPA*, some of the shortcomings of the preliminary reference route for validity challenges. He highlights the costs and delays caused by the need to go through a series of appeals and the procedure before the ECJ, the fact that it is for the national court, and not the claimant, to make such a reference, and that there are fears that the national court will refuse to send references.[253]

The same author, C. Harding, continues his elaboration on the use of the preliminary reference for validity challenges in a very interesting and thorough article in 1981.[254] He starts by recognising the restrictive interpretation of the standing criteria for direct actions, noting that this may at least be seen as consistent with a tradition in Western European systems under which it is generally difficult for individuals to challenge legislative action, this tradition finding its inspiration both in the potentially disruptive consequences of such a challenge and in the fact that legislation in these countries is usually democratically conceived and private challenge may then appear as politically objectionable, although it is questionable whether these are equally valid considerations in a Community context. He does then emphasise that the Community does not however leave individuals wholly without legal protection, due to the

[252] C. Harding, ibid, at p. 389.
[253] C. Harding, ibid, at p. 391.
[254] C. Harding, "The Impact of Article 177 of the EEC Treaty on the Treaty on the Review of Community Action" (1981) 1 *YEL* 93.

availability of the plea of illegality and the preliminary reference.[255] In fact, he does even assert that it would be misleading to picture the private plaintiff as a disinterested legal watchdog, alert to identify as soon as possible illegal Community activity, and instead the individual's interest arises when he is actually affected by the measure, so, in this light, the preliminary reference procedure appears as an equally, if not more, natural avenue of review than a direct action.[256]

Assessing the impact of preliminary references and any possible disruptive effects on the implementation of Community policies, the same author finds that the successful invalidity cases via preliminary references as at the time of writing were no more than 20. The number of measures annulled in these cases is rather more than just 20, but this remains a tiny proportion of the Community's legislative output. He then comments that as is the case with direct actions and actions for damages, the chances of success are relatively small, but this is not surprising bearing in mind that many of the measures in question involve discretionary powers or necessarily prompt reactions to crises of unforeseen developments. The annulment of a measure in preliminary reference proceedings may have more or less disruptive results depending on how long the measure has been in force and the extent of its application. It is difficult to quantify or compare the costs of the results of a particular system of judicial review, for instance damage to traders on the one hand and administrative disruption on the other, but it is something that is necessary.[257] He elaborates further on the shortcomings of preliminary reference challenges, stating that it would be misleading to convey the impression that individuals have automatic access to such a reference, as this is a matter for the national court, although at the time of writing there was little evidence that national courts were unwilling to send references on validity. He asserts

[255] C. Harding, ibid, at p.p. 93-94.
[256] C. Harding, ibid, at p. 96.
[257] C. Harding, ibid, at p.p. 99-100.

that the overall conclusion may be that an individual is likely to have little difficulty in practice in getting the matter before the ECJ, but remains nonetheless in a formally subsidiary position, so it cannot be said that a direct action is redundant since this is in many respects a superior procedure for his purposes, when available.[258]

The contribution of C. Harding continues with another stimulating review in 1982.[259] This was also written before the judgment in *Codorniu* and the author repeats the then prevailing view that private parties could only challenge the legality of decisions and not of regulations, except where the contested regulation is in substance a decision, which was the crucial question. The difference between regulations and decisions was, according to the author, more conveniently put, that the regulation may be said to be "legislative" or "normative" in character, while the particular application of the decision connotes the idea of an administrative act. He notes that it is this legislative character of regulations that justifies their exclusion from review. In the first place, an individual is just one of an indeterminate number of persons affected by a regulation, so that his interest in the annulment would be proportionately small and uncertain. Secondly, the annulment of a legislative act is potentially more disruptive of established interests so that a private party's proportionately small interest in a general measure does not justify his being able to set in motion the process of annulment. The author notes that on the whole, the distinction between legislative and non legislative acts does not loom so large in Member State legal systems, but since the distinction is fundamental to the Community judicial review system, the ECJ had to develop more exact distinguishing criteria to deal with borderline cases,[260] and the abstract terminology test was developed. The criteria initially developed for direct actions are then described, under which the plaintiff first needs to show that the measure although

[258] C. Harding, ibid, at p.p. 100-101.
[259] C. Harding, "The Review of EEC Regulations and Decisions" (1982) 19(2) *CMLRev* 311.
[260] C. Harding, ibid, at p.p. 311-313.

in the form of a regulation is in substance a decision, and secondly, that it is of direct and individual concern to him.[261] He then notes that the ECJ's Case-Law has been consistent to the extent that, in those cases where individuals were allowed to challenge regulations, the measures in question were clearly applicable to a determinate number of persons, so it would seem that the idea of individual concern plays a crucial role in the process of distinguishing regulations and decisions. The author then finds that it has sometimes been asserted in litigation that for an individual to challenge a regulation by a direct action, he need not show both that the measure is a decision and that it is of direct and individual concern to him, but only direct and individual concern, since evidence of individual concern implies that the measure is a decision, but he realises that this argument had not at the time, found acceptance, as this article was written before *Codorniu*. He raises the question whether "legislative nature" on the one hand, and "individual concern" on the other are no more than two sides of the same coin, so that the presence of one entails the absence of the other, but does not find support for this either in the Case-Law available at the time.[262] He further observes that very generally the concept of individual concern functions to identify a special interest in a measure, which is clearly distinct from the general interest in that act, and the presence of this special interest at the same time reflects the juridical character of the measure. He then repeats that instances where individual concern was satisfied up to the time of writing involved an element of retroactivity.[263] He concludes that the Case-Law both as regards the distinction between decisions and regulations and the meaning of direct and individual concern, suggests that, in practice, direct actions by a private party are admissible only if there has been a species of misuse of powers, in that the Community should not have acted by means

[261] C. Harding, ibid, at p. 313.
[262] C. Harding, ibid, at p.p. 315-319.
[263] C. Harding, ibid, at p.p. 319-320.

of, for instance, a regulation or a decision addressed to a Member State, but ought to have directly addressed itself to a determinate group of individuals.[264]

2.3. *The reception of Codorniu*

As previously mentioned, the Court accepted for the first time in *Codorniu*[265] that even where the contested provision is of a legislative nature, that does not prevent it from being of individual concern to some private parties, so dispensing with the need to satisfy the abstract terminology test. Effectively neutralising the text of Article 173 EEC as far as it required a private applicant to show that the contested measure is in effect a decision although in the form of a regulation.

In one of the first commentaries by D. Waelbroeck and D. Fosselard,[266] this was described as an unexpected opening for private parties wishing to challenge true regulations, as it surely lifted one of the main hurdles obstructing the way of private applicants. The judgment was criticised for its bare reasoning, and it seemed too soon for these authors to decide whether this announced a radical change on locus standi of private applicants, although it certainly did raise the hopes.[267] It was considered an important evolution in admissibility of actions, a stepping stone and a decisive step in enlarging the notion of individual concern. It was however realised that it should not prima facie be sufficient for an applicant to demonstrate some kind of prejudice following the adoption of a regulation, but it must be demonstrated that the applicant

[264] C. Harding, ibid, at p.p. 321-322.
[265] Case C-309/89 *Codorniu v. Council* [1994] ECR I-1853.
[266] D. Waelbroeck & D. Fosselard, "Case C-69/89 *Codorniu SA v. Council of the European Union*, Judgment of 18 May 1994, [1994] ECR I-1853" (1995) 32 *CMLRev* 257.
[267] D. Waelbroeck & D. Fosselard, ibid, at p.p. 257-260.

is supporting an abnormally heavy prejudice peculiar to the applicant and which is not supported by other traders.[268]

An extensive review of the position after the judgment in *Codorniu* was offered by A. Arnull.[269] His article notes the trend of relaxing the standing criteria for challenges against administrative acts by private parties in several of the Member States, including France and the United Kindgom, while Germany still remained on a more restrictive approach. He then argued that the flexibility of the notion of direct and individual concern means that much has depended on the construction placed upon Article 173 EEC by the ECJ, and the ECJ's approach has also been influenced by its conception of the fundamental characteristics of the Community legal order, an order in which the political institutions enjoy extensive legislative powers.[270] He found that the requirement for individual concern is closely related to the requirement of a decision and the test is expressed by the ECJ in basically the same terms whether the contested measure takes the form of a regulation or that of a decision.[271]

He further asserted that the special cases of competition, anti-dumping and state aid where a more relaxed approach had been taken by the Court in considering individual concern, all involve quasi-judicial measures taken at the end of a procedure in which interested parties may express their views.[272] He takes the view that these cases were difficult to reconcile with the dominant trend that individual concern does not seem to have been based on the effect produced on the applicants by the contested measures. While the part played by an applicant in the procedure leading to the adoption of a measure is a perfectly proper basis on which to accord standing, it does not of itself

[268] D. Waelbroeck & D. Fosselard, ibid, at p.p. 268-269.
[269] A. Arnull, "Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty" (1995) 32 *CMLRev* 7. See also H. Rasmussen, *The European Court of Justice* (Gadjura, 1998), Chapter 6, at p.p. 178-182.
[270] A. Arnull, ibid, at p. 13.
[271] A. Arnull, ibid, at p.p. 25-26.
[272] A. Arnull, ibid, at p. 30.

establish that the effect on him is qualitatively different from its effect on anyone else actually or potentially carrying on the same business. The difficulty of accommodating these cases accordingly indicated that there was a need for the Case-Law to be relaxed, and that *Extramet* reinforced this indication when it accepted that the applicant was individually concerned because it happened to carry on a particular activity.[273]

He proceeds by noting that the judgment in *Codorniu* effectively dispensed with the obligation to show that a contested measure is by nature a decision. He asserts that the judgment was evidently the subject of considerable controversy within the ECJ, based on the fact that the opening paragraphs on the standing of private parties to challenge regulations are incompatible with the rest of the reasoning, and also that from October 1992 when AG Lenz gave his opinion judgment was not given until May 1994, as well as the fact that in the meantime jurisdiction on direct actions for annulment was conferred on the CFI.[274] He also offers an interesting analysis on the relationship between direct actions for annulment and preliminary references on validity, with particular reference the fact that claims by applicants that preliminary references made by national courts did not cover all the arguments which had been advanced, did not succeed. The ECJ insisted that the fact that the national court is empowered to determine which questions it intends to submit to the Court is an inherent feature of the system established by the Treaty and is not therefore an argument which is capable of justifying a broad interpretation of the conditions of admissibility.[275]

Pessimistic approaches about the impact of *Codorniu* and as to whether this signalled a relaxation of individual concern emerged very quickly. One author, M. Hedemann-

[273] A. Arnull, ibid, at p.p. 34-35.
[274] A. Arnull, ibid, at p.p. 39-40.
[275] A. Arnull, ibid, at p.p. 41-42.

Robinson,[276] was quick to argue that such high hopes may well prove to be illusory in the short term in the absence of an amendment of the Treaty. He characterises the judgment as cursory and clouded in uncertainty on the issue of individual concern, unlike the fully reasoned opinion of AG Lenz, and finds it extremely difficult to glean any clear rationale from it as to how the impact of legislation on individuals will be assessed in order to determine whether they are individually concerned. In his view, this lack of guidance combined with the absence of reference to the reasoning of AG Lenz in the judgment, renders it of limited value as a precedent.[277] He further considers that even a formal amendment of the Treaty will be of partial value so long as a hierarchy of norms is not established, and the institutions become no longer able to choose between regulations, directives and decisions at their discretion[278]. But he considers one thing for certain, that the Court needs to clear the murky waters of individual concern, and cannot seriously continue with its half way approach and hope to continue to muddle through on an unclear factual and casuistic basis[279].

2.4. *The calls for reform in UPA and Jego Quere*

The calls for reform in 2002, as previously mentioned,[280] contained in the Opinion of AG Jacobs in *UPA*[281] and subsequently the judgment of the CFI in *Jego Quere*,[282] can be seen as a summary of the criticism against the EU judicial review system as it was developed under Article 173 EEC and Article 230 EC. It will be recalled that it was

[276] M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127.
[277] M. Hedemann-Robinson, ibid, at p.p. 150-152.
[278] M. Hedemann-Robinson, ibid, at p. 154.
[279] M. Hedemann-Robinson, ibid, at p. 156.
[280] See Chapters 1 and 2.
[281] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677.
[282] Case T-177/01 *Jego Quere v. Commission* [2002] ECR II-2365.

argued by AG Jacobs that effective judicial protection dictated that applicants should have access to a court that can grant remedies capable of protecting them against the effects of invalid acts, and this could only be achieved by a direct action for annulment. The preliminary reference mechanism was said to cause delays and increased costs, it is not a remedy available as of right, as the national court decides whether to refer and on the grounds of the reference and it is also inevitable that national courts, even at the highest level which have an obligation to refer, may err in their preliminary assessment of the grounds of invalidity put forward and refuse a reference.[283] Also, in the case of acts of general application without the need for implementing measures at national level, an individual may not be able to reach the national courts unless he breaks the Law. The ECJ maintained that the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and that it was up to the Member

[283] On preliminary reference validity review see generally A. Arnull, "National Courts and the Validity of Community Acts" (1988) *European Law Review* 125, G. Tesauro, "The Effectiveness of Judicial Protection and Co-operation Between the Court of Justice and the National Courts" (1993) 13 *Yearbook of European Law* 1, at p.p. 15-16, H.G. Schermers and D.F. Waelbroeck, *Judicial Protection in the European Union* (Kluwer, 2001), at p.p. 907-914, A. Biondi, "The European Court of Justice and Certain National Procedural Limitations: Not Such a Tough Relationship" (1999) 36 *Common Market Law Review* 1271, W. Van Gerven, "Of Rights, Remedies and Procedures" (2000) *Common Market Law Review* 501, M. Claes, "Judicial Review in the European Communities: The Division of Labour Between the Court of Justice and National Courts" in R. Bakker, A. Willem Heringa and F. Stroink, *Judicial Control – Comparative Essays on Judicial Review* (Metro, 1995), at p.p. 109-131, T. Tridimas, "The ECJ and the National Courts – Dialogue, Cooperation and Instability" in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), Chapter 16, R. Barents, "The Preliminary Reference Procedure and the Rule of Law in the European Union" in R.H.M. Jansen, D.A.C. Koster and R.F.B Van Zutphen, *European Ambitions of the National Judiciary* (Kluwer, 1997), at p.p. 61-73, P. Allott, "Preliminary Rulings – Another Infant Disease" (2000) *European Law Review* 538, A. Arnull, "References to the European Court" (1990) *European Law Review* 375, C. Barnard and E. Sharpston, "The Changing Face of Article 177 References" (1997) 34 *Common Market Law Review* 1113, F.G. Jacobs, "Enforcing Community Rights and Obligations in National Courts: Striking the Balance" in J. Lonbay and A. Biondi, *Remedies for Breach of EC Law* (Wiley, 1997), Chapter 3, A. Arnull, "Judicial Architecture or Judicial Folly? The Challenge Facing the European Union" (1999) *European Law Review* 516, P.J.G. Kapteyn, "Europe's Expectation of its Judges" in R.H.M. Jansen, D.A.C. Koster and R.F.B Van Zutphen, *European Ambitions of the National Judiciary* (Kluwer, 1997), at p.p. 181-189, A. Arnull, "The Law Lords and the European Union: Swimming With the Incoming Tide" (2010) *European Law Review* 57, M. Bobek, "Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice" (2008) 45 *Common Market Law Review* 1611. See also the statistical study in C.J. Carrubba, M. Gabel and C. Hankla, "Judicial Behavior Under Political Constraints: Evidence From the European Court of Justice" (2008) 102 *American Political Science Review* 435.

States to establish a system which ensures respect for the right to effective judicial protection. In other words, it was up to the Member States and their national courts to make the preliminary reference route of validity challenges work in a way that ensures effective judicial protection of individuals.

2.4.1. *Back to numbers*

Before moving into the academic reception of these developments, it is worth going back to the statistical analysis of T. Tridimas and G. Gari, mentioned above.[284] It should be recalled that the results of this study seem to convey a feeling in line with the criticism, that the standing criteria rendered direct actions for annulment inadmissible to their vast majority in respect of challenges against measures of general application, while at the same time it seems difficult to induce a preliminary reference on validity.[285]

This study however slightly, if not only very slightly, blurs the point of criticism that the preliminary reference route of validity challenges is itself the cause of increased delays or the point that it is desirable for reasons of legal certainty that acts are reviewed directly within a reasonable time from their adoption, both of which were also employed by AG Jacobs and put forward as being contrary to the principle of effective judicial protection and as grounds for liberalising the test of individual concern.[286]

[284] See Chapter 2.
[285] See T. Tridimas and G. Gari, "Winners and losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance (2001-2005)" (2010) 35 *European Law Review* 131, at p. 140, p. 146, p.p. 155-158 and p.p. 172-173.
[286] Similar points were made earlier in A. Arnull, "Challenging Community Acts – An Introduction" in H.W. Micklitz et al, *Public Interest Litigation before European Courts* (Nomos Baden, 1996), at p. 52.

Their statistical analysis shows[287] that 48% of actions for annulment lodged before the CFI and 67.6% of those lodged before the ECJ, compared to 61.4% of preliminary references on validity, lasted between 18 and 36 months. Only 12.2% of actions before the CFI, 2.2% of actions before the ECJ and 9% of preliminary references on validity lasted less than 12 months and the majority of these were rejected as inadmissible. A good 11.6% and 10.3% of annulment actions before the CFI and the ECJ respectively lasted more than 48 months. Only around 7% of preliminary references on validity lasted between 42 and 48 months and no preliminary reference exceeded 48 months. These results on the length of the proceedings being roughly the same for actions for annulment and preliminary references, seem to be corroborated by an earlier study by C. Harlow, of cases brought in the years 1995, 1996, 1999 and 2000, where at that time however, the length of proceedings was significantly less, varying from 17.1 months to 23.9 months.[288]

These results seem to confirm that the action for annulment is not very fast and that it is certainly not faster than a preliminary reference, not taking into account the possibility of accelerated and expedited procedures,[289] although speed could be expected to increase following reform of the EU's court system.[290] It seems a fair point that the partial liberalisation of standing in Article 263 TFEU or indeed a bolder liberalisation of standing as proposed by AG Jacobs or the CFI cannot have any effect on the speed of these proceedings, and accordingly better serve legal certainty as

[287] T. Tridimas and G. Gari, "Winners and losers in Luxembourg: a statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001-2005)" (2010) 35 *ELRev* 131, at p.p. 144-145.
[288] C. Harlow, *Accountability in the European Union* (OUP, 2002), Chapter 6, at p.p. 157 – 159.
[289] See E. Barbier De La Serre, "Accelerated and Expedited Procedures Before the EC Courts: A Review of the Practice" (2006) 43 *Common Market Law Review* 783.
[290] See for detailed analysis A. Alemanno and L. Pech, "Thinking Justice Outside the Docket: A Critical Assessment of the Reform of the EU's Court System" (2017) 54 *Common Market Law Review* 129.

proposed, in terms of the action for annulment being a more suitable procedure for having the measures reviewed within a reasonable amount of time.

In correlation, taking only into consideration the length of the procedure before the ECJ and not including the length of the procedure before national courts, the assertion that delays and costs entailed in the preliminary reference procedure could themselves be contrary to effective judicial protection should also be addressed to annulment actions. However, naturally, compared to a direct action for annulment, what makes the preliminary reference route of validity challenges a much longer procedure for private parties to pursue is the fact that it is additional to national proceedings. In this context, it is also fair to say that Member States and national courts can indeed contribute and expedite the process and time when they consider whether to send a preliminary reference on validity. The closer to issue of proceedings this is considered, the speedier will the issue of validity be brought before the ECJ, not even excluding the possibility of closely following the speed of a direct action for annulment. In this respect, there is the opportunity for example, that one jurisdiction may permit national courts to deal with requests for preliminary references on validity at an early stage by means of a specialised application for such a preliminary reference.[291]

It should also be noted that the reluctancy of national courts to refer is also statistically documented elsewhere. K.J. Alter interestingly cites a 2000 study by D. Chalmers showing a calculation that from a sample from 1972 until 1998, 269 out of 1088, that is less than 25%, of cases involving EU Law in the United Kingdom were actually referred to the CJEU.[292]

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[291] See the example of the Preliminary Reference to the Court of the European Communities Procedural Regulation (No. 1) of 2008, in Cyprus.

[292] K.J. Alter, *Establishing the Supremacy of European Law – The Making of an International Rule of Law in Europe* (OUP, 2001), Chapter 2, at p.p. 34-35.

2.4.2. *The reception of UPA and Jego Quere*

A plethora of academic commentaries followed the judgment in *UPA*,[293] with most of them strongly critical of the judgments of the ECJ. The ECJ's long maintained view that the Treaties provided a complete system of remedies and procedures which ensure review of acts of the institutions and other bodies, has always left a number of scholars unconvinced.

As K. St Clair Bradley put it well before *UPA*, the "complete system of remedies and procedures" which the ECJ considers the Treaties to have established is a creature of the ECJ's own begetting, and the decision to subject acts directly to judicial review is one of judicial policy based on a daring schematic interpretation of the institutional provisions as a whole. However, the author continued, a system of judicial protection cannot be said to be complete simply because all acts can be submitted to the ECJ for

[293] For such detailed reviews see, among others, A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), C. Kombos, "The Recent Case Law on Locus Standi of Private Applicants under Art. 230(4) EC: A Missed Opportunity or A Velvet Revolution (2005) 9 *EIoP* No. 17, A. Ward, "Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a "Wobbly Polity"" (2003) 22 *YEL* 45, E. Berry and S. Boyes, "Access to Justice in the Community Courts: A Limited Right?" (2005) *Civil Justice Quarterly* 224, D. Waelbroeck, "The Workload of the EU Courts and the Citizen's Right to Have Access to Justice" in D. Curtin et al, *The EU Constitution: The Best Way Forward?* (Asser Press, 2005), at p.p. 357-371, E. Biernat, "The Locus Standi of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community", (2003), *Jean Monnet Working Paper No. 12/03*, M. Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jego-Quere et Cie SA v. Commission* and *Union de Pequenos Agricultores v. Council*" (2003) 66 *MLR* 124, A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, J. Manuel et al, "*Ubi ius, Ibi Remedium*? – *Locus Standi* of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads" (2004) 11 *MJ* 233, J. Usher, "Direct and Individual Concern – An Effective Remedy or a Conventional Solution?" (2003) 28 *European Law Review* 575, S. Enchelmaier, "No-One Slips Through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC" (2005) *YEL* 173, P. Craig, *EU Administrative Law* (OUP, 2nd edition, 2012), Chapter 11, X. Groussot, "The EC Legal System of Legal Remedies and Effective Judicial Protection: Does the System Really Need Reform?" (2003) 30 *Legal Issues of European Integration* 221, K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1, and Koch, "Locus Standi of Private Applicants under the EU Constitution: Preserving Gaps in the Protection of Individuals' Right to an Effective Remedy" (2005) 30 *European Law Review* 511.

a decision. It must also mean that the parties whose rights are affected necessarily have the possibility of initiating the procedure for the determination of those rights.[294] The author puts forward the argument that since the ECJ considers the Community to be based on the Rule of Law it should allow the European Parliament to issue annulment proceedings, arguing that it would otherwise be difficult to avoid the conclusion that the ECJ's use of the term "complete system of judicial remedies and procedures" partakes of the logic of Humpty Dumpty in "Alice through the Looking Glass", that the phrase means what the Court chooses it to mean.[295]

Others have been more sympathetic with the Court's approach, like J. Schwarze,[296] arguing that it was not easy for the Court to ignore its previous Case-Law and the wording of the Treaty in order to introduce a universal right to judicial protection against measures of general application. He accordingly considers the *UPA* judgment to be within the limits of judge-made Law, and blames the unclear formulation of Article 230(4) EC as detrimental to an effective system of judicial protection. In his view, any attempt for reform should aim to provide more clarity, easier application, take into account the individual's need for judicial protection and balance it with the scope of discretion required and enjoyed by the institutions. He sees that a differentiation between decisions and acts of general application remains a suitable solution, and these two basic forms of measures have to be distinguished by substantive criteria in order to prevent abuses based on choice of measure. With regards to acts of general application he sees a further distinction as appropriate, between regulations issued by the Commission and regulations issued by the "true

[294] K. St. Clair Bradley, "The Variable Evolution of the Standing of the European Parliament in Proceedings Before the Court of Justice" (1988) 8 *YEL* 27, at p. 51.
[295] K. St Clair Bradley, ibid, at p.p. 56-57.
[296] J. Schwarze, "The Legal Protection of the Individual against Regulations in European Union Law" (2004) 10(2) *EPL* 285, at p.p. 297-298.

legislature", the Council and Parliament. He asserts that the individual's judicial protection should be enhanced by granting a remedy for objections only to regulations issued by the Commission. As for regulations with Law-like character, an exception should only be made for anti-dumping regulations issued by the Council, as their content is mainly administrative in nature. He even puts forward a formulation for a reform, that proceedings are also admissible against regulations issued by the Commission and anti-dumping regulations issued by the Council, as long as they directly concern the complainant. He notes that such a differentiation of judicial protection against legislative and administrative measures is also supported by a comparison of the legal systems of the Member States, where remedies against legislative measures, if available at all, need to satisfy stricter admissibility conditions than against measures of the executive. These differences are justified by the notion of stronger democratic legitimacy of legislative measures. He does however acknowledge the counterargument that such a sharp differentiation between the legislature and the executive does not exist at EU level.[297]

The different ways in which the right to effective judicial protection affected the ECJ's view and the opinion of AG Jacobs in *UPA* is analysed by P. Craig in a 2009 article.[298] He finds the case fascinating because both, as well as the CFI in *Jego Quere*, took this right expressly into account but accorded to it a markedly different role. He sees the opinion of AG Jacobs as a classic example of the use of background rights and principles as a mechanism for the reassessment of existing doctrine. He also considers it a reality that the right to effective judicial protection had not featured significantly in the Case-Law on locus standi, but more commonly been part of the reasoning in cases concerned with the effectiveness of national remedial protection.

[297] J. Schwarze, ibid, at p.p. 298-299.
[298] P. Craig, "Standing, Rights, and the Structure of Legal Argument" (2009) 9(4) *EPL* 493.

The ECJ concluded its judgment by reaffirming its major premise, and the secondary, limited role that was played by the right to effective judicial protection. This secondary role was moreover interpretative in a minimalist sense, but could not have any greater impact since this would, in the view of the ECJ, entail the setting aside of a Treaty condition.[299] He accepts it was perfectly reasonable for the ECJ to frame its analysis on the express premise that the Treaty provided for a complete system of remedies, but sees three major difficulties. The first are the difficulties of the preliminary reference route are in part procedural, as analysed by AG Jacobs, and in part substantive, in that the individual may not be able to challenge a measure before the national courts unless he contravenes it. Secondly, the ECJ, while not responding to these difficulties, sought to circumvent them by saying that it is for the Member States to apply national procedure rules in such a way so as to enable such indirect challenges, but such a strategy is of limited utility and cannot resolve the inherent difficulties of the preliminary reference route. Thirdly, the increased use of the preliminary reference route will entail more workload for the ECJ, which seems contrary to the reason for establishing the CFI, in order to allow the ECJ to deal with more important issues than matters of validity which do not really need to go to the top court of the Union.[300]

He sees that the prospect of reforming the Case-Law on direct challenges raises two issues, legitimacy and practicality. On the issue of legitimacy, the ECJ considered that a reinterpretation of the concept of individual concern required a Treaty amendment, as it would otherwise have the effect of setting aside a condition expressly laid down in the Treaty. But he finds this unconvincing in view of the willingness of the ECJ to stretch the meaning of several provisions through teleological interpretation in order

[299] P. Craig, ibid, at p.p. 500-501.
[300] P. Craig, ibid, at p.p. 502-504.

to obtain the Community's goals. Also, it is the meaning accorded to individual concern by the ECJ that was an issue, and *Plaumann* is not the only possible interpretation of individual concern, so there is in reality no reason why a different test like the one based on substantial adverse impact cannot be a legitimate reading of that notion. Considering practicality, the fear is the workload that can be generated for the EU courts by a more liberal test. However, he finds four reasons why this should not preclude such a shift. The first is that the Community prides itself as being based on the Rule of Law, so it is axiomatic to such an order that there should be proper mechanisms for the control of legality. It is right and proper in normative terms that those who have suffered some substantial adverse impact should have access to judicial review, and such a test is no more liberal than that which prevails in most domestic legal orders. The workload generated is a proper consequence of a system based on the Rule of Law. Secondly, there is no reason why such a change should necessarily entail an increased workload since the preliminary reference alternative can lead to a similar workload. Thirdly, this assumption seems to be based on the fear that there will be numerous challenges to a measure, but this ignores the possibility of cases being joined and also the fact that once the EU courts decide one claim this could be the end of the matter unless another applicant could raise some new legal argument. Fourthly, it must also be recognised that the EU courts may nevertheless influence the number of actions through the standards of review that they apply. The fact that the applicants have a relatively high hurdle to surmount in order to win on the substance of the case will have an impact on the number of actions brought.[301]

The point that since the notion of individual concern was not defined in the Treaty it was perfectly open to the ECJ to adopt a flexible construction as it has done in

[301] P. Craig, ibid, at p.p. 504-506.

relation to numerous other Treaty concepts and even in the context of Article 230 EC itself, is repeated by A. Albors-Llorens.[302] She favoured the test proposed by AG Jacobs as more realistic in economic terms than the one suggested in *Jego Quere*, arguing that it would increase legal certainty. In contrast, she thought that the test proposed by the CFI would leave scope for further debate and interpretation, as questions would soon have followed as to when a measure restricted a right or imposed an obligation.[303] She criticises the judgment of the ECJ as the reinterpretation of the test would not signify a departure from the wording of Article 230 EC, in contrast to the bolder, if less publicised, step it took when it accepted challenges against general acts. She acknowledges that the judgment does not convincingly demonstrate that the ECJ opposes a relaxation of standing, but only that it considers this the task of the Member States, and notes that the ECJ had previously suggested amendments as early as 1975 and for the 1996 Intergovernmental Conference, which fell on deaf ears.[304]

It is acknowledged by M. Granger that although opening wider the gates of EU courts to private parties for the purpose of controlling more closely the action of the EU institutions may appear as a growing priority in a Communauté de droit, such a development requires careful consideration. It is argued that there is a delicate equilibrium to be found between the various objectives, such as the protection of individuals, the respect for the Rule of Law, the effectiveness of EU decision making, the principle of legal certainty, the coherence of the system of judicial remedies and

[302] A. Albors-Llorens, "The Standing of Private Parties to Challenge Community Measures: Has the European Court Missed the Boat?" (2003) 62(1) *CLJ* 72, at p.p.74-75.
[303] A. Albors-Llorens, ibid, at p.p. 85-86.
[304] A. Albors-Llorens, ibid, at p.p. 91-92.

the EU and national courts' missions and workloads.[305] She draws a parallel with the test proposed by the CFI in *Jego Quere* to the French concept of an acte faisant grief which is the main admissibility requirement for judicial review of administrative acts in French Law, recalling that the action for annulment was originally modelled on the French recours pour exces de pouvoir. She then argues that since the drafting of the Treaty of Rome, the scope and intensity of Community action has expanded far beyond what was envisaged at the time, but the ECJ has recognised that the Treaty is a living instrument which can be adapted to changing circumstances and needs.[306] She sees that the test of the CFI would open wider the gates to individuals but would not go as far as accepting actio popularis, and does not greatly help interest groups or associations. In addition, the effect of the measure must be definite, something which excludes effects which are only potential. The effect must also be immediate, although the meaning of this is not evident from the judgment. In comparison with the test of AG Jacobs, she considers that that test seemed to include any kind of potential effects, something which would enable interest groups to lodge actions.[307] On the litigation flood argument, she considers that reasonable private parties will be dissuaded in pursuing actions that have limited potential of success on the merits and are unlikely to invest their time and money in such actions. Also, there is the procedural possibility of managing such claims internally by the Courts and disposing them more efficiently.[308]

[305] M. Granger, "Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: *Jego-Quere et Cie SA v. Commission* and *Union de Pequenos Agricultores v. Council*" (2003) 66 *MLR* 124, at p. 125.
[306] M. Granger, ibid, at p.p. 132-133.
[307] M. Granger, ibid, at p. 133.
[308] M. Granger, ibid, at p.p. 134-135.

3. Measuring "effective" judicial protection

It can easily be seen from this sample of the academic reception of the judgments in *UPA* and *Jego Quere*, that reactions varied from critical to more nuanced views. This comes as a natural consequence of one of the contemporary realities,[309] that there are no clear measures against which to measure the effectiveness of the judicial system and that there is no clarity to the concept of effective judicial protection, at least when it comes to the question of access to justice in judicial review proceedings. As a result, how one views the system is, to a degree, a subjective opinion, and consequently, from one's standpoint the system may appear effective, whereas it may appear completely ineffective to another. In this light, and in view of the lack of clarity as to what actually constitutes effective judicial protection in terms of access to justice, the argument could be maintained that the CJEU should be considered as right in accepting, or at least cannot be blamed for accepting, that the judicial review system ensures respect for this right.

Yet again, this may seem too simplistic an idea or conclusion in a modern system or in the EU as it is perceived today. It seems rather based on an approach that the system need only be "effective enough", and the consequent presumption that the EU should tolerate even the least effective system of judicial protection. Meaning that there is no need for the most effective system of judicial protection in the EU, not even for a mediocre or averagely effective one, but the least effective system of judicial protection suffices. Put this way, this conclusion seems rather unsatisfactory.

Without disregarding the fact that this argument does not refer to mere existence of judicial protection, but to effective judicial protection, although to the least effective

[309] See Chapter 1.

judicial protection, this statement leaves a negative impression. It turns the focus on the borderline of what can be considered as effective, with the consequent effect that when considering borderline cases, something which appears effective to some, may not appear effective to others. And it so appears that this is the position where the CJEU has put this matter, and itself, in relation to the question of the effectiveness of the judicial review system. A position which seems totally different to the impression it created of itself when it comes to the protection of individual rights in other areas of EU activity.

In view of the above, it would seem more welcome had there been some requirement that such borderline interpretations are avoided. But this is indeed a question that seems to lead to problems once again. Such a venture would necessarily begin with a reinterpretation of what constitutes effective judicial protection when it comes to access to justice. To which there is no answer, or yardstick against which to measure effectiveness. Naturally there has to be a lowest in each measure or notion, and one necessarily has to be defined in this notion of effectiveness of access to justice. Something which is difficult to achieve, but seems unavoidable.

Accordingly, any requirement to avoid such borderline cases has to be based necessarily on some additional requirement to the notion of effectiveness. And this begs the question as to what such a requirement could be. One argument could be that in a modern system of a modern union such as the EU in the 21st century, there should be a requirement of "substantially" effective judicial protection. Yet such an additional notion seems again to leave much to be desired and to lead to other grey and uncertain areas of its own. And it may also be criticised for not offering any more clarity than the concept of the effectiveness itself, leading in its turn to questions as to

what degree of effectiveness or protection would be considered as substantial, in which case there will again be no measure or yardstick to measure this against.

An alternative argument could be based on a requirement that the system "undeniably" or "clearly" or "uncontroversially" offers effective judicial protection. This may seem better placed to set a requirement that borderline interpretations have to be avoided. It does seem to entail the necessity that one judges the effectiveness of the system, and consequently measures what he perceives as the lowest, but also needs to add something to it in order to bring it within a higher level of protection. By the use of such words, an interpretation needs to move to a higher than the lowest effective judicial protection, effectively creating something that no one should be able to say, or at least easily argue, that is not effective. This seems not so reliant on any measurement of the threshold for effectiveness, although of course it cannot be denied that some such degree of subjective opinion is unavoidable. It could however act as a requirement that borderline interpretations should be avoided. It leads to a requirement akin to proof beyond reasonable doubt in Criminal Law, in that what it requires is interpretations and remedies that establish effective judicial protection beyond reasonable doubt.

There is however no such requirement of an additional element that would push any interpretation away from borderline cases, but this was hardly based on any Treaty provision or other provision that is binding on the CJEU. It is, as aforesaid, all a matter of policy choice of the CJEU and how it perceives the effectiveness of protection in a given area. The possibility to move away from borderline interpretations can also appear evident from the comparison between the judgments in

Jego Quere and *Unibet*, also highlighted previously.[310] In *Jego Quere*, the ECJ effectively accepted that effective judicial protection exists even though a private party may need to break the Law in order to obtain access to a court in order to attempt a challenge against an EU measure by means of a preliminary reference, whereas in *Unibet*, it denied that effective judicial protection existed where national Law had a similar effect of requiring a private party to break the Law in order to obtain access to a court to challenge the national implementing measure. In *Jego Quere* the Court was moving along the borderline of what could be considered as effective, whereas in *Unibet* it chose to move towards a safer interpretation under almost identical circumstances. This example demonstrates that there can indeed be a move to safer interpretations, by moving away from borderline interpretations where the element or the influence of subjective opinion is stronger.

At this stage, and before continuing to the consideration of the effect of the reform in Article 263(4) TFEU, it is important to explore briefly the requirements of the European Convention of Human Rights and the EU Charter of Fundamental Rights, as well as considerations based on the Rule of Law, that are relevant to the issue of access to justice and locus standi for judicial review. It is also important to consider the possible justification of the locus standi rules as developed by the CJEU, and also the the benefits of private enforcement in this field.

[310] Case C-263/02 P *Commission v. Jego Quere* [2004] ECR I-3425, compared with Case C-432/05 *Unibet v. Justitiekanslern* [2007] ECR I-2271. See also A. Arnull, "Case C-432/05, *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, judgment of the Grand Chamber of 13 March 2007" (2007) 44 *Common Market Law Review* 1763, G. Anagnostaras, "The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights" (2007) *European Law Review* 727 and A. Arnull, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" (2011) *European Law Review* 51.

4. The ECHR

The provisions of the ECHR that relate to access to justice are found in Article 6 ECHR which provides for the right to a fair trial and Article 13 ECHR which provides for the right to an effective remedy.

4.1. *Article 6 ECHR*

The relevant part of Article 6 ECHR provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by Law. A basic premise is that the legal proceedings available must provide a remedy capable of addressing someone's contentions on the merits.[311] It can be invoked in constitutional proceedings to the extent that these have a decisive bearing on a dispute concerning a civil right.[312]

Despite the lack of an explicit guarantee of right of access to a court, this has been firmly established by the European Court of Human Rights in *Golder v. United Kingdom*,[313] on the basis that it would be inconceivable that Article 6(1) could offer procedural guarantees, yet that it should not first protect that which alone makes it in

[311] *Ulianov v. Ukraine*, No. 16472/04, 5/10/2010.
[312] *Ruiz-Mateos v. Spain*, Series A, No. 262, 23/6/1993. See generally W. Schabas, *The European Convention on Human Rights – A Commentary"* (OUP, 2015), at p.p. 272-276, D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 9, and B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey – The European Convention on Human Rights* (OUP, 7th edition, 2017), Chapter 12.
[313] *Golder v. United Kingdom*, §28, Series A, No. 18. See also D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 9, at p.p. 399-410, and O. Johan Settem, *Applications of the "Fair Hearing Norm" in ECHR Article 6(1) to Civil Proceedings* (Springer, 2016), at p.p. 60-64, M. De S.-O.-L' E. Lasser, *Judicial Transformations – The Rights Revolution in the Courts of Europe* (OUP, 2009), Chapter 4, and G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP, 2013), Chapter 4, at p.p. 128-146.

fact possible to benefit from such guarantees, that is, access to a court. Legal certainty, which is also an aspect of the Rule of Law, is identified as one of the components of the right of access to a court, which is considered as impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice, and form a sort of barrier preventing a litigant from having his case determined on the merits by the competent court.[314] The right exists in private litigation or claims against the state, including claims arising out of administrative decisions.[315]

The right of access means access in fact as well as access in Law, and under *Golder* it is a right to effective access to the courts.[316]

The right of access to a court is however not absolute and may be subject to limitations because the right itself by its very nature calls for regulation by the state. The limitations applied should not restrict or reduce access in such a way or to such an extent that the very essence of the right is impaired, and in any event, all limitations must pursue a legitimate aim and there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[317] Court costs, restrictions on the right to bring proceedings by particular categories of litigants, restrictions of abusive litigants and limitation periods have been accepted as proper limitations on access to a court.[318]

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[314] *Kart v. Turkey*, No. 8917/05, §79, ECHR 2009. See W. Schabas, *The European Convention on Human Rights – A Commentary"* (OUP, 2015), at p.p. 284-285.

[315] *Sporrong and Lonnroth v. Sweden* A 52 (1982) 5 EHRR 35 PC. See also D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 9, at p. 400.

[316] D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 9, at p. 400.

[317] *Jones and others v. United Kingdom*, No. 34356/06 and 40528/06, §186, 14/1/2014, *Ashingdane v. United Kingdom* A 93 (1985) 7 EHRR 528.

[318] See W. Schabas, *The European Convention on Human Rights – A Commentary"* (OUP, 2015), at p.p. 285-286, D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 9, at p.p. 403-410, and P. Leach, *Taking a Case to the European Court of Human Rights* (OUP, 3rd edition, 2011), at p.p. 272-273.

It should be stressed that the ECHR does not guarantee any right to have a case referred by a domestic court to the CJEU for a preliminary ruling under Article 267 TFEU, but a refusal of a request for a preliminary ruling may infringe the fairness of the proceedings if it appears to be arbitrary. As also mentioned above, the European Court of Human Rights has held that Article 6(1) ECHR imposes an obligation on national courts to give reasons for any decision refusing such referral, with reference to the CJEU's Case-Law.[319]

Another guarantee offered by Article 6(1) ECHR is that of a trial within a reasonable time. The concept of reasonable time seems to be vague however. As W. Schabas characteristically quotes, reasonable time is a roguish thing, and rather like the Chancellor's foot it may be long or short, or indeterminate, depending upon many factors. Attempting to set guidelines for application of the principle of trial within a reasonable time, the Case-Law does little more than proclaim that this is to be assessed in the light of the particular circumstances of the case.[320]

4.2. *Article 13 ECHR*

Article 13 ECHR provides for the right to an effective remedy, formulated that everyone whose rights and freedoms as set forth in the Convention are violated, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. It requires the

[319] *Schweighofer v. Austria*, No. 35673/97, judgment of 24/8/1999, *Matheis v. Germany*, No. 73711/01, 1/2/2005, *Lutz John v. Germany*, No. 15073/03, 13/2/2007, *Ullens de Schooten and Rezabek v. Belgium*, No. 3989/07, 20/9/2011. See J. Krommendijk, ""Open Sesame!": Improving Access to the ECJ by Requiring National Courts to Reason their Refusals to Refer" (2017) *European Law Review* 46, and C. Grabenwarter, *European Convention on Human Rights – Commentary* (C.H. Beck, Hart and Nomos, 2014), at p. 133.

[320] W. Schabas, *The European Convention on Human Rights – A Commentary"* (OUP, 2015), at p. 292, citing *Pelissier and Sassi v. France*, No. 25444/94, §67, ECHR 1999-II. See also D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 9, at p.p. 440-446.

national authorities to ensure that there is a domestic remedy that allows the competent national authority to address the substance of a complaint under the Convention and provide appropriate relief. It is said to provide an additional guarantee for a person in order to ensure that he effectively enjoys the rights conferred by the Convention.[321] The remedy must be effective in practice as well as in Law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the State.[322] It has however been decided that the right to an effective remedy under Article 13 ECHR does not guarantee a remedy allowing a challenge to primary legislation before a national authority, on the ground that it is contrary to the Convention.[323]

It is also worth noting that Article 13 ECHR has been interpreted in the light of the principle of subsidiarity. It has been considered as fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, with the European Court of Human Rights exercising a supervisory role subject to the principle of subsidiarity.[324]

Article 13 ECHR is related to the rights to access to a court and to trial within a reasonable time under Article 6(1) ECHR.[325] It is notable for the purposes of this discussion that in *Geouffre de la Pradelle v. France*[326], in the context of challenges

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[321] *Kudla v. Poland*, No. 30210/96, §152, ECHR 2000-XI. See W. Schabas, *The European Convention on Human Rights – A Commentary"* (OUP, 2015), at p.p. 550.

[322] *Husayn (Abu Zubaydah) v. Poland*, No. 7511/13, §540, 24/7/2014. See also C. Grabenwarter, *European Convention on Human Rights – Commentary* (C.H. Beck, Hart and Nomos, 2014), at p.p. 333-334.

[323] *Cobzaru v. Romania*, No. 48254/99, §83, 26/7/2007.

[324] *A. and others v. United Kingdom*, No. 3455/05, §174, ECHR 2009.

[325] For an overview see W. Schabas, *The European Convention on Human Rights – A Commentary"* (OUP, 2015), at p.p. 550-552, D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Harris, O' Boyle and Warbrick – Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 16, and B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey – The European Convention on Human Rights* (OUP, 7th edition, 2017), Chapter 7.

[326] *Geouffre de la Pradelle v. France*, No. 87/1991/339/412, §37, Series A, No. 253-B, at para 34 of the judgment. See also *Cappella Paolini v. San Marino* 2004-VIII, *F.E. v. France* 1998-VIII, *Serghides and Christoforou v. Cyprus* (2002) 37 EHRR 873, A. Ward, "*Locus Standi* Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a "Wobbly Polity"" (2003) 22 *Yearbook of European Law* 45,

against administrative acts, the European Court of Human Rights held that an individual is entitled to expect a coherent system that would achieve a fair balance between the authorities' interests and his own, and in particular he should have had a clear, practical and effective opportunity to challenge an administrative act that was a direct interference with his right. A test which A. Ward argued the EU judicial review system would fail as it seemed impossible to attain the level of coherence required, mainly due to the complexity of the locus standi rules and the relationship between an action for annulment and preliminary reference validity review, as well as in view of the parallel systems of implementation which are split in many areas between EU and national authorities.[327]

It is observed that a cumulation of possible channels of redress in the national legal system must be taken into account when deciding whether an applicant has an effective remedy for the purposes of Article 13, rather than examining any or each procedure in isolation.[328] The European Court of Human Rights in *Leander v. Sweden*[329] stated that it was a general principle of Article 13 ECHR that although no single remedy may itself entirely satisfy its requirements, the aggregate of remedies provided for may do so. In the same judgment the European Court of Human Rights further stated that the individual applicant must have a bona fide opportunity to have his case tested on its merits and if appropriate, to obtain redress.

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and D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 9, at p. 403.

[327] A. Ward, "*Locus Standi* Under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a "Wobbly Polity"" (2003) 22 *Yearbook of European Law* 45, at p. 46.

[328] D.J. Harris, M. O' Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (OUP, 4th edition, 2018), Chapter 16, at p.p. 753-754.

[329] *Leander v. Sweden* A 116 (1987) 9 EHRR 433.

4.3. *Bosphorus and the EU preliminary reference mechanism*

It should further be noted that the European Court of Human Rights in *Bosphorus Hava Yollari Turizm v. Ireland*[330] considered the preliminary reference system of the EU, and noted that while the ECJ's role is limited to responding to the question referred by the national court, the response will often be determinative of the domestic proceedings and detailed guidelines on the timing and content of a preliminary reference have been laid down by the Treaty. It also noted the parties to the domestic proceedings have the right to put their case to the ECJ during the preliminary reference procedure, finding that in such circumstances, the protection of fundamental rights by EU Law can be considered to be equivalent to that the of ECHR system. The European Court of Human Rights had also noted the restrictive locus standi provisions for a direct action for annulment, without having to pronounce on that aspect.[331]

A more critical, but concurring separate judgment was given by Judge Ress in *Bosphorus*. While subscribing to the finding that an effective protection of fundamental rights exists within the EU including those guaranteed by the ECHR, even if the access of individuals to the ECJ is rather limited as the European Court of Human Rights has recognised, if not criticised, Judge Ress noted that the European

[330] *Bosphorus Hava Yollari Turizm v. Ireland* (2006) 42 EHRR 1.

[331] See generally M. Eliantonio, C.W. Backes, C.H. Van Rhee, T.N.B.M. Spronken and A. Berlee, *Standing Up for Your Right(s) in Europe – A Comparative Study on Legal Standing (Locus Standi) Before the EU and Member States' Courts* (Intersentia, 2013), Chapter 2, at p.p. 40-41, S. Peers, "Bosphorus – European Court of Human Rights – Limited Responsibility of European Union Member States for Actions Within the Scope of Community Law. Judgment of 30 June 2005, *Bosphorus Airways v. Ireland*, Application No. 45036/98" (2006) 2 *European Constitutional Law Review* 433, C. Costello, "The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe" (2006) 6(1) *Human Rights Law Review* 87, F. van den Berghe, "The EU and Issues of Human Rights Protection: Same Problems to More Acute Problems?" (2010) 16 *European Law Journal* 112, at p.p. 116-119, L.F.M. Besselink, "The EU and the European Convention of Human Rights after Lisbon: From *Bosphorus* Sovereign Immunity to Full Scrutiny? (13 January 2008), available at SSRN: https://ssrn.com/abstract=1132788 or http://dx.doi.org/10.2139/ssrn.1132788.

Court of Human Rights has not addressed the question whether this limited access is really in accordance with Article 6(1) ECHR and whether the provisions of Article 173 EC as it then was, should not be interpreted more extensively in the light of Article 6(1) ECHR, a point that was in issue in *Jego Quere*. The judge emphasised that one should not infer from the findings of the Court that the Court accepts that Article 6(1) ECHR does not call for a more extensive interpretation. Judge Ress continued that since the guarantees of the ECHR only establish obligations "of result", without specifying the means to be used, it seems possible to conclude that the protection of fundamental rights, including those of the ECHR, by EU Law can be considered as equivalent, even if the protection of the ECHR by the ECJ is not a direct one but rather an indirect one through different sources of Law, namely the general principles of EU Law. This separate judgment of Judge Ress also noted that the criticism has sometimes been made that these general principles do not fulfil the required standard of protection as interpreted by the ECJ, as they are limited by considerations of the general public interest of the EU, and this renders it difficult for the ECJ to find violations of these general principles. In the judge's view, one cannot say for once and for all that in relation to all ECHR rights, there is a presumption of compliance because of the mere formal protection by the ECJ, and it may be expected that the Charter of Fundamental Rights may enhance and clarify this level of control for the future.

It has been suggested that Court in *Bosphorus* misinterpreted the position of individuals in the preliminary reference procedure, in considering that the parties to domestic proceedings have the right to put their case to the CJEU, as no such right

exists.[332] It is of course the national court that frames the questions that will be referred to the ECJ, and the parties have no right to intervene, apart from their submissions to the court before these questions are framed. However, they have a right to make their submissions to the ECJ on the questions referred.

4.4. *EU accession to the ECHR*

The accession of the EU to the ECHR,[333] despite being an obligation in Article 6(2) TEU following the adoption of the Lisbon Treaty, is at a halt after the Opinion of the of the Full Court of the ECJ of 18/12/2014,[334] declaring the draft accession agreement as incompatible with EU Law.[335] To some this appeared as bringing about a definitive stop to the accession process,[336] but it has also been argued there is little choice other than to proceed with EU accession to the ECHR,[337] although there seems to be need for amendments of the Treaties or the Draft Accession Agreement. The future seems

[332] J. Komarek, "In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Reference Ruling Procedure" (2007) *European Law Review* 467, at p. 477.

[333] See generally P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart, 2013), R. Baratta, "Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism" (2013) 50 *Common Market Law Review* 1305, R.C.A. White, "A New Era For Human Rights in the European Union?" (2011) 30 *Yearbook of European Law* 100, at p.p. 116-119, E. Wennerstrom, "EU Accession to the European Convention on Human Rights – The Creation of a European Legal Space for Human Rights?" in J. Nergelius and E. Kristofferson, *Human Rights in Contemporary European Law* (Hart, 2015), Chapter 7, and V. Kosta, N. Skoutaris and V. Tzevelakos, *The EU Accession to the ECHR* (Hart, 2014).

[334] Opinion 2/2013 of 18/12/2014. See S. Andreadakis, "Problems and Challenges of the EU's Accession to the ECHR: Empirical Findings With a View to the Future" in S. Morano-Foadi and L. Vickers, *Fundamental Rights in the EU – A Matter for Two Courts* (Hart, 2015), Chapter 4.

[335] For general coverage see among others, K. Raba, "Closing the Gaps in the Protection of Fundamental Rights in Europe: Accession of the EU to the ECHR" in S. Morano-Foadi and L. Vickers, *Fundamental Rights in the EU – A Matter of Two Courts* (Hart, 2015), at p.p. 21-46, F. van den Berghe, "The EU and Issues of Human Rights Protection: Same Problems to More Acute Problems?" (2010) 16 *European Law Journal* 112, E. Spaventa, "A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13" (2015) 22 *Maastricht Journal of European and Comparative Law* 35, and W. Weiss, "Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon" (2011) 7 *European Constitutional Law Review* 64.

[336] See E. Spaventa, "Fundamental Rights in the European Union" in C. Barnard and S. Peers, *European Union Law* (OUP, 2nd edition, 2017), Chapter 9, at p.258.

[337] K. Raba, "Closing the Gaps in the Protection of Fundamental Rights in Europe: Accession of the EU to the ECHR" in S. Morano-Foadi and L. Vickers, *Fundamental Rights in the EU – A Matter of Two Courts* (Hart, 2015), at p. 46.

unknown at present as to accession and as to the relationship between the two courts, the CJEU and the European Court of Human Rights.[338]

It has been eloquently described that upon accession, the EU will be institutionally bound by the ECHR, which will have the same characteristics as EU primary Law, and the EU will accordingly be subject to its supervision, making it possible for individuals to bring complaints directly against it and for the preferential treatment under *Bosphorus* to be lifted.[339] The core of the *Bosphorus* doctrine was also deduced to say that measures that a state has adopted in the implementation of obligations imposed on it as a member of an international organisation it has joined after acceding to the ECHR will be presumed to be compatible with the ECHR if the said organisation protects human rights in a way that could be considered as equivalent to their guarantee under the ECHR, but such presumption is not absolute.[340] It was argued that this seeks to ensure that the ECHR will not be an obstacle to further European integration by the creation of the EU as a supranational organisation.[341]

A point identified by A. Ward should also be noted. The period it takes for the ECJ to return preliminary reference questions sent by a national court of a Member State that is also a state party to the ECHR, cannot be counted in calculating whether there has

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[338] See J. Callewaert, "Do We Still Need Article 6(2) TEU? Considerations on the Absence of EU Accession to the ECHR and its Consequences" (2018) 55 *Common Market Law Review* 1685, K. Lenaerts, "La Vie Apres L' Avis: Exploring the Principle of Mutual (Yet Not Blind) Trust" (2017) 54 *Common Market Law Review* 805, F. Fabbrini and J. Larik, "The Past, Present and Future of the Relation Between the Court of Justice and the European Court of Human Rights" (2016) 35 *Yearbook of European Law* 145, and J. Kokott and C. Sobotta, "Protection of Fundamental Rights in the European Union: On the Relationship Between EU Fundamental Rights, the European Convention and National Standards of Protection" (2015) 34 *Yearbook of European Law* 60.

[339] M. Claes and S. Imamovic, "National Courts in the New European Fundamental Rights Architecture" in V. Kosta, N. Skoutaris and V. Tzevelakos, *The EU Accession to the ECHR* (Hart, 2014), Chapter 11, at p. 167.

[340] O. De Schutter, "*Bosphorus* Post-Accession: Redefining the Relationships Between the European Court of Human Rights and the Parties to the Convention" in V. Kosta, N. Skoutaris and V. Tzevelakos, *The EU Accession to the ECHR* (Hart, 2014), Chapter 12, at p. 179.

[341] O. De Schutter, "*Bosphorus* Post-Accession: Redefining the Relationships Between the European Court of Human Rights and the Parties to the Convention" in V. Kosta, N. Skoutaris and V. Tzevelakos, *The EU Accession to the ECHR* (Hart, 2014), Chapter 12, at p. 181.

been unreasonable delay in proceedings in breach of Article 6(1) ECHR.[342] In the case cited, a preliminary reference took around two and a half years to complete, and it was noted by the European Court of Human Rights that this appeared relatively long, but to take it into account would adversely affect the preliminary reference system instituted by the then Article 177 EEC and work against the aim pursued in substance of that Article.[343]

Mention should also be made of the effect accession would have in relation to the issue of exhaustion of domestic remedies under Article 35(1) ECHR. The European Court of Human Rights has held that the general rule is that Article 35(1) ECHR does not necessitate an applicant to make use of remedies which are inadmissible according to domestic Laws or settled legal opinions of the domestic state.[344] The potential problems in relation to the action for annulment, being now the principal, and after accession the main domestic remedy against EU acts, have been identified by P. Gragl to relate to the potential complexity as to the admissibility of an action for annulment under the reformed Article 263(4) TFEU and the uncertainty created therefrom.[345]

Another important problem in relation to Article 35(1) ECHR after accession is also identified by P. Gragl, in that it is not yet clear whether the preliminary reference procedure under Article 267 TFEU is a necessary requirement under the exhaustion of national remedies rule, and it is not yet also clear what the scope of Article 267 TFEU will be considered to be under the ECHR lens and how it may coherently adjudicate on this matter in relation to Article 6 ECHR.[346] The European Commission on Human

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[342] A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 6, at p. 272.
[343] *Pafitis v. Greece* (1999) 27 EHRR 566, at para 95.
[344] *De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, Applications No. 2832/66, 2835/66 and 2899/66, 18/6/1971.
[345] P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart, 2013), Chapter 11, at p.p. 214-219.
[346] P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart, 2013), Chapter 11, at p.p. 223-224.

Rights has held in *Divagsa*[347] that the refusal of a national court to request a preliminary ruling from the CJEU may infringe the fairness of the proceedings under Article 6 ECHR, something that leads P. Gragl to consider this as meaning that the preliminary reference proceedings are integral to national proceedings. It is however noted that no complaint based on a refusal to refer has yielded any noteworthy results so far, although it has been confirmed by the European Court of Human Rights[348] that there may be circumstances in which such a refusal by a national court might constitute a violation, particularly where it appears to be arbitrary.[349]

A joint statement by the Presidents of the two courts recognises the complexity of the situation where if, for whatever reason, a reference for a preliminary ruling were not made, the European Court of Human Rights would be required to adjudicate on an application calling into question provisions of EU Law without the CJEU having the opportunity to review the consistency of that law with the fundamental rights guaranteed by the Charter of Fundamental Rights. While it is stated that in all probability that situation should not arise often, it is recognised that the fact remains that it is foreseeable that such a situation might arise because the preliminary ruling procedure may be launched only by national courts and tribunals, to the exclusion of the parties, who are admittedly in a position to suggest a reference for a preliminary ruling, but do not have the power to require it. It is then expressly stated that this means that the reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before referring the matter to the European Court of

[347] *Divagsa Company v. Spain*, Application No. 20631/92, 12/5/1993.
[348] See *Moosburger v. Austria*, Application No. 44861/98, 25/1/2000.
[349] P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart, 2013), Chapter 11, at p.p. 223-224.

Human Rights.[350] The preliminary reference procedure has also been treated similarly under the Draft Accession Agreement.[351]

A solution was given to this in the Draft Accession Agreement, with the co-respondent mechanism. Under Article 3(2) of the Draft Accession Agreement, when an application is directed against an EU Member State, the EU may become a co-respondent if it appears that the compatibility of EU Law with the ECHR is called into question. Article 3(6) of the Draft Accession Agreement then provides that where the CJEU has not had an opportunity to assess the compatibility with ECHR rights of a provision of EU Law, then it shall be afforded sufficient time to do so. This solution was however among the provisions found incompatible with the Treaties by the CJEU in Opinion 2/13 because, first, it did not reserve exclusively to the CJEU the power to rule on whether the CJEU has already dealt with an issue, and second, it did not permit the CJEU to rule on the interpretation, but only on the validity, of EU Law.

5. The EU Charter of Fundamental Rights

The Charter of Fundamental Rights was given legal effect under the Lisbon Treaty and has been recognised under Article 6(1) TEU to have the same legal value as the Treaties. The Charter is addressed to the EU and will also apply to the Member States when implementing EU Law. It applies to all EU activities that relate to the implementation or application of EU Law. The Preamble of the Charter refers to the Charter as reaffirming the rights that result in particular from the constitutional

[350] Joint Communication from Presidents Costa and Skouris, 17/1/2011.

[351] See Final Report to the CDDH, Appendix V – Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, at para 65. See also A. Torres Perez, "Too Many Voices? The Prior Involvement of the Court of Justice of the European Union" in V. Kosta, N. Skoutaris and V. Tzevelakos, *The EU Accession to the ECHR* (Hart, 2014), Chapter 3, at p. 36.

traditions common to the Member States, the ECHR and the general principles of EU Law.[352]

The relevant parts of Article 47 of the Charter, provide that, under its first paragraph, everyone whose rights and freedoms guaranteed by the Law of the Union are violated as the right to an effective remedy before a tribunal in compliance with the conditions it lays down, and, under its second paragraph, that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by Law. Under an Explanatory Note issued, the first paragraph of Article 47 of the Charter is based on Article 13 ECHR, and its second paragraph is meant to have the same meaning and scope as the second paragraph of Article 6 ECHR.[353] This Explanatory Note further states that in EU Law, the protection afforded is more extensive since it guarantees the right to an effective remedy before a court, and the CJEU enshrined this right as a general principle of EU Law.[354] It however also clarifies that Article 47 of the Charter has not been intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility for direct actions for annulment otherwise than under the reformed part of Article 263(4) TFEU.

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[352] See generally on the status of the Charter K. Lenaerts and J.A. Gutierrez-Fons, "The Charter in the EU Constitutional Edifice" in S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights* (Hart, 2014) at p.p. 1559-1562, J. Piris, *The Lisbon Treaty – A Legal and Political Analysis* (CUP, 2010) at p.p. 158-160, P. Craig, *The Lisbon Treaty – Law, Politics and Treaty Reform* (OUP, 2014) at p.p. 199-200, G. De Burca, "The Drafting of the European Union Charter of Fundamental Rights" (2015) *European Law Review* 799, J. Morijn, "Kissing Awake a Sleeping Beauty? The Charter of Fundamental Rights in EU and Member States' Policy Practice" in V. Kosta, N. Skoutaris and V. Tzevelakos, *The EU Accession to the ECHR* (Hart, 2014), Chapter 9, F.G. Jacobs, "The EU Charter of Fundamental Rights" in A. Arnull and D. Wincott, *Accountability and Legitimacy in the European Union* (OUP, 2002), Chapter 16, B. Dickson, "The EU Charter of Fundamental Rights in the Case Law of the European Court of Human Rights" (2015) *European Human Rights Law Review* 27, and C.L. Rozakis, "The Accession of the EU to the ECHR and the Charter of Fundamental Rights: Enlarging the Field of Protection of Human Rights in Europe" in V. Kosta, N. Skoutaris and V. Tzevelakos, *The EU Accession to the ECHR* (Hart, 2014), Chapter 20.

[353] Explanation Relating to the Charter of Fundamental Rights, published in the Official Journal of the European Union, C303/34, on 14/12/2007.

[354] Case 222/84 *Johnston* [1986] ECR 1651.

It has been noted by D. Shelton that the right to a remedy, or the obligation to provide a remedy when human rights are violated is expressly guaranteed by most global and regional human rights instruments, which effectively guarantee the same two requisites of a remedy that are set forth in Article 47, these being the procedural right of effective access to a fair hearing, and the substantive right to adequate redress.[355] At the same time, D. Shelton further notes that the EU right to a fair hearing is wider than Article 6(1) ECHR in that it may be relied upon by parties alleging a violation of any right conferred upon them by EU Law, and not only in respect of rights guaranteed by the Charter, this being the consequence of the fact that the EU is a community based on the Rule of Law.[356]

Article 47 of the Charter, along with Article 19(1) TEU,[357] effectively incorporate the right to effective judicial protection, which is one of the general principles of EU Law,[358] and in essence guarantees a right to obtain a remedy in a competent court. Along the lines of Article 13 ECHR, this remedy must be effective both in Law and in

[355] D. Shelton in S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights* (Hart, 2014) at p.p. 1200-1201.

[356] D. Shelton in S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights* (Hart, 2014) at p.p. 1210-1211. See also Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339.

[357] As to the scope of Article 47 of the Charter and its interrelation with Article 19(1) TEU, see Case C-64/16 *Associacao Sindical dos Juizes Portugueses* EU:C:2018:117. See also L. Pech and S. Platon, "Judicial Independence Under Threat: The Court of Justice to the Rescue in the *ASJP* Case" (2018) 55 *Common Market Law Review* 1827, at p. 1844.

[358] See M. Borraccetti, "Fair Trial, Due Process and Rights Defence in the EU Legal Order" in G. Di Federico, *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument* (Springer, 2011), Chapter 5, F. Wilman, *Private Enforcement of EU Law Before National Courts – The EU Legislative Framework* (Elgar, 2015), Chapter 2, at p.p. 36-40, and R. Barents, "EU Procedural Law and Effective Legal Protection" (2014) 51 *Common Market Law Review* 1437, at p. 1442. On the development of fundamental rights in the EU see F.G. Jacobs, "The Evolution of the European Legal Order" (2004) 41 *Common Market Law Review* 303, M. Brkan, "The Concept of Essence of Fundamental Rights the EU Legal Order: Peeling the Onion to its Core" (2018) 14 *European Constitutional Law Review* 332, M. Safjan and D. Dusterhaus, "A Union of Effective Judicial Protection: Addressing a Multi-level Challenge Through the Lens of Article 47 CFREU" (2014) 33 *Yearbook of European Union Law* 3, J. Kuhling, "Fundamental Rights" in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Hart and Verlag CH Beck, 2nd edition, 2010), Chapter 13, and A. Arnull, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" (2011) *European Law Review* 51, and J. Temple Lang "The Principle of Effective Judicial Protection of Community Law Rights" in D. O' Keeffe, *Liber Amicorum Slynn* (Kluwer, 2000), Chapter 17. On the development of fundamental rights in the EU, see E. Spaventa, "Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU" in M. Dougan and S. Currie, *50 Years of the European Treaties – Looking Back and Thinking Forward* (Hart, 2009), Chapter 14.

practice.[359] It seems rightly argued that there are, and should be, several aspects of the right to effective judicial protection, one of which is the requirement of actual access to courts, which are independent, impartial and competent to rule on both fact and Law, and that this possibility of applying to a court may not be restricted or denied altogether.[360]

It has also rightly been observed that the repeated declaration by the CJEU that the right to effective judicial protection is one of the general principles of EU Law, stemming from the constitutional traditions of the Member States, gives very little guidance as to the specific contents of that right, the constraints to which it may subject, and the way it should be balanced with other conflicting interests.[361] It has also interestingly been noted that while the right to effective judicial protection lacks such certainty in comparison to the ECHR jurisprudence,[362] the CJEU's continued reliance on this concept when Member States are required to protect this right and EU Law rights in general, makes it seem that there is no reason in Law or in logic to deny individuals access to the same type of sanctions when they challenge EU measures.[363] Despite the entry into force of the Charter, the problematic nature of locus standi for an action for annulment under Article 263(4) TFEU is however still in place.[364]

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[359] H.Ch. Hofmann in S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights* (Hart, 2014) at p.p. 1213-1215. See also T. Tridimas, *The General Principles of EU Law* (OUP, 2nd edition, 2006), Chapter 9, at p.p. 455-456, A. Ward, "Access to Justice" in S. Peers and A. Ward, *The European Union Charter of Fundamental Rights* (Hart, 2004), Chapter 5, S. Prechal, "EC Requirements for an Effective Remedy" in J. Lonbay and A. Biondi, *Remedies for Breach of EC Law* (Wiley, 1997), Chapter 1, M. Accetto and S. Zleptnig, "The Principle of Effectiveness: Rethinking its Role in Community Law" (2005) 11 *European Public Law* 375, at p.p. 388-389, and C. Harlow, "Access to Justice as a Human Right: The European Convention and the European Union" in P. Alston, *The EU and Human Rights* (OUP, 1999), Chapter 7.

[360] J.H. Jans, R. De Lange, S. Prechal and R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing, 2007), Chapter 2, at p. 50.

[361] T. Tridimas, *The General Principles of EU Law* (OUP, 2nd edition, 2006), Chapter 9, at p. 443.

[362] A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 4, at p. 175.

[363] A. Ward, *Judicial Review and the Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 4, at p. 203.

[364] See the detailed account by L. Pech and A. Ward in S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights* (Hart, 2014) at p.p. 1245-1250.

6. The Rule of Law

The Rule of Law is said to underline all jurisprudence relating to access to justice both in the EU and ECHR.[365] As F.G. Jacobs reiterates, the Rule of Law is universally recognised as a fundamental value, but there is not universal agreement about what it means, nor is there agreement about how it can be reconciled with other competing values, like the requirements of democratic government.[366] He continues that there are two aspects of the Rule of Law, the formal and the substantive. Formally, it requires that the exercise of power, and accordingly all acts of the public authorities, are, with narrow exceptions, subject to review by the courts to ensure that the exercise was authorised by Law.[367]

Although recognised that there is no clear definition, and that it is even less clear what the Rule of Law means in an EU context,[368] among the basic elements deduced by A. Arnull is that there should be an independent and impartial judiciary with responsibility for resolving disputes over precisely what the Law requires and providing effective remedies where the Law is breached.[369] Noting further that there remain several respects in which observance of the Rule of Law in the EU remains imperfect, and access to the Courts is one of the most pressing concerns, especially in the case of direct actions for annulment.[370] In a very useful summary, it is stated that the basic elements of the Rule of Law are, on a view, purely technical, in that that

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[365] See K. Tuori, *European Constitutionalism* (CUP, 2015), Chapter 6, at p.p. 209-217.
[366] F.G. Jacobs, *The Sovereignty of Law: The European Way* (CUP, 2007), Chapter 1, at p.p. 7-8. See however also L. Pech, "Promoting The Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law", in F. Amtenbrink and D. Kochenov, *The EU's Shaping of the International Legal Order* (Cambridge University Press, 2013).
[367] F.G. Jacobs, ibid, Chapter 1, at p.p. 7-8.
[368] See however K.L. Scheppele and L. Pech, *Is the Rule of Law Too Vague a Notion?, VerfBlog,* 2018/3/01, https://verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers/, DOI: bbd0a40a7297412cbc73552af7e8729d.
[369] A. Arnull, "The Rule of Law in the European Union" in A. Arnull and D. Wincott, *Accountability and Legitimacy in the European Union* (OUP, 2002), Chapter 14, at p.p. 240-241.
[370] A. Arnull, ibid, at p. 248.

they are concerned with the form rather than the content of the Law and with the mechanics of the legal system. There is also a view that the Rule of Law does not extend further than this, and that the notion is just one of the virtues which a legal system may possess and by which it is to be judged. And those who have this conception of the Rule of Law say that the content of the rules is a matter of substantive justice, which is an independent ideal, in no sense part of the Rule of Law. However, the notion is sometimes used in a wider sense to embrace aspects of substantive content, often implying something about the rights of the individual. The dividing line between the formal and the substantive conception of the Rule of Law can be difficult to draw, not least because some of the technical elements of the Rule of Law are regarded as fundamental rights.[371]

In another useful statement, recognising that the Rule of Law is a classic example of an essentially contested concept and that the EU is seemingly as hopeless at defining it, D. Kochenov considers that it is clear what the Rule of Law is not, and it is not democracy, the protection of human rights or other wonderful things, each of them existing independently of the Rule of Law, and it is not mere legality which is adherence to the Law. A strong notion in the Rule of Law tradition is that it is absolutely hostile to the untrammelled exercise of power, bringing the basic meaning of the Rule of Law down to the idea of subordination of the Law to another kind of Law which is not up to the sovereign to change at will.[372]

Nevertheless, it has also been argued that most general principles, including the Rule of Law, have clear cores and contestable margins, and that it is no argument against

[371] See A. Arnull, ibid, at p.p. 252-254.

[372] D. Kochenov, "EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?" (2015) 34 *Yearbook of European Law* 74, at p.p. 80-82.

the existence of the clear core that one can imagine cases at the margins over which one can reasonably argue.[373]

In an extensive examination, L. Pech[374] notes that the Rule of Law has become, in the light of multiple references to it, an overarching and primary principle of EU Constitutional Law. The concept, which is regularly equated with the idea of a government of Laws, not of men, enjoys widespread support and an undeniable high degree of consensus, not least because of its lack of a definition and the consequent dissensus as to its meaning, something which of course is not a problem peculiar to the EU.[375] It is something commonly left to the courts, and similarly to most national courts, the CJEU views the Rule of Law as an umbrella principle which can be relied on as an interpretative guide and as a source from which more specific legal standards can be derived.[376] This absence of a definition has had the consequence of allowing or even obliging the CJEU to flesh out a definition, leading to the developments in the area of judicial review, where the statement that all acts of the institutions shall be subject to review was welcomed.[377] It is characteristically noted that, on the other hand, the concept has not convinced the CJEU to relax locus standi for direct actions for annulment, and indeed the question whether the Rule of Law can be relied on to justify an unconditional right of access for individuals deserves a negative answer, but that is not to say that there is no room for improvement.[378]

Closely related to the Rule of Law discussion are considerations of judicial or legal accountability, which is more important in the EU given the democratic deficit

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[373] K.L. Scheppele and L. Pech, *Is the Rule of Law Too Vague a Notion?, VerfBlog,* 2018/3/01, https://verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers/, DOI: bbd0a40a7297412cbc73552af7e8729d

[374] L. Pech, ""A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principe of EU Law" (2010) 6 *European Constitutional Law Review* 359.

[375] L. Pech, ibid, at p.p. 359-361.

[376] L. Pech, ibid, at p. 369.

[377] L. Pech, ibid, at p.p. 370-371.

[378] L. Pech, ibid, at p. 387.

issues.[379] As rather classically stated, to secure accountability, the introduction of a neutral third party, the judge, is perceived as necessary, and this intervention can take place in several forms, such as criminal proceedings or judicial review proceedings.[380] Similar considerations as under the Rule of Law apply in subjecting legislative and administrative action to judicial review.[381]

7. Justifications of the standing rules

With the above in mind, and before proceeding to the examination of the Lisbon Treaty reform, the possible justifications of the locus standi rules as developed by the CJEU also demand consideration. The starting point should of course be some of the rather classic works on the function and justifications of locus standi rules in Public Law theory. This is followed by a consideration of the possible justifications for the locus standi rules as developed in the judicial review system, ending with an assessment of these from the standpoint of the individual.

7.1. *Locus standi rules in Public Law Theory*

To P. Cane, in Public Law actions, the interests of the individual are in conflict with the interests of the government, which, at least in democratic theory, represent the aggregates of the interests of a majority of citizens. Rules on standing require the applicant to say why he should be allowed to come to court to enforce one of the values given effect to by the substantive grounds of review of administrative

[379] See M. Bovens, "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *European Law Journal* 447.
[380] C. Harlow, Accountability in the European Union (OUP, 2002), Chapter 1, at p.p. 16-17.
[381] See generally P. Craig, "Accountability" in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), Chapter 17.

action,[382] and they should be used only to ensure that an appropriate applicant is before the courts.[383]

Conversely, D. Feldman sees that when litigation raises issues which go beyond the material interests of the litigants or those whom they claim to represent, the courts face major political and constitutional choices, and also have to answer the question whether litigation in the public interest will be the prerogative of the state and its organs or whether it will be the right of some or all citizens. The answer to such a question depends on the model of the constitution the judges adopt. If they have a statist or elitist view, they will tend to give the state or members of a ruling elite a monopoly in deciding where the public interest lies and enforcing it. If they see the constitution as based on a participatory political theory, public interest litigation by individuals or groups may be more acceptable. However, if everyone is permitted to raise public interest issues, litigation becomes an alternative or a supplement to orthodox political processes, taking the courts beyond their core function of adjudicating on individuals' rights and duties. If judicial review is legitimate in a democracy if it bolsters participation and limits the impact of a lack of access to, or voice in, the political system, the judge will need to decide what sort of participation or representation in politics is required by the constitutional scheme. And such questions are likely to turn on ideas about the role of citizens in politics.[384]

Put rather differently by S. Freeman, inevitably one's view regarding the democratic legitimacy or role of judicial review must turn upon how he conceives of democracy, and according to one common view, what democracy essentially involves is equal consideration of and responsiveness to everyone's interests in deliberations on Laws

[382] P. Cane, "The Function of Standing Rules in Administrative Law" (1980) *Public Law* 303, at p.p. 304-305.
[383] P. Cane, "The Function of Standing Rules in Administrative Law" (1980) *Public Law* 303, at p. 327.
[384] D. Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) *Modern Law Review* 44, at p.p. 48-49.

and social policies.[385] The standard basis for objecting to judicial review is that it is inconsistent with democracy and the majority rule in that judicial reversals of majority decisions violate the basic democratic principle of equal consideration of everyone's interests, which majority procedures are designed to accommodate,[386] but he argues that this is based on a misconception of the nature of legislative power and a short sighted conception of democracy, whereas there is nothing undemocratic about judicial review of Laws that infringe equality of fundamental rights.[387]

While not making an unconditional argument, J. Waldron criticises judicial review, as being politically illegitimate as far as democratic values are concerned mainly by privileging majority voting among a small number of unelected and unaccountable judges.[388] He also builds an argument that rights are not better protected by judicial review than in democratic legislatures or procedures, but his focus in these assertions is on judicial review of primary legislation enacted by an elected legislature of a polity, not judicial review of executive action or administrative rulemaking, the judicial review of which is widely accepted and a requirement of the Rule of Law.[389]

To receive a reply by R.H. Fallon, presenting arguments that although courts are not better overall at identifying rights violations than are legislatures, they have a perspective that makes them more likely to apprehend serious risks to some kinds of fundamental rights which are morally more disturbing than errors that result in erroneous overenforcement of fundamental rights. The argument is made that a judicial review system can be so designed that the total moral costs of such

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[385] S. Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review" (1990-1991) 9 *Law and Philosophy* 327, at p. 330.
[386] S. Freeman, ibid, at p.p. 330-331.
[387] S. Freeman, ibid, at p. 367.
[388] See J. Waldron, "The Core of the Case Against Judicial Review" (2006) *The Yale Law Journal* 1346, at p. 1369-1406.
[389] J. Waldron, ibid, at p.p. 1353-1354.

overenforcement will be lower than those that would result from the underenforcement that would occur in the absence of judicial review.[390]

7.2. *The choice for locus standi in the EU judicial review system*

In considering the EU judicial review system and locus standi of private parties, the starting point has to be the statement that the general rule is that in an international legal order dominated by states, the individual citizen is generally viewed as lacking international legal capacity, and accordingly cannot appear, apart from very limited exceptions, in an international forum to advance his rights.[391]

The possible justifications of the standing rules in the EU system were examined by C. Harding, who makes interesting observations. In the first place, he states that an individual is just one of an indeterminate number of persons affected by a regulation, so that his interest in the annulment would be proportionately small and uncertain. Secondly, the annulment of a legislative act is potentially more disruptive of established interests so that a private party's proportionately small interest in a general measure does not justify his being able to set in motion the process of annulment. The author notes that on the whole, the distinction between legislative and non legislative acts does not loom so large in Member State legal systems, but since the distinction is fundamental to the Community judicial review system, the ECJ had to develop more exact distinguishing criteria to deal with borderline cases.[392]

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[390] R.H. Fallon, "The Core of an Uneasy Case *For* Judicial Review" (2008) 121 *Harvard Law Review* 1693, at p.p. 1735-1736.

[391] See E. Stein and G.J. Vining, "Citizen Access to Judicial Review of Administrative Action in a Trannational and Federal Context" (1976) 70 *American Journal of International Law* 219, at p. 219.

[392] C. Harding, "The Review of EEC Regulations and Decisions" (1982) 19(2) *CMLRev* 311, at p.p. 311-313.

The possible explanations are also examined by A. Arnull,[393] who considers this a very difficult question. It seems likely that this approach was the product of a number of factors, some connected with the perceived intentions of the authors of the Treaty and some with the ECJ's own view of the needs of the Community system. One factor mentioned by the ECJ itself in *Producteurs de Fruits* is the fact that the system of the Rome Treaties lays down more restrictive conditions than the ECSC Treaty. He quotes E. Stein and G.J. Vining[394] who, as mentioned above, argued that the Community is a body at the borderline between the federal and the international, and in International Law the very notion of an individual having independent standing to sue before an international tribunal is little short of revolutionary.[395] The limited standing was also seen as a reflection of the liberal economic philosophy which underpins much of the Treaty, especially in its original form.[396] He refers to H. Rasmussen, who acknowledged that the expression "direct and individual concern" was essentially ambiguous and regarded the restrictive interpretation it had been given as part of a wider policy to allow itself to act more like a high court of appeals of Community Law, with all other national courts or Community courts established, acting as courts of first instance, and that interest outweighs the citizen's interest in direct access to the ECJ.[397] A further consideration is that expressed by C. Harding,[398] that a proliferation of direct challenges by private parties, perhaps accompanied by

[393] A. Arnull, "Private Applicants and the Action for Annulment Under Article 173 of the EC Treaty" (1995) 32 *CMLRev* 7, at p.p. 44-49. See also A. Arnull, *The European Union and its Court of Justice* (OUP, 2nd edition, 2006), Chapter 3, at p.p. 92-94.
[394] P. Stein and J. Vining, "Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context" (1976) 70 *AJIL* 219.
[395] See also C. Harlow, "Towards a Theory of Access for the European Court of Justice" (1992) 12 *Yearbook of European Law* 213, at p. 227.
[396] D. Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) 55 *MLR* 44, at p. 55.
[397] H. Rasmussen, "Why is Article 173 Interpreted Against Private Plaintiffs?" (1980) 5 *ELRev* 112, at p. 122.
[398] C. Harding, "The Private Interest in Challenging Community Action" (1980) 5 *ELRev* 354.

interim measures,[399] could have seriously disrupted the proper functioning of the Community system. This danger was particularly acute during the period when the Council did not adopt legislation until a consensus had emerged in its support. He deduces that the most progressive of the ECJ's decisions have been concerned principally with making the Community work. Where, as in cases of direct effect, this has meant protecting the rights of the individual against encroachment by national authorities the ECJ has not hesitated to uphold the rights of the individual. Where the conflict was between the rights of the individual and those of the Community's still immature institutions, however, the ECJ initially tended to give precedence to those. He then concludes that a growing realisation on the part of the ECJ that the strict application of the standing requirements could produce substantial injustice led ultimately to the breakdown of any coherence its Case-Law may once have had. The result was a significant relaxation of the standing rules, against the background of increasing maturity of the Community system, which was also consistent with developments in a number of national legal systems. He considered the unduly restrictive rules on standing as incompatible with the notion of a Community based on the Rule of Law, and advocated for a basic test based on whether the applicant has been adversely affected by the contested act, similar to s. 10 of the US Administrative Procedure Act 1946.[400]

More recently, A. Arnull identified that the strongest case against judicial review concerns rights based challenges to primary legislation where a court is being asked to

[399] On the possibility of interim measures, see D. Sinaniotis, *The Interim Protection of Individuals Before the European and National Courts* (Kluwer, 2006), K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law* (OUP, 2014), Chapter 13, F. Castillo De La Torre, "Interim Measures in Community Courts: Recent Trends" (2007) *Common Market Law Review* 273, and S. De La Sierra, "Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving From the Right to Effective Court Protection. A Comparative Approach" (2010) 10 *European Law Journal* 42.

[400] A. Arnull, ibid, at p.p. 48-49.

overturn the conclusion reached by a democratically elected legislature, leading to a conclusion of the existence of a close link between judicial review and democracy, and the very problem lies in the democratic deficit issues faced by the EU.[401]

A very interesting account comes from C. Harlow,[402] who relates categories of access to two developed theories of public interest representation in courts. The first theory is state oriented, where public interest representation is left to an official of the state, who possesses functions to bring before the courts matters of public interest where no one has locus standi. Such an official acts like a privileged applicant as no objection can be raised to his appearance on the ground of lack of interest. The second theory is founded in pluralist political theory and stresses the non governmental dimension of public interest representation, and demands that courts, legislators and administrators can arrive at decisions only after consultation of a variety of viewpoints, including those of private parties. This theory has gained ground, creating demand for procedures whereby third party and collective interests could be presented in courts.[403]

Considering the locus standi criteria for an action for annulment against EU measures, C. Harlow notes that little attempt has been made to relate criticism to the theoretical discussion of the public interest, noting that it would be a mistake to assume that the growing phenomenon of public interest litigation is an unmitigated good or that wider standing should be conceded just because it is demanded. Drawing from the American experience of public interest litigation, it could be said to have blurred the political and legal boundary, pushing the courts into the centre of the political process, while the procedural changes inspired by it have led to prolixity, delay and expense, the

[401] A. Arnull, "Judicial Review in the European Union" in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), Chapter 15, at p.p. 382-384.
[402] C. Harlow, "Towards a Theory of Access for the European Court of Justice" (1992) 12 *Yearbook of European Law* 213.
[403] C. Harlow, ibid, at p.p. 213-214.

result of which has been to imperil the ideal of impartial justice.[404] She argues that the CJEU is a natural magnet for wealthy repeat players willing to use legal proceedings systematically to protect their interests,[405] and that in these shark infested waters, the CJEU must be cautious if it is not to stultify the Commission's work, since administrative and adjudicative procedures are expensive, time consuming and capable of endless manipulation by the parties involved.[406] However, she makes the point that modern courts increasingly show a democratic willingness to hear as many citizens as possible, and for the CJEU of its own accord to open its doors to public interest representation would at the same time enhance its standing and help to redress the general democratic deficit of the Community.[407]

The drafters' intentions troubled H. Rasmussen, who considers that the most possible explanation is that they did not want to vest authority in the CJEU to review the legal acts of the institutions if the bringing of such actions was not under some sort of political control. He considers that the drafters could rightly hypothesise that the Member States and the institutions would blend concern for the upholding of legality with considerations of the political expediency of bringing annulment actions. In contrast, private applicants could be assumed to only look at their own interests in bringing the application of a general act to a halt by filing an action for annulment.[408] He concludes that while some shielding from such actions is obviously desirable as it would serve not to add more burdens on the rulemaking processes which would increase their slowness and inadequacy, the resulting situation is not a tenable one for the view of judicial protection of the individual against the powerful institutions.[409]

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[404] C. Harlow, ibid, at p. 215.
[405] C. Harlow, ibid, at p. 236.
[406] C. Harlow, ibid, at p. 240.
[407] C. Harlow, ibid, at p. 248.
[408] H. Rasmussen, *European Court of Justice* (Gadjura, 1998), Chapter 6, at p.p. 186.
[409] H. Rasmussen, ibid, at p.p. 201-202.

Another author, M. Hedemann-Robinson, considers that the main arguments in favour of restricting the numbers of private applications were basically the need to prevent the EU courts being flooded with litigation and ensure that Community legislation would not be continually and unnecessarily shrouded in legal uncertainty or be held to ransom by the economic interests of individual litigators.[410] He also tries to discern a hierarchy of Community enactments, but he recognises that this can be by implication only. At the top of the tree are regulations, which have general application and being directly applicable, bear features which closely resemble national Laws. Decisions, however, have the capacity to be either akin to a generalist or an administrative measure. He states that on the one hand, they can fairly be described as administrative in nature if they are designed to manipulate the behaviour of specific private actors, but on the other hand, they can be of a legislative or generalist nature, as opposed to being administrative, when they are addressed to Member States which are instructed to carry out measures which affect their territory generally and without reference to the commercial activities of particular individuals. Standing is accordingly differentiated.[411] He further notes that the Treaty is descriptive rather than prescriptive, in that it does not instruct the legislature when to utilize a regulation, directive or a decision. In a significant number of instances, the Treaty leaves it entirely to the discretion of the legislature, but the EU courts accepted that the legislature could not avoid judicial review proceedings by simply the type of measure chosen. Economic analysis seems to be absent in determining individual concern in the opinion of M. Hedemann-Robinson.[412] Even if the applicant constituted the sole trader, one of a very small number of persons or the largest player affected by a

[410] M. Hedemann-Robinson, ibid, at p.p. 127-128, citing Groeben/Broeckh, *Kommentar zum EWG Vertrag*, Bd II, 1960, at p. 135.
[411] M. Hedemann-Robinson, ibid, at p.p. 130-131.
[412] M. Hedemann-Robinson, ibid, at p.p. 141-142.

measure and liable to be fairly easily identified by the legislature, the EU courts did not sway away from their traditional position. On the one hand, he argues that there is some merit in this, in that it is not easily justifiable why someone should be granted standing simply because of his dominant position. On the other hand, he argues that where the legislature is able to identify with far greater accuracy the effects on the market participants concerned, measures take on a more administrative and specific nature, as opposed to legislative character. In these cases, it becomes unrealistic to accept that such enactments are passed irrespective of the particular commercial activities of the market players concerned. The approach makes little sense pragmatically as well, as argued by P. Craig,[413] since the range of affected parties is normally established by the principles in supply and demand. If there are two or three firms in the industry this is because they can satisfy the current market demand, and the number is unlikely to alter significantly if at all.

Another view has been expressed, that the nature of the subject matter provides the best rationale for the CJEU's approach, and also serves to distinguish the mainline cases from those in other areas, such as dumping, competition and state aid, where there is more willingness to proceed with the substance.[414]

The admissibility of actions for annulment seems a fundamental problem of every economic order which is based on the Rule of Law to J. Schwarze.[415] On the one hand, it is essential in the public interest to grant the necessary freedom to the European institutions in constituting and shaping the economic order by legislation and administration. On the other hand, the Rule of Law generates the need to grant

[413] P. Craig, "Standing, Rights, and the Structure of Legal Argument" (2009) 9(4) *EPL* 493, at p. 494.
[414] P. Craig, "Legality, Substantive Review in Community Law" (1994) 14 *Oxford Journal of Legal Studies* 507, at p. 536.
[415] J. Schwarze, "The Legal Protection of the Individual against Regulations in European Union Law" (2004) 10(2) *EPL* 285.

appropriate judicial protection to private parties affected by those measures.[416] The jurisdiction under *Plaumann* is based on the idea that due to their significance and general validity, regulations should not be put at the discretion of a vast number of challenges. He sees three reasons for this. First, this would increase judicial workload. Secondly, regulations are adopted after long and hard negotiations, and would be impeded even if these are only partially annulled. Thirdly, the exclusion of direct challenges is justified because of the availability of indirect routes. Citing N. Neuwahl,[417] he agrees that the judicial review system is based on the premise that no act is excluded from judicial review altogether, but it is not necessary that judicial protection is in every case granted to the largest possible extent.[418]

For K. Lenaerts and T. Corthaut,[419] there seem to be advantages in imposing on Member States and national courts the obligation to provide effective remedies and for the ECJ in using national courts as filters, in that this can assist in avoiding being inundated with manifestly unfounded actions and for the institutions not being interrupted all the time by direct actions, other than those brought by privileged applicants. However, they see the argument derived from the workload as questionable, in the sense that as a matter of principle it is an admission of weakness to let the extent of judicial protection depend on the ECJ's perceived burden. But also in practical terms this assessment is not strong, in the sense that an indirect route for judicial review basically is a cumbersome way to end up in Luxembourg after all, marred with all the procedural defects identified by AG Jacobs, and the only major shift rather seems to transfer the protection of individuals from the CFI to the ECJ. They further see that there is also the danger that treating national courts as filters

[416] J. Schwarze, ibid, at p.p. 285-286.
[417] N. Neuwahl, "Article 173 Par. 4 EC: Past, Present and Possible Future" (1996) *ELRev* 17.
[418] J. Schwarze, ibid, at p.p. 289-290.
[419] K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1.

could actually only deter them from sending references. The argument derived from a possible disturbance of the functioning of the institutions is also troublesome in that an indirect challenge can be equally disruptive for the institutions as an action for annulment, or even more so, since indirect challenges take place at a far later time when the institutions have taken hundreds of decisions on the basis of the contested act.[420] Admittedly, the right to an effective remedy does not necessarily imply a right of access to a court with competence to invalidate a measure enacted by the legislature, and reference is made to the ECHR Case-Law, and in particular *Posti and Rahko v. Finland*,[421] where a violation has been found not because of the unavailability of access to a court capable of invalidating a Finnish decree, but because the applicants were left without a remedy, and no one can be required to breach the Law so as to be able to have a civil right determined in accordance with Article 6(1) ECHR.[422] A comparison with the position in many Member States who provide far greater access to courts against administrative and to a lesser degree legislative acts seems not convincing to them, as national legislatures are generally democratically elected whereas there is a democratic deficit in the EC and there is no clear hierarchy of norms.[423] The approach also relating to *Kobler* liability for failure to send a preliminary reference seems also inappropriate in terms of an effective remedy as there are extensive delays for the initial proceedings to reach the highest courts who have an obligation to refer, and then fresh proceedings for compensation should be issued.[424]

[420] K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1, at p.p. 12-14.
[421] *Posti and Rakho v. Finland*, Application No. 27824/95, 24/9/2002, at para 64.
[422] K. Lenaerts and T. Corthaut, ibid, at p. 14.
[423] K. Lenaerts and T. Corthaut, ibid, at p.p. 14-15.
[424] K. Lenaerts and T. Corthaut, ibid, at p.p. 16-18.

To S. Bogojevic, the choice for a restrictive interpretation of the locus standi criteria and the diversion of private parties to national courts seems to be in accordance with judicial subsidiarity, allowing legal issues to be resolved closer to the citizen. This reflects a deeper interest in maintaining the delicate balance between the regulatory powers of the Commission and of the Member States, and from this viewpoint, judicial subsidiarity is the result of a deliberate political strategy.[425]

7.3. *Theories of political science*

An application of theories of political science has revealed several motivations for the CJEU's position on locus standi to M. Eliantonio and N. Stratieva. According to the reasoning of rational choice institutionalism, the CJEU only engages in activism when it is given the impetus by external actors and expects the changes to be approved by the majority of the Member States. Consequently one can deduce that a reform will take place only when the institutions and the Member States push for it, and under the Lisbon Treaty they seemed unwilling to change direct and individual concern. They continue that if viewed under the alternative approach of historical institutionalism, according to which the CJEU would be acting on the basis of self interest, the willingness to perform changes was evident in other areas, but not in standing. In the case of standing, judicial restraint can be justified by the CJEU's desire to keep the EU immune from challenges. Finally, they argue that path dependency suggests that the policy choices made in the early days of the life of the institution, like the interpretation of individual concern, have been entrenched and too high costs would have to be incurred in order to change them. Therefore, despite the path inefficiencies

[425] S. Bogojevic, "Judicial Protection of Individual Applicants Revisited: Access to Justice Through the Prism of Judicial Subidiarity" (2015) 34 *Yearbook of European Law* 5, at p.p. 20-21.

that are sustained due to the incompleteness of the system for judicial remedies, the initial choice is maintained.[426]

7.4. *Thoughts from the individual's standpoint*

The arguments that centre upon the significance of certain EU measures or the problems that institutions face in order to achieve consensus in the process of adopting them, seem to sit rather unwell with individual rights and the principle of the Rule of Law. It seems difficult to maintain that the difficulties faced in the adoption of a measure or its perceived importance can be valid justifications for restricting the possibilities to challenge its validity.

The argument based on the possibility of disruption that would result following the annulment of a measure also sits rather unwell. It is inevitable in any system that there will be a gap between the time a measure enters into force and the time when challenges against it are determined by the courts. The argument seems to sit equally unwell with any notion of legality, in that it cannot be easily justified that any such disruption resulting from the annulment of an illegal measure can constitute a ground for accepting its illegality or prolonging its illegality. The strange result of such an argument is that actually a direct challenge, which is a shorter procedure than a preliminary reference which comes additional to national proceedings, would actually create less disruption, as also recognised by AG Jacobs in *UPA*, in that a measure shall be declared invalid with binding effects throughout the EU in a shorter timeframe, and not after a longer period of its application.

[426] M. Eliantonio and N. Stratieva, "From Plaumann, through UPA and Jego-Quere, to the Lisbon Treaty – The Locus Standi of Private Applicants under Article 230(4) EC Through a Political Lens", Maastricht Faculty of Law Working Paper No. 2009/13.

The main arguments identified by M. Hedemann-Robinson in favour of restricting the numbers of private applications,[427] also sit rather unwell with the notions of the Rule of Law and individual rights. The first, which was the need to prevent the EU courts being flooded with litigation offers little justification for any restriction, as it can equally be argued that the protection of individual rights cannot depend on a system's allocation of resources to its courts or judicial bodies. Equally, the second argument, based on the need to ensure that EU legislation would not be continually and unnecessarily shrouded in legal uncertainty or be held to ransom by the economic interests of individual litigators, also seems problematic. Its first limb, that EU legislation would be shrouded in uncertainty has been dealt with previously. And the second limb could seem rather exaggerated, as it seems difficult to envisage how individual litigators by lodging direct actions for annulment to protect their interests could hold the EU to ransom. It is the contrary that may be argued, in that the EU should not be allowed to hold individual litigators to ransom by restricting access to courts capable of granting an effective remedy or providing effective judicial protection to their rights. With due respect of course, it can be argued that this cannot be a strong argument for restricting challenges to legality. If the quality of legislation is satisfactory and does not infringe general principles or individual rights, then the EU and its various bodies have nothing to fear from direct challenges, let alone be held to ransom.

The argument of E. Stein and G.F. Vining[428] that the Community is a body at the borderline between the federal and the international, and in International Law the very notion of an individual having independent standing to sue before an international

[427] M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p.p. 127-128, citing Groeben/Broeckh, *Kommentar zum EWG Vertrag*, Bd II, 1960, at p. 135.

[428] P. Stein and J. Vining, "Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context" (1976) 70 *AJIL* 219.

tribunal is only short of revolutionary seems to be correct, at least for its time. However, it should now be seen in the light of how much the EU has remarkably developed since then, and how much wider its competencies and its legislative and regulatory activities are. With the EU deciding on net meshes for fishing, pharmaceutical products, construction products, food, drink, banking, insurance policies, and electronics, it can hardly now be resembled to any other international body. This justification seems no longer appropriate in the case of the EU.

The extent to which the unavailability of a direct action for annulment is mitigated by alternative routes of challenges is also questionable and has been considered above. The choice or need or policy for decentralisation emerges as a valid argument. However, like any other policy, it cannot override or reduce the effect of individual rights, including the right to effective judicial protection. Decentralisation in the judicial review system, which effectively translates into having national courts acting filters for validity challenges may not be precluded in principle, provided however that it works and is effective. Not only is it not precluded, as mentioned above, references to a superior court on matters of Law or the constitutionality of legislation are actually common in the Member States and around the world. The criticism of the judicial review system is based on the problems of this procedure, as implemented in the EU through the preliminary reference procedure. If these problems cannot be overturned, and the system cannot provide effective judicial protection and respect for individual rights, any policy of judicial decentralisation should give way.

8. Protection of the individual and the individual as a protector

A final consideration that should be borne in mind before proceeding to the effect of the reform in Article 263(4) TFEU, is the important role of individuals in private enforcement of EU Law.

The protection of individual rights must of course be a central aim of EU Law, but there can very well be another side of the coin. Private parties can also play a significant role in ensuring legal accountability of the various actors and enhancing compliance with the Rule of Law within the EU. This aspect does not feature very well in the discussions on standing of private parties in direct actions for annulment but should by no means be underestimated. Whole sectors of European Law have been built or operate through private enforcement,[429] and the areas of environmental policy,[430] consumer policy,[431] public procurement[432] and competition[433] can be listed as such examples.

[429] See generally F. Wilman, *Private Enforcement of EU Law Before National Courts – The EU Legislative Framework* (Elgar, 2015), A.M. Van Den Bossche, "Private Enforcement, Procedural Autonomy and Article 19(1) TEU: Two's Company, Three's a Crowd" (2014) 33 *Yearbook of European Law* 41, and S. Drake and M. Smith, *New Directions in the Effective Enforcement of EU Law and Policy* (Elgar, 2016).

[430] See M. Eliantonio, "Enforcing EU Environmental Policy Effectively: International Influences, Current Barriers and Possible Solutions" in S. Drake and M. Smith, *New Directions in the Effective Enforcement of EU Law and Policy* (Elgar, 2016), Chapter 7.

[431] See P. Cortes, "Enforcing EU Consumer Policy More Effectively: A Three-Pronged Approach" in S. Drake and M. Smith, *New Directions in the Effective Enforcement of EU Law and Policy* (Elgar, 2016), Chapter 8 and F. Wilman, *Private Enforcement of EU Law Before National Courts – The EU Legislative Framework* (Elgar, 2015), Chapter 5.

[432] See F. Wilman, *Private Enforcement of EU Law Before National Courts – The EU Legislative Framework* (Elgar, 2015), Chapter 3.

[433] See C. Petrucci, "Effective Private Enforcement of EU Competition Law: An Input and Output Legitimacy Analysis of Collective Redress" in S. Drake and M. Smith, *New Directions in the Effective Enforcement of EU Law and Policy* (Elgar, 2016), Chapter 9, and F. Wilman, *Private Enforcement of EU Law Before National Courts – The EU Legislative Framework* (Elgar, 2015), Chapter 6.

It has been neatly summarised[434] that what became known as the private enforcement model of EU Law, which ensures the possibility for private parties to initiate legal proceedings for alleged infringements of their rights under EU Law, not only serves the interests of those parties themselves, but also adds to the supervision exercised by the Commission or otherwise by the Treaties, and this implies that private parties are recruited as "private attorneys general"[435] or "private policemen",[436] employing the vast potential resources of the general European population in securing the uniform and effective application of EU Law.[437] Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights have also been described as innovations aiding the private enforcement model.[438]

When private interests are affected, more force is naturally put in litigation for the annulment of a measure by the person aggrieved. This aids and promotes accountability and democracy. Whole chapters in books are devoted to the democratic deficit in the EU and the problems or deficiencies of internal checks and balances in EU Administrative Law[439] and also how judicial review is one of the significant

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[434] F. Wilman, *Private Enforcement of EU Law Before National Courts – The EU Legislative Framework* (Elgar, 2015), Chapter 1, at p. 4.
[435] C. Kilpatrick, "The Future of Remedies in Europe" in C. Kilpatrick, T. Novitz and P. Skidmore, *The Future of Remedies in Europe* (Hart, 2000), at p. 2.
[436] S. Drake, "Scope of Courage and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the ECJ" (2006) 31 *European Law Review* 841, at p. 843.
[437] M. Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart, 2004), at p. 76.
[438] See S. Drake, "More Effective Private Enforcement of EU Law Post-Lisbon: Aligning Regulatory Goals and Constitutional Values" in S. Drake and M. Smith, *New Directions in the Effective Enforcement of EU Law and Policy* (Elgar, 2016), Chapter 1, at p.p. 27-37. See also S. Bogojevic, "Judicial Protection of Individual Applicants Revisited: Access to Justice Through the Prism of Judicial Subidiarity" (2015) 34 *Yearbook of European Law* 5, at p. 21.
[439] See for example H.C.H. Hofmann, G.C. Rowe and A.H. Turk, *Administrative Law and Policy of the European Union* (OUP, 2011), Chapters 22, 23 and 24, A.H. Turk, "Comitology" in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), Chapter 13, L. Bolzonello, "Independent Administrative Review Within the Structure of Remedies Under the Treaties: The Case of the Board of Appeals of the European Chemicals Agency" (2016) 22 *European Public Law* 569, T. Larsson and G.F. Schaefer, "The Problem of Democratic Legitimacy in a Supranational Government" in H.C.H. Hofmann and A.H. Turk, *EU Administrative Governance* (Elgar, 2006), Chapter 16, M. Everson and J. Eisner, *The Making of a European Constitution – Judges and Law Beyond Constitutive*

responses to the EU's democratic deficit due to its contribution to substantive legitimacy.[440] The institutions, the Member States and other privileged applicants who can lodge actions for annulment without having to satisfy any standing criteria can in some respects be so heavily influenced by political ideas, choices and limitations in deciding whether to pursue such a challenge, that they cannot be expected to perform this role adequately. Private parties on the other hand, are not affected or influenced by such political factors, and will go as far as they can to protect their rights and interests, subjecting all players to legal accountability.[441] This may potentially come a long way in mitigating the shortcomings of accountability mechanisms in the administrative system of the EU. No system can be complete without private enforcement, which is capable of invaluably supplementing even the most thorough accountability mechanisms.

Private enforcement in validity challenges does not burden the funds of the EU, apart from the resources that have to be allocated in defending such challenges. In all other respects, private funds are used in enforcing accountability and compliance with the Rule of Law. On the contrary, the argument may also be made that if challenges are found to be ungrounded, then funds, in the form of legal costs, are paid to the

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Power (Routledge – Cavendish, 2007), Chapter 6, M. Chamon, *EU Agencies* (OUP, 2016), Chapter 2, at p.p. 53-60, R. van Schendelen and R. Scully, *The Unseen Hand – Unelected EU Legislators* (Frank Cass, 2003), C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (Hart, 1999), P.L. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community" (1999) 99 *Columbia Law Review* 628, T. Christiansen, J.M. Oettel and B. Vaccari, *21st Century Comitology – Implementing Committees in the Enlarged European Union* (EIPA, 2009), A. Alemanno and A. Meuwese, "Impact Assessment of EU Non-Legislative Rulemaking: The Missing Link in "New Comitology"" (2013) 19 *European Law Journal* 76, and C.F. Bergstrom and D. Ritleng, *Rulemaking by the European Commission – The New System of Delegation of Powers* (OUP, 2016).

[440] G. Majone, "Europe's "Democratic Deficit": The Question of Standards" (1998) 3 *European Law Journal* 5, at p.p. 22 and 26. See also M. Bartl, "The Way We Do Europe: Subsidiarity and the *Substantive* Democratic Deficit" (2014) 21 *European Law Journal* 23, D. Leczykiewicz, ""Constitutional Justice" and Judicial Review of EU Legislative Acts" in D. Kochenov, G. De Burca and A. Williams, *Europe's Justice Deficit?* (Hart, 2015), Chapter 7, at p. 108.

[441] See generally C. Kilpatrick, "The Future of Remedies in Europe" in C. Kilpatrick, T. Novitz and P. Skidmore, *The Future of Remedies in Europe* (Hart, 2000), Chapter 1, at p.p. 2-9.

institutions as successful parties. In this sense, private enforcement can in fact be seen as a self-funded surveillance mechanism that oversees and supplements the due fulfilment of tasks by various actors in complex checks and balances of administrative structures, and this should also form an important consideration in the discussion of the judicial review system and the locus standi criteria.

9. Summary of key findings

The following key findings of this chapter can be summarised for ease of reference:

a) The ECJ was allowed considerable discretion by the Treaties in relation to the interpretation of the locus standi criteria of direct and individual concern, and was actually forced to find a solution on its own and of its own. As a matter of judicial policy choice, the interpretation was very restrictive, leading to a decentralised judicial review system.

b) The historical overview of the academic reception of the locus standi rules reveals that the shortcomings of the judicial review system on which criticism continues to be based, were actually realised in the very early years of the then EEC.

c) The right to effective judicial protection is not entirely clear, at least when it comes to the question of access to judicial review proceedings. As a result, how one views the EU judicial review system is, to a degree, a subjective opinion, and consequently, from one's standpoint the system may appear effective, whereas it may appear completely ineffective to another.

d) Likewise, Article 6 ECHR and Article 13 ECHR, Article 47 of the Charter of Fundamental Rights and the principle of the Rule of Law, are also not entirely

clear when it comes to access to judicial review proceedings. Nevertheless, systems of indirect challenges such as the preliminary reference mechanism are generally acceptable, but examination is anyway carried out on a case by case basis.

e) There are various possible explanations as to why the ECJ chose a restrictive interpretation of the locus standi rules, leading to a decentralised judicial review system. However, if the shortcomings of the EU judicial review system cannot be overturned, and endanger effective judicial protection or respect for individual rights, any policy of judicial decentralisation should give way.

f) There are anyway important benefits associated with private enforcement of EU Law, and in the area of judicial review, private parties can play a significant role in ensuring legal accountability and enhancing compliance with the Rule of Law.

The following chapter examines the Lisbon Treaty reform of the locus standi criteria in Article 263(4) TFEU, and the interpretative choices of the CJEU for the new notions of a regulatory act and implementing measures.

CHAPTER 4: THE LISBON TREATY REFORM IN ARTICLE 263(4) TFEU

This chapter covers the Lisbon Treaty reform of the locus standi criteria, and the interpretation of the notions of a regulatory act and implementing measures by the CJEU. It then relates the developments back to the questions of judicial policy choice of the CJEU.

1. The regulatory act not entailing implementing measures

The effect of the Lisbon Treaty reform depended on the interpretation of the new provision in Article 263(4) TFEU, under which a private party is now afforded standing to file an action for the annulment of a regulatory act that is of direct concern to him and does not entail implementing measures. With the test of direct concern already being in place, the extent of the reform naturally depended on the interpretation of the term "regulatory act" and the question of what degree of further action would constitute "implementing measures".[442]

Tons of ink were spent immediately after the adoption of the Lisbon Treaty as to the definition of the concept of a "regulatory act". A term which, despite having a clearer or better place in the draft Constitution of Europe under the nomenclature and hierarchy that would have been created under it, had no connection with other provisions of the Lisbon Treaty. Arguments advocating for its interpretation to include legislative acts and not only non legislative acts of general application were readily put forward, depicting and conveying not least the universal outcry of the

[442] As also pointed out in P. Craig & G. De Burca, *EU Law: Text, Cases and Materials* (OUP, 6th edition, 2015). See also A. Albors-Llorens, "Remedies Against the EU Institutions After Lisbon: An Era of Opportunity?" (2012) 71(3) *Cambridge Law Journal* 507.

academic world for the highest possible relaxation of the standing criteria after decades of customary application of the *Plaumann* test.[443] And the time seemed absolutely right, since the CJEU had been given what it asked for in *UPA* and *Jego Quere* in order to reconsider the judicial review system it had developed, a reform of the Treaty by the Member States.

Surprisingly, the interpretation of the notion of "implementing measures" was not so central in the early discussion that followed the reform, which primarily focused on the interpretation of the term "regulatory acts".[444] At least it was not so much foreseen as a potential obstacle to the extent of the reform. This could arguably be attributed to the early expectation that it will be closely related to the interpretation of direct concern, which related the purely automatic application of a measure to the existence of real discretion in its implementation, and considering the criterion as satisfied even in cases where some discretion existed but its exercise was entirely theoretical.[445] Or perhaps also to the lack of a publicly available record in the travaux preparatoires as to any adversarial discussion in relation to the potential interpretation of this in the Discussion Circle of the European Convention, which itself, from what is reported, seems to have focused more on the choice of term or name for what was finally

[443] See among others S. Balthasar, "Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU" (2010) 35 *European Law Review* 542, R. Barents, "The Court of Justice After the Treaty of Lisbon" (2010) 47 *Common Market Law Review* 709, at p.p. 122-126, P. Craig, *EU Administrative Law* (OUP, 2nd edition, 2012), Chapter 11, at p.p. 317-318, and S. Peers and M. Costa, "Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and others v. Commission* & Judgment of 25 October 2011, Case 262/10 *Microban v. Commission*" (2012) 8 *European Constitutional Law Review* 82.

[444] See for example among others, A. Arnull, "The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?" (2011) *European Law Review* 51, at p. 70, S. Balthasar, "Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU" (2010) 35 *European Law Review* 542, R. Schutze, *European Union Law* (CUP, 2015), at p. 359, I. Blahusiak, "Access of Citizens to the Court of Justice: The Role of Regulatory Acts" Dny práva – 2010 – Days of Law, 1 ed. Brno: Masaryk University, 2010, available at http://www.law.muni.cz/content/cs/proceedings.

[445] See also M. Bergstrom, "Judicial Protection for Private Parties in European Commission Rulemaking" in C.F. Bergstrom and D. Ritleng, *Rulemaking by the European Commission – The New System for Delegation of Powers* (OUP, 2016), Chapter 10, at p.p. 220-223.

branded a "regulatory act".[446] Time however only proved correct the reservations expressed by some of the commentators, and certainly the expectation of A. Albors-Llorens, that the interpretation of this requirement that the act should not entail implementing measures will be as important as the notion of a regulatory act.[447]

2. Interpretation of "regulatory acts"

The question of what constitutes a regulatory act reached the GC quickly. In *Inuit*[448], an action for annulment of a Regulation on trade in seal products which was actually adopted before the entry into force of the Lisbon Treaty was filed, and the applicants claimed, among others, that this constituted a regulatory act not entailing implementing measures so their action should be held to be admissible without them being required to show individual concern. Although the measure predated the entry into force of the Lisbon Treaty, standing had to be judged under the revised criteria in Article 263(4) TFEU which applied at the time the action was filed.[449] The GC was forced to categorise a measure predating the Lisbon Treaty, under the categories of measures provided for in the Lisbon Treaty, in order to apply the standing rules of Article 263(4) TFEU. The contested measure was adopted under the codecision procedure, which is the predecessor of the ordinary legislative procedure, and would accordingly have been a legislative act under the Lisbon categorisation. The applicants maintained that even so, legislative acts may also be regulatory acts, this being a term covering all acts of general application. The GC disagreed, holding that the term encompasses all acts of general application other than legislative acts.

[446] See for example S. Balthasar, "Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU" (2010) 35 *European Law Review* 542, T.C. Hartley, *The Foundations of European Union Law* (OUP, 8th edition, 2014), Chapter 12, at p.p. 383-386.
[447] A. Albors-Llorens, "Remedies Against the EU Institutions After Lisbon: An Era of Opportunity?" (2012) 71(3) *Cambridge Law Journal* 507, at p. 526.
[448] Case T-18/10 *Inuit Tapiriit Kanatami and others v. European Parliament and Council* [2011] ECR II-5599.
[449] See for example Case T-539/08 *Etimine SA and Ab Etiproducts Oy v. Commission*.

The applicants appealed the order dismissing their application to the ECJ,[450] employing no more no less virtually all arguments generated in the academic discussion advocating for a broader interpretation of the term so as to include legislative acts. And also employing virtually all known arguments condemning the EU judicial review system as not providing effective judicial protection, and highlighting the Lisbon Treaty reform as an opportunity to enhance judicial protection.

The ECJ agreed with the GC and dismissed the appeal, holding that the term "regulatory acts" cannot be interpreted to include legislative acts. Acknowledging that the new provision which formed the third limb of Article 263(4) TFEU relaxed the conditions of admissibility, it then proceeded to examine the construction of the whole of this paragraph, highlighting the use of the term "acts" in the first limb covering acts addressed to an applicant, and in the second limb covering acts which are of direct and individual concern to an applicant. It then highlighted by way of comparison the use of the term "regulatory act" in this third limb. Existing Case-Law[451] dictated that the term "acts" had to be construed as encompassing all acts of general application, legislative or otherwise, and individual acts, so the ECJ regarded impossible an interpretation of the term "regulatory act" to include legislative acts since this would amount to nullifying the distinction made between these two terms in the text of Article 263(4) TFEU and its three limbs.[452]

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[450] Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625.
[451] See for example Case 60/81 *IBM v. Commission* [1981] ECR 2639.
[452] *Inuit,* paras 56-58. See P.A. Van Malleghem and N. Baeten, "Before the Law Stands a Gatekeeper – Or, what is a "regulatory act" in Article 263(4) TFEU? *Inuit Tapiriit Kanatami*" (2014) *Common Market Law Review* 1187, and the coverage by L. Pech and A. Ward in D. Shelton in S. Peers, T. Harvey, J. Kenner and A. Ward, *The EU Charter of Fundamental Rights* (Hart, 2014) at p.p. 1246-1250.

In the view of the ECJ, this conclusion was corroborated by the origins of the provision which came to be Article 263(4) TFEU, as evidenced in the travaux preparatoires of Article III-365(4) of the draft Constitution for Europe, which showed that a restrictive approach towards direct challenges against legislative acts was intended to be maintained. The Opinion of AG Kokott, was also in line with the judgment of the ECJ, having similarly considered that the drafting history of what came to be Article 263(4) TFEU rendered it clear that the term "regulatory acts" should not encompass legislative acts, adding that it was highly unlikely that the Intergovernmental Conference that negotiated the Lisbon Treaty wished to achieve a different outcome by the adoption of this reform than what was originally contemplated under the draft Constitution.[453]

The ECJ then dealt with the applicants' argument that there should be a reinterpretation of the test for individual concern along the lines of the proposal of AG Jacobs in *UPA*, since it was in their opinion obvious that the Member States were inspired by that call for reform in the revision of the standing rules effected by the Lisbon Treaty. This argument was rather summarily dismissed, holding that it is clear from the fact that these notions were not altered in any way by the reform, the existing interpretation of individual concern must not be altered.[454]

The applicants had also argued that a strict interpretation of Article 263(4) TFEU would be in breach of Article 47 of the now applicable Charter of Fundamental Rights, as well as Articles 6 and 13 of the ECHR, since it would not enable them to challenge the legality of acts that directly affect them. The ECJ stated that the Treaty had established a complete system of remedies and procedures that ensures legality

[453] Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625, at para 46 of her Opinion.
[454] Paras 68-71 of the Judgment.

review of all EU acts, and that the ECHR and the Charter could not provide any basis for reinterpretation or further relaxation of the standing conditions. Article 47 of the Charter combined with Article 6(1) TEU made it clear that its adoption was not meant to reform the existing judicial review system any further.[455]

A similar analysis had also been made by AG Kokott in her Opinion.[456] Recognising that due account must be taken of the fundamental right to effective judicial protection, whether this is based on the Charter, the ECHR or the general principles of EU Law, this right does not dictate that a direct remedy must in all cases be available, highlighting at the same time that even the applicants themselves cite no authority to that effect. She also stated that there is no reason to fear for any gap in the protection if a direct action is not available against a legislative act as in the case before them, arguing that the applicants themselves could write to their national authorities requesting confirmation that the ban in trading of seal products is not applicable to them. A negative reply by the national authority must be reviewable before national courts, which in their turn may refer the issue of validity of the Regulation which is a legislative act to the ECJ, so effective judicial protection was ensured within the reasoning of *UPA*.

As interestingly observed by C.F. Bergstrom,[457] the ECJ avoided dealing with the notion of implementing measures in *Inuit*, focusing instead only on a general analysis and repeating its traditional position that the Treaties have established a complete system of remedies and procedures that ensures review, and that it is for the Member States to ensure compliance with the right to effective judicial protection. It is worth

[455] See para 95 of the judgment.
[456] See paras 105-124 of her Opinion.
[457] C.F. Bergstrom, "Defending Restricted Standing for Individuals to Bring Direct Actions Against "Legislative" Measures" (2014) *European Constitutional Law Review* 481, at p.p. 490-491.

noting that the Opinion of AG Kokott was given on 17/1/2013 and the judgment of the Grand Chamber of the CJEU came on 3/10/2013, a timegap which itself seems to reveal how much the issue of the interpretation of "regulatory act" must have troubled the judges. And it could consequently be that in the circumstances, the judges composing the Grand Chamber might have wanted to avoid dealing with the issue of implementing measures in that case, since this was not absolutely necessary in order to give judgment, given the finding that regulatory acts do not include legislative acts.

The outcome of *Inuit* leads to the seemingly immutable realities.[458] Legislative acts are not included in the definition of regulatory acts. And also that the CJEU stands firm to its traditional position that the right to effective judicial protection, as well as Articles 6 and 13 ECHR and Article 47 of the Charter, cannot form a basis for any further extension of the availability of a direct action for annulment, whether by means of the interpretation of the new third limb of Article 263(4) TFEU or reinterpretation of the test for individual concern. On the contrary, the ECJ treated the Lisbon Treaty reform as coming rather as a confirmation of the *Plaumann* test.

The judgment in *Inuit* was characterised as a remarkable judgment for a court not generally noted for its restraint, which rather resorted to a narrow conservatism jerry built on the presumed intentions of the authors of the Treaties.[459]

Despite some argumentation towards the wider definition to include legislative acts[460] and some to the narrower to include only non legislative acts,[461] the interpretation of

[458] See Chapter 1.
[459] A. Arnull, "Judicial Review in the European Union", in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), Chapter 15, at p.p. 397-398.
[460] See for example among others M. Dougan, "The Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 45 *Common Market Law Review* 617, J. Bast, "Legal Instruments and Judicial Protection" in A. von Bogdandy and J. Bast, *Principles of European Constitutional Law* (Hart, 2009), and the useful summary in R. Schutze, *European Union Law* (Hart, 2015), at p.p. 359-360, and S.

the term "regulatory act" did not come as a surprise. Indeed, it seems difficult to flaw the reasoning of AG Kokott or the Grand Chamber of the ECJ especially in view of the travaux preparatoires, despite the arguments of the applicants in *Inuit* and some other arguments that these are inconclusive.[462] The Final Report of the Discussion Circle on Reform of the Court of Justice provides evidence that the choice of the expression "regulatory act" was favoured since it would enable a restrictive approach to proceedings by private parties against a legislative act and a more open approach against a regulatory act.[463] And it is also evidenced that, very likely, the main goal of the Lisbon Treaty reform was indeed to overcome the problem where a party was forced to break the Law in order to obtain access to justice, which existed in the case of measures of general application that did not require implementing measures.[464]

It has even been nicely illustrated that the grammatical interpretation of the term regulatory act in the different language versions suggests that such a definition is more appropriate.[465] However, the force of some of the arguments cannot be underestimated. In one of the first commentaries of the GC's judgments in *Inuit* and

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Balthasar, "Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU" (2010) 35 *European Law Review* 542, at p.p. 544-545.

[461] See among others C. Werkmeister, S. Potters and J. Traut, "Regulatory Acts Within Article 263(4) TFEU – A Dissonant Extension of Locus Standi for Private Applicants" (2010-2011) 13 *The Cambridge Yearbook of European Legal Studies* 311, A. Turk, *Judicial Review in EU Law* (Elgar, 2009), at p.p. 168 – 169, A. Dashwood and A. Johnston, "The Institutions of the Enlarged EU under the Regime of the Constitutional Treaty" (2004) 41 *Common Market Law Review* 1481, at p. 1509, M. Eliantonio, "Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?" (2010) *Journal of Politics and Law* 121, summary in R. Schutze, *European Union Law* (Hart, 2015), at p.p. 359-360.

[462] See R. Schutze, *European Union Law* (Hart, 2015), at p. 360.

[463] Final Report of the Discussion Circle on the Court of Justice of 25/3/2003, CONV 636/03, at para 22. See further C.F. Bergstrom, "Defending Restricted Standing for Individuals to Bring Direct Actions Against "Legislative" Measures" (2014) *European Constitutional Law Review* 481, at p.p. 496-499.

[464] See Cover Note from the Praesidium to the Convention of 12/5/2003, CONV 734/03. See also the general overview of the discussion in M. Varju, "The Debate on the Future of Standing under Article 230(4) TEC in the European Convention" (2004) 10 *European Public Law* 43 and R. Barents, "The Court of Justice in the Draft Constitution" (2004) 11 *MJ* 121, at p.p. 123-127.

[465] C. Werkmeister, S. Potters and J. Traut, "Regulatory Acts Within Article 263(4) TFEU – A Dissonant Extension of Locus Standi for Private Applicants" (2010-2011) 13 *The Cambridge Yearbook of European Legal Studies* 311, at p.p. 314-320.

Microban, S. Peers and M. Costa[466] highlight that the reasoning begs the question why, if the drafters of the Lisbon Treaty intended such a distinction between legislative and non legislative acts, they did not use unambiguous wording to such effect, specifically limiting the exception to non legislative acts. Especially since they chose to make such distinction in other parts of the Treaty, such as Articles 15, 203, 290, 296, 297, 349 and 352 TFEU. They further highlight the reference to legislative acts in the first paragraph of Article 263 TFEU but not in the third limb of the fourth paragraph. They concede however that the historical interpretation of the GC by reference to the travaux preparatoires is clearly correct, and they even see five further arguments showing the correctness of this interpretation, which the GC did not invoke. The first is that the definition is the easiest to apply in practice, since it is straightforward to see whether an act is a legislative or a non legislative one, although this approach would, in their view, give precedence to legal certainty and transparency over a more fundamental aspect of the Rule of Law which is judicial accountability for the legality of acts of public authorities which can only be guaranteed by effective access to judicial review. The second is that the definition matches the hierarchy of norms as developed by the drafters of the Lisbon Treaty. The third is that this mirrors the standing conditions against legislative acts found in most Member States, arguing however that such comparisons with national Law are not usually a factor for interpreting EU Law. The fourth is the argument that since legislative acts enjoy greater democratic legitimacy than acts of the executive, judicial review should be limited, pointing out however that while this is a valid argument in national legal systems, it is not equally strong for the EU legal and political system

[466] S. Peers and M. Costa, "Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and others v. Commission* & Judgment of 25 October 2011, Case 262/10 *Microban v. Commission*" (2012) 8 *European Constitutional Law Review* 82.

since it lacks the same legitimacy as those of Member States. The fifth is that a decentralised system respects judicial subsidiarity, although they argue that in the particular case this points in the opposite direction given the incapability of national courts to declare acts invalid.

3. Interpretation of "implementing measures"

The first judgments on the definition of the term "implementing measures" followed closely before this matter was also settled by the Grand Chamber of the ECJ. And unfortunately, it was quickly realised that an even higher degree of judicial conservatism on the part of the CJEU was forthcoming.

In *Telefonica*,[467] the contested measure was a decision of the Commission declaring a Spanish tax scheme as state aid and ordering repayment of the aid. The applicants filed an action for annulment against that decision claiming that it was a regulatory act not entailing implementing measures. The action was dismissed as inadmissible by the GC and the applicants appealed to the ECJ with the case being allocated to the Grand Chamber. The decision, although addressed to Spain, was considered by AG Kokott to be a measure of general application following existing Case-Law as it produced general effects within that Member State. On the other hand, she considered that it entailed implementing measures as against the applicants since the recovery of the aid had to be carried out by the national authorities. The Grand Chamber of the ECJ agreed. It first clarified that the question whether a regulatory act entails implementing measures should be assessed by reference to the position of the person pleading the right to bring proceedings under the final limb of Article 263(4) TFEU, and that it is irrelevant whether the act in question entails implementing measures

[467] Case C-274/12 P *Telefonica v. Commission* EU:C:2013:852.

with regard to other persons.[468] It also clarified that in order to determine whether the measure being challenged entails implementing measures, reference should be made exclusively to the subject matter of the action and, where an applicant seeks only the partial annulment of an act, it is solely any implementing measures which that part of the act may entail that must, as the case may be, be taken into consideration.[469] In view of these, the ECJ noted that the decision only declares the scheme incompatible but does not define the consequences for each tax payer. These consequences will be determined in the administrative documents, such as a tax notice, that will be produced by the national authorities, and which constitute implementing measures.[470]

In *Stichting Woonpunt*,[471] the applicants, who were not for profit housing organisations, sought the annulment of a decision by which the Commission confirmed that a Dutch scheme of aid was compatible with the common market, following certain commitments provided by the national authorities amending the aid scheme which benefitted the applicants. The ECJ found that it was apparent from the recitals to the contested decision that those commitments would be implemented by a national ministerial decree and by new housing legislation, which, following the reasoning in *Telefonica*, had to be regarded as implementing measures.[472] The ECJ however found that the applicants were individually concerned in this case since the measure affected them as a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group,

[468] At para 30 of the judgment.
[469] At para 31 of the judgment.
[470] At paras 35-37 of the judgment.
[471] Case C-132/12 P *Stichting Woonpunt and others v. Commission* EU:C:2014:100.
[472] See in particular paras 50-54 of the judgment.

they formed part of a limited class of traders and the decision altered rights acquired by them prior to its adoption.[473]

The question reached the Grand Chamber of the ECJ for a second time by way of appeal in *T & L Sugars*.[474] This case involved annulment proceedings against a number of Regulations adopted by the Commission in relation to sugar quotas. This appeared to be a last chance to avoid such an open interpretation of the notion of implementing measures which was backed by a very strong Opinion by AG Cruz Villalon.[475]

AG Cruz Villalon first noted that as regards direct concern the CJEU has consistently held that, for a natural or legal person to be directly concerned by a measure, that measure must directly affect the person's legal situation and, where it entails the adoption of intermediate measures, it must leave no discretion to the authorities responsible for implementing it, such implementation being purely automatic and resulting solely from EU rules. After all, the condition of direct concern, as interpreted by the CJEU in relation to the pre-Lisbon version of the Treaty, was already based on the understanding that where implementation was purely automatic there was no obstacle to the recognition of standing to bring proceedings. Noting further that it could be argued that the condition relating to the absence of implementing measures, in other words, the absence of acts going beyond purely automatic implementation, is inherent in the condition relating to direct concern. Something which, according to AG Cruz Villalon, can support the view that the

[473] At paras 57-62 of the judgment. See also the similar judgment in Case C-133/12 P *Stichting Woonlinie and others v. Commission* EU:C:2014:105.
[474] Case C-456/13 P *T & L Sugars and Sidul Acucares v. Commission* EU:C:2015:284. See also C. Buchanan and L. Bolzonello, "Towards a Definition of "Implementing Measures" Under Article 263, Paragraph 4, TFEU" (2015) 6 *European Journal of Risk Regulation* 671.
[475] Delivered on 14/10/2014.

Lisbon Treaty complicated these simple rules, by adding in the third limb the requirement of direct concern and the absence of implementing measures, rendering it necessary to make sense of this conceptual duality.

He went on to argue that the term "measure" inevitably means that a certain 'power' is exercised, and accordingly implies that a certain degree of discretion exists in the exercise of Member State authority. It does not follow solely from the fact that national public authorities are required to fulfil certain duties that the measures which those authorities take in order to fulfil those duties constitute implementing measures, and it is important to take into account, specifically and in each case, not only the nature, but also the form and the intensity, of the cooperation required from the national authorities.

AG Cruz Villalon then explicitly stated that it would be difficult, if the objective of relaxing the admissibility conditions for natural and legal persons in connection with non legislative regulatory acts is not to be wholly frustrated, to interpret the new provision as meaning that the fact that non substantive or ancillary measures are taken by the national authorities, through any kind of action or adopted in the exercise of a circumscribed power, linking the applicant and the contested regulatory act, could be construed as grounds for concluding that, at one and the same time, the condition of direct concern is satisfied but the condition relating to the absence of implementing measures is not, simply because of that link.

He thought that the inclusion of the two conditions, direct concern and not entailing implementing measures, calls for a functional division between those conditions. In reflection of that division, a distinction should be made between, on the one hand, defining the rule as such and determining its addressees, which is direct concern, and,

on the other hand, determining the various circumstances, these being among others procedural, quantitative, temporal, specific to its application in practice and to its implementation, which enable it to be said that that rule is fully and autonomously operational. It may also be argued that direct concern refers both to the definition of the rule and to the identification of its addressees, while implementing measures ensure that that rule, whose addressees have been identified, is fully operational. This would render it necessary to carry out a specific analysis of the purpose and content of the regulatory act itself and its effects on the applicant's legal situation in order to reach a conclusion as to whether or not that act entails implementing measures.[476]

On the facts of the particular case, he noted that it is true that operational implementation of the contested Regulations required the Member States to take action and to adopt a certain number of administrative measures, essentially receiving applications from the economic operators concerned, checking whether the applications are admissible in the light of the formal requirements established, submitting them to the Commission and then issuing licences on the basis of the allocation coefficients fixed by the Commission. He thought it difficult to conclude that the purely administrative activity thus carried out by the national authorities involves the exercise of implementing powers. The contested Regulations specified the scope ratione materiae, ratione personae and ratione temporis for each, as well as the eligibility and admissibility conditions which must be satisfied in order to benefit from those measures.

The ECJ disagreed with that interpretation, holding that the decisions of the national authorities granting such certificates, which apply the coefficients fixed by the Implementing Regulation to the operators concerned, and the decisions refusing such

[476] See paras 25-33 of his Opinion.

certificates in full or in part therefore constitute implementing measures within the meaning of the final limb of Article 263(4) TFEU. Firmly maintaining that this conclusion is not called into question by the allegedly mechanical nature of the measures taken at national level.[477]

A thought on the possible rationale behind this approach seemed to A. Albors-Llorens to be the interpretation the ECJ gave as to the purpose of the reform, which was to prevent the situation where a private party would have to contravene a measure in order to obtain access to justice, commenting that if any measure is required at national level, theoretically there should be an opportunity to challenge it before a national court, which leads to the possibility of a preliminary reference on validity, but realising at the same time that this interpretation has the effect of limiting significantly the reform because a great proportion of EU measures require some action, even if entirely mechanical.[478]

It is rather notable that this interpretation of the notion of implementing measures by the CJEU came contrary to early expectations of a more relaxed interpretation, which were corroborated by the judgment of the GC in *Microban*.[479] That case involved a Commission Decision removing a substance known as triclosan from the list of materials that can come into contact with foodstuffs, that list being contained in a Directive, and effectively banning its use. The GC considered the contested decision to be a regulatory act of direct concern to the applicants, who were producers of triclosan, since it left no discretion to the Member States. It then likewise held that the contested decision did not require implementing measures since the ban was complete

[477] See paras 34-42 of the judgment.
[478] A. Albors-Llorens, "Judicial Protection before the Court of Justice" in C. Barnard & S. Peers, *European Union Law* (OUP, 2nd edition, 2017), at p. 286.
[479] Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v. Commission* EU:T:2011:623.

and that any implementing measures taken during the transitional period would be ancillary to the pending prohibition, for which no implementing measures would be necessary. It seems difficult to reconcile this judgment of the GC with its later judgment in *T & L Sugars* or of course the judgment of the ECJ.

In a comment well before these judgments, P. Craig argued that the most natural meaning of implementing measures would be that regulations, being directly applicable, do not generally entail implementing measures, this being also true for the great majority of decisions, whether they are classic individualised decisions or whether they are decisions of a more generic nature that are concerned with inter institutional relations. Recognising the argument that even regulations or some decisions will lead to modification of national rules, and the consequent question whether such national measures should be regarded as implementing measures for the purposes of Article 263(4) TFEU, he considered that such a conclusion must be wrong. A consequence of such a conclusion would be that the possibility of a direct challenge of the same regulation would vary from state to state, since whether any particular Member State needed to modify its national rules and if so how, would depend on the fit between the demands of the EU act and its pre existing Law, which will necessarily differ from one Member State to another. A result which will depend on national law and not the regulatory act itself.[480]

The judgment in *T & L Sugars* was followed in several cases, and unfortunately the results confirm that this interpretation effectively diluted the effects of the reform. In *Kyocera Mita*,[481] the contested Regulation, forming part of the Customs Code, set the duty that would be paid on certain types of machinery, but that had to be

[480] P. Craig, *EU Administrative Law* (OUP, 2nd edition, 2012), Chapter 11, at p.p. 317-318.
[481] Case C-553/14 P *Kyocera Mita Europe BV v. Commission* EU:C:2015:805. See also the similar judgment in Case C-552/14 P *Canon Europa NV v. Commission* EU:C:2015:804.

communicated by the national authority which would also allow the release of the goods. The ECJ held that only then a measure against the applicants would be created, and given the fact that the mechanical nature of any national measures is not a relevant factor, that action constituted implementing measures.

In *European Union Copper Task Force v. Commission*,[482] by the contested Regulation, the Commission listed copper compounds on the list of candidates for substitution, annexed to that Regulation, on the ground that that substance fulfilled the criteria to be considered a persistent and toxic substance for the purposes of a Directive. The GC considered the contested Regulation to be a regulatory act for the purposes of Article 263(4) TFEU, but then held that this entailed implementing measures since it encompassed a further Regulation by the Commission for any renewals of the preapproved compounds which became candidates for substitution, and also required Member States to perform a comparative assessment of health and environmental lists, which also had discretion to decide on an application.

In *EGBA and RGA v. Commission*,[483] the contested decision was a state aid decision in the gambling and betting sector in France, allowing a scheme with the reasoning that it constituted aid within the equine sector established on the basis of the common interest that online horse race betting operators have in organising horse races on which bets are placed and that it benefited all online horse-race betting operators subject to the levy. The GC found that the contested decision was a regulatory act but since it was a decision addressed to France and did not define the specific and concrete consequences of the declaration of compatibility, either for the beneficiaries

[482] Case T-310/15 *European Union Copper Task Force v. Commission* EU:T:2016:265.
[483] Case T-238/14 *European Gaming and Betting Association (EGBA) and The Remote Gambling Association (RGA) v. Commission* EU:T:2016:259.

or for any other person who may be affected in some way by the measure at issue, it entailed implementing measures for the purposes of Article 263(4) TFEU.

More recently, in *Netflix International BV and Netflix, Inc. v. Commission*,[484] an amendment of an aid scheme was again held to entail implementing measures since the specific and actual consequences of the contested Decision in respect of the applicants was considered by the GC to be given material form by national acts such as the tax notices defining the exact amount payable by each operator and the decisions granting aid using the new criteria introduced by the amendment.

4. Back to policy choice

The above lead back to the discussion on the policy choice of the CJEU. As a matter of fact, it has been rather blatantly admitted by the then President of the ECJ, Mr Rodriguez Iglesias, in an oral presentation[485] which forms part of the travaux preparatoires of the Constitutional Treaty, that the definition of locus standi is primarily a policy choice and that any solution can be perfectly envisaged. A further admission can also be found in this presentation, and this is that it was indeed possible to convert the current conditions of admissibility into alternative conditions.[486]

Although it has been acknowledged in *Inuit* that the Lisbon Treaty reform of Article 263(4) TFEU came as a response to the calls for reform in *UPA* and *Jego Quere*, and the judgments of the ECJ in these cases expressly calling for Treaty reform in order to revise the standing conditions, this reform did not evidently come with sufficient clarity. The CJEU still had to answer the two major questions discussed above, and

[484] Case T-818/16 *Netflix International BV and Netflix, Inc. v European Commission* EU:T:2018:274.
[485] CONV 572/03.
[486] See also the outline of the discussion in M. Varju, "The Debate on the Future of Standing under Article 230(4) TEC in the European Convention" (2004) 10 *European Public Law* 43, at p. 50.

give its own interpretation of what is a “regulatory act” and what degree of action is required in order for an EU measure to “entail implementing measures”.

These terms warranted definition within the context of the existing standing rules, and the Lisbon Treaty context in general. The CJEU was not on this occasion designing the judicial review system of the EU from the beginning, but was deciding the extent of the reform that the Member States effected on the judicial review system that the CJEU had already designed. It is rather questionable whether this was an easy task, or a task that should have been left to the CJEU had any specific reform or extent of reform been intended by the Member States.

In relation to the first of these questions, the CJEU was given a term, “regulatory act”, that was not defined elsewhere in the Lisbon Treaty. Its literal meaning was not also helpful as to whether it was intended to cover legislative as well as non legislative acts, although it showed that it had to relate to acts of general application, regulating a matter. There was accordingly ample room for the calls for the widest possible interpretation, so that it also includes legislative acts. More precise guidance as to its interpretation existed however. This was defined in the failed Constitutional Treaty, from which it derived, as well as the travaux preparatoires of the Constitutional Treaty, as recognised in *Inuit*. The CJEU cannot accordingly be held solely or entirely responsible in this respect for adopting the narrower definition. On the other hand, it would hardly have been criticised if, despite that existing guidance, it adopted the wider definition, and accepted that this term also covered legislative acts. It was the Member States anyway that had introduced a term that was not defined, and whose literal meaning was inconclusive. As R. Schutze comments, teleological arguments point in both directions, depending on which telos one prefers, where those favouring

individual rights will prefer the wider view to include legislative acts, and those wishing to protect democratic values will prefer the narrower view.[487] In this light, the existence of a policy choice made by the CJEU is also evident here, even though this choice can be significantly shielded from criticism.

In relation to the other question as to whether an act entails implementing measures, the CJEU was left with considerable discretion, if not even absolute freedom. The phrase effectively allowed any possible interpretation, from that taken by the CJEU in *T & L Sugars* to any other tying the answer to any degree of discretion or exercise of autonomous will of a third party. A multi-language analysis of the wording of this provision that has been attempted seemed also inconclusive.[488]

It is not easy to find any guidance from the text of the Lisbon Treaty or the context in which this was placed. Unlike the case of the notion of a regulatory act, such guidance does not derive from the travaux preparatoires. The only conclusion from the travaux preparatoires that seems to be relevant is the position that the amendment came as a response to the calls for reform, and more specifically in order to reverse the undesirable situation where a private party was forced to break the law in order to obtain access to justice and contest the validity of an EU act. This however, hardly advocated on its own for the most open interpretation as adopted by the Court in *T & L Sugars* and hardly set any limit to the scope of the reform as finally embodied in the text of Article 263(4) TFEU. Even if one accepts the CJEU's position that this goal is achieved by the most open interpretation in *T & L Sugars*, which severely limits the instances of the new limb in Article 263(4) TFEU, then necessarily this is equally

[487] R. Schutze, *European Union Law* (Hart, 2015), at p. 360.
[488] C. Werkmeister, S. Potters and J. Traut, "Regulatory Acts Within Article 263(4) TFEU – A Dissonant Extension of Locus Standi for Private Applicants" (2010-2011) 13 *The Cambridge Yearbook of European Legal Studies* 311, at p.p. 326-329.

achieved by less open, and consequently less restrictive, interpretations, allowing direct challenges in more instances.

This can also be contrasted with the context in which the calls for reform were formulated. The calls for reform, and especially those of AG Jacobs in *UPA* and the CFI in *Jego Quere*, to which the CJEU referred and to which it recognised Article 263(4) TFEU to constitute a response, covered much wider problems, of which the problem that an applicant would have to break the law in order to obtain access to justice in certain situations was only one. Since the CJEU recognised that the Member States acted not least as a response to such calls for reform, a wider interpretation would serve to satisfy other issues identified in that criticism. It cannot be said that the Member States did not offer such an opportunity to the CJEU, since at least the interpretation of what would constitute implementing measures, if not also the interpretation of regulatory acts, was wide open.

There was also no other stressing factor for the CJEU to opt for this open interpretation, as could have possibly been a need to interpret national legislation, procedures or procedural rules, something which it resisted. The interpretation advocated by AG Cruz Villalon did not dictate such an examination of national rules, but on the contrary, only focused on the EU measure itself.

This interpretation of implementing measures by the CJEU, arguably, even puts question marks on whether direct concern has any real place or use in this case of regulatory acts not entailing implementing measures. In the sense that if an EU act does not entail any further action by anyone, even automatic or mechanical, then naturally nobody is vested with discretion in applying the EU act to the applicant. Under this reading, the requirement for direct concern may seem even obsolete.

It should perhaps be fair at this point to recall part of what have been described herein as the ninth and tenth realities,[489] which says that the argument may be sustained that the EU judicial review system could still be regarded as more favourable than those of many Member States where direct actions against legislative acts are not in the formal sense available, since it permits actions for annulment against legislative acts, although with restrictive locus standi conditions.[490] On the other hand, it is equally fair to recall another finding made by A. Turk from a comparison of the United Kingdom, France and Germany, that the standing requirements in case of a challenge against acts of general application are, with the exception of Germany, more restrictive than those of national legal systems.[491]

The impression has already been formed, that this much anticipated revision of the standing criteria by the Lisbon Treaty did not lead to any satisfactory result, and has been rendered of very limited effect following the intervention and interpretations of the CJEU. As a result, it is regrettably submitted that it seems doomed to be recorded in EU legal history as another "false dawn" and another missed opportunity.

The effects of these interpretative choices of the CJEU for the notions of a regulatory act and implementing measures will be examined through a review of a sample of the older Case-Law under the revised locus standi rules in Chapter 5, and a quantitative study in Chapter 6. These offer a comparison as to what these restrictive interpretations have achieved, against what the system could have been like had the interpretation of AG Cruz Villalon *T & L Sugars* for the notion of regulatory acts

[489] See Chapter 1.
[490] H.C.H. Hofmann, G.C. Rowe and A.H. Turk, *Administrative Law and Policy of the European Union* (OUP, 2011), Chapter 25, at p. 840 and A.H. Turk, *The Concept of Legislation* (Kluwer, 2006), Part 2, Chapter 2, at p. 173. See also M. Eliantonio et al, *Standing Up for your Right(s) in Europe* (Intersentia, 2013) and the Study on Individual Access to Constitutional Justice of the European Commission for Democracy Through Law of the Council of Europe ("Venice Commission"), CDL-AD(2010)039rev.
[491] A.H. Turk, *The Concept of Legislation* (Kluwer, 2006), Part 2, Chapter 2, at p. 173.

been adopted. Against these results, and in particular the comparison of the effects of the interpretation of the notion of implementing measures that the CJEU adopted to the effects of that of AG Cruz Villalon, the CJEU has very little to shield itself from criticism.

CHAPTER 5: EFFECT OF LISBON TREATY REFORM THROUGH A REVIEW OF OLDER CASE-LAW

This chapter examines a sample of the pre-Lisbon Case-Law under the reformed locus standi criteria in Article 263(4) TFEU. After setting out the background, it considers the pre-Lisbon and post-Lisbon legislative procedures, the methodology for review, and then proceeds to the review of the chosen Case-Law sample. The sample is grouped under the different categories of application of the *Plaumann* test for easier reference.

1. The background

Before the adoption of the Lisbon Treaty, the standing criteria of direct and individual concern applied to all measures under the EC pillar, irrespective of the procedure under which they were adopted. The type of a measure or the procedure under which it was adopted only became relevant for the purposes of standing for private parties after the application of the revised standing criteria in Article 263(4) TFEU, where it has to be decided whether the contested measure is a regulatory act.

As previously examined,[492] the GC[493] and then the ECJ in *Inuit*[494] were in line with the majority of commentators in holding that "regulatory acts" are measures of general application that are not legislative acts and were ready to categorise a pre Lisbon measure under the Lisbon categorisations. The EU courts' methodology will be employed in an attempt for a review of the older Case-Law under the revised standing criteria.

[492] See Chapters 1 and 4.
[493] Case T-18/10 *Inuit Tapiriit Kanatami and others v. European Parliament and Council* [2011] ECR II-5599.
[494] Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625.

The purpose of this review is to see which of the most commonly cited cases or commonly cited examples of categories of cases in the criticism on the previous standing regime under Article 173 EEC and Article 230(4) EC would have been decided differently had they been considered under Article 263(4) TFEU. It is of course impossible to review nearly 60 years of Case-Law, so this review will concentrate on a selection of cases, to a large extent, those referred to in one of the definitive accounts of the previous standing regime of Article 230 EC, written by A. Ward.[495] The benefits of such a review are that the effect of the reform can be examined by looking at real world scenarios of interrelation between EU acts and the effects or combined effects of various types of EU acts on private parties. It also allows an examination of the effect of the reform on Case-Law and precedents for which a change was argued to be necessary. It is naturally with reference to such previous Case-Law that the criticism developed and the authors of the Lisbon Treaty decided, among all the options open to them, to relax standing only for regulatory acts not entailing implementing measures.

2. Post-Lisbon legislative procedures

This methodology requires reference to the legislative procedures under the Lisbon Treaty and their predecessors. The Lisbon Treaty has simplified the legislative procedures in the EU to a large extent.[496] Legislative acts are adopted under the ordinary legislative procedure of Article 294 TFEU or by the Council with the participation of the European Parliament, and vice versa, under the special legislative

[495] A. Ward, *Judicial Review and Rights of Private Parties in EU Law* (OUP, 2nd edition, 2007), Chapter 6.
[496] See P. Craig and G. DeBurca *EU Law – Text Cases and Materials* (OUP, 5th edition, 2011), at p. 123 and M. Bergstrom, "Judicial Protection for Private Parties in European Commission Rulemaking" in C.F. Bergstrom and D. Ritleng, *Rulemaking by the European Commission – The New System for Delegation of Powers* (OUP, 2016), Chapter 10, at p.p. 209 – 220.

procedure as provided in Article 289 TFEU.[497] All other acts are non legislative. Legislative and non legislative acts are now published under these two headings in the Official Journal of the European Union and are easily identifiable.[498]

The ordinary legislative procedure is a development of the co-decision procedure that existed under Article 251 EC. The special legislative procedure takes various forms depending on the particular Treaty article providing for its use. The common forms of this procedure are the adoption of a measure by the Council with the consent of the European Parliament, or the adoption of a measure by the Council after consulting the European Parliament. There are instances however where the consent of the European Parliament may be required for the adoption of a non legislative measure, but the cases where this is so are not very relevant to this discussion.[499]

Two categories of non legislative acts are expressly covered in the Lisbon Treaty. The first is delegated acts under Article 290 TFEU, issued by the Commission to supplement or amend non essential elements of a legislative act. The second category is implementing acts under Article 291 TFEU, issued by the Commission or exceptionally the Council where uniform conditions for implementing legally binding Union acts are needed. There are also non legislative acts based directly on the Treaties and an example is Article 81(3) TFEU, providing for the possible adoption of a decision changing the decision making procedure as regards Family Law measures.[500]

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[497] For the origins under the Constitutional Treaty, see A.H. Turk, "The Concept of the "Legislative Act" in the Constitutional Treaty" (2005) 6 *German Law Review* 1555.
[498] See generally K.S.C. Bradley, "Legislating in the European Union" in C. Barnard and S. Peers, *European Union Law* (OUP, 2nd edition, 2017), Chapter 5, and R. Schutze, *European Union Law* (CUP, 2015), Chapter 7.
[499] See generally P. Craig and G. DeBurca, *EU Law – Text Cases and Materials* (OUP, 5th edition, 2011), at p. 130.
[500] See generally J. Bast, "New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law" (2012) 49 *Common Market Law Review* 885, J. Bast, "Is There a

The distinction between delegated and implementing acts may be significant in other respects,[501] but is not important for standing.[502] As the term "regulatory act" was interpreted in *Inuit*, both delegated and implementing acts can be regulatory acts if they are of general application. In the case of delegated acts, these should in any case be of general application.

3. Pre-Lisbon legislative procedures

As the process for adoption of a measure is a crucial factor in its classification as a regulatory act, it is necessary for the purposes of this attempt to review older Case-Law to have in mind the legislative procedures that existed before the adoption of the Lisbon Treaty.

As aforesaid, the ordinary legislative procedure in Article 294 TFEU is in essence the co-decision procedure that existed in Article 251 EC before the adoption of the Lisbon Treaty,[503] under which the Council and the European Parliament jointly adopt

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Hierarchy of Legislative, Delegated, and Implementing Acts?" in C.F. Bergstrom and D. Ritleng, *Rulemaking by the European Commission – The New System for Delegation of Powers* (OUP, 2006), Chapter 8, D. Curtin and T. Manucharyan, "Legal Acts and Hierarchy of Norms in EU Law" in A. Arnull and D. Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), Chapter 5, M. Chamon, "Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty" (2016) 53 *Common Market Law Review* 1501, and P. Craig and G. De Burca, *EU Law – Text, Cases and Materials* (OUP, 6th edition, 2015), Chapter 4.

[501] See P. Craig, "Delegated Acts, Implementing Acts and the New Comitology Regulation" (2011) *ELRev* 671, A. Heritier, C. Moury and K. Granat, "The Contest for Power in Delegated Rulemaking", in C.F. Bergstrom and D. Ritleng, *Rulemaking by the European Commission – The New System for Delegation of Powers* (OUP, 2016), Chapter 6, P. Craig, "Comitology, Rulemaking and the Lisbon Settlement: Tensions and Strains" in C.F. Bergstrom and D. Ritleng, *Rulemaking by the European Commission – The New System for Delegation of Powers* (OUP, 2016), Chapter 9, S. Peers and M. Costa, "Accountability for Delegated and Implementing Acts After the Treaty of Lisbon" (2012) 18 *European Law Journal* 427, T. Christiansen and M. Dobbels, "Non-Legislative Rule Making After the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts" (2013) 19 *European Law Journal* 42, D. Curtin, H. Hofmann and J. Mendes, "Constitutionalising the EU Executive Rule-Making Procedures: A Research Agenda" (2013) 19 *European Law Journal* 1, Z. Xhaferri, "Delegated Acts, Implementing Acts and Institutional Balance Implications Post-Lisbon" (2013) 20 *Maastricht Journal of European and Comparative Law* 557, and J. Mendes, "Delegated and Implementing Rule Making: Proceduralisation and Constitutional Design" (2013) *European Law Journal* 22.

[502] See also H. Hofmann, "Legislation, Delegation and Implementation Under the Treaty of Lisbon: "Typology Meets Reality" (2009) 15 *ELJ* 482, at p. 497, fn 69.

[503] *Inuit*, ibid.

a measure. This was originally introduced by the Maastricht Treaty in 1992 and was already under increased use before Lisbon. It was however only after Lisbon that this procedure was extended to some of other important areas of EU activity, like agriculture, asylum and immigration.

There was also the consultation procedure where the European Parliament was consulted by the Council, but the Council was not bound to adopt its opinion. This applied only where the specific Treaty article forming the basis of the measure that was going to be enacted provided for such consultation to take place.

The cooperation procedure of Article 252 EC was introduced by the Single European Act in 1986 and has now been repealed by the Lisbon Treaty. This procedure afforded a greater role to the European Parliament by according it two readings for measures that came within its ambit, through which it was able to propose amendments.

Before the adoption of the Single European Act in 1986, the Council generally acted alone upon a proposal of the Commission.

There was also the assent procedure where the European Parliament had to give its assent for a measure to be adopted, but this is not so relevant for this discussion. It was introduced by the Single European Act in 1986 and continued to exist for some important matters, the most notable being expansion of Community membership under Article 49 TEU, Article 105(6) EC on the functioning of the European Central Bank, Article 107(5) EC on the amendment of the statute of the European System of Central Banks, and Article 161 EC on certain measures relating to economic and social cohesion.

As Craig and DeBurca assert,[504] the distinguishing characteristic of the different legislative procedures that applied within the Community Pillar was principally the degree of power afforded to the European Parliament. The Commission always had the right of initiation of legislation, something which has also been formalised by the Lisbon Treaty.

4. Methodology for review

The methodology that will be employed in this review of older Case-Law is the same as that employed by the GC in *Inuit*[505] and subsequently endorsed by the ECJ for the classification of the contested measure which was passed before the adoption of the Lisbon Treaty, under the categories of acts provided for by the Lisbon Treaty. Three tasks are involved.

The first task is to determine how the contested measure was adopted, in order to see if this was the result of a legislative or a non legislative procedure. If it was adopted under a legislative procedure, in effect one of the predecessors of the ordinary and special legislative procedures, then it would be a legislative act under Lisbon and the reform of the standing criteria would not make any difference to the result.

If it was not adopted under a legislative procedure, then it would be a non legislative act under Lisbon and the second task will be performed. This is to determine whether the contested measure is of general application. If it is not of general application then it would not be classified as a regulatory act under Lisbon and the reform would not have made any difference to the result.

[504] P. Craig and G. DeBurca, *EU Law – Text Cases and Materials* (OUP, 5th edition, 2011), at p. 123.
[505] Case T-18/10 *Inuit Tapiriit Kanatami and others v. European Parliament and Council* [2011] ECR II-5599, at paras 57-62 of the Order.

If the contested measure would be classified as a non legislative act and is of general application, then it would be classified as a regulatory act under Lisbon. The third task would then be to determine whether the contested measure entailed implementing measures. If it did, then the reform would not have made a difference to the result of the case as the applicant would still need to satisfy the criteria of direct and individual concern. If it did not entail implementing measures, then it would be a regulatory act not entailing implementing measures and the applicant would not be required to satisfy the criterion of individual concern under the revised criteria of Article 263(4) TFEU. In this part of the task, a comparison will be made between the results that are produced by the CJEU's interpretation of the notion of implementing measures in *T & L Sugars* with the results that would have been produced had the interpretation of AG Cruz Villalon been accepted. In line with *T & L Sugars* and related Case-Law, the question whether implementing measures are entailed is judged exclusively from the standpoint of the applicant.

In some instances, references from cases are intentionally rather longer than this review would necessitate. This was considered desirable for the sake of showing the restrictive scope and complexity of certain applications of the *Plaumann* test for individual concern, in order to show in contrast the difference that would have been made had the interpretation of implementing measures been different, and also the importance that such a different interpretation such as that proposed by AG Cruz Villalon would have made.

5. The 2002 calls for reform

It is convenient to start this review with the landmark cases, where calls for reform were advanced by AG Jacobs and the CFI. In *Union de Pequenos Agricultores v.*

Council,[506] the contested measure was Council Regulation (EC) 1638/98 of 20/7/1998, amending Regulation 136/66/EEC, reforming the Community aid regime in the olive oil sector. Regulation 1638/98 was adopted by the Council under ex Article 43, which later became Article 37 EC, on the common agricultural policy. Measures could be adopted by the Council on a proposal by the Commission and after consulting the European Parliament. This was not the co-decision procedure so it is not a predecessor of the ordinary legislative procedure. Nevertheless, the participation of the European Parliament in a measure adopted by the Council points to the direction of a special legislative procedure[507] and suggests that this would still have been a legislative act under the Lisbon Treaty. The relevant provisions are now found in Article 43 TFEU which allows measures to be adopted by the Council and the European Parliament acting in accordance with the ordinary legislative procedure, upon a proposal by the Commission and after consulting the Economic and Social Committee. No doubt, if such a measure was adopted under the Lisbon Treaty it would have been a legislative act and the standing criteria would still be direct and individual concern. The applicants failed to establish individual concern so this case would not have been decided differently.

In *Commission v. Jego Quere*,[508] the measure in question was Commission Regulation (EC) 1162/2001 which was an emergency measure aimed at the protection of juvenile hake by providing minimum mesh sizes for fishing nets. This was adopted by the Commission under the authority granted to it by Council Regulation 3760/92 which established a Community system for fisheries and aquaculture. The contested measure would under Lisbon be a non legislative act of general application, which

[506] Case C-50/00P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677.
[507] See Article 289(2) TFEU.
[508] Case C-263/02 P *Commission v. Jego Quere* [2002] ECR I-3425.

would make it a regulatory act. Before the judgment of the CJEU in *Telefonica* or *T & L Sugars*, it seemed highly arguable that it did not entail implementing measures, and would accordingly be challengeable by showing only direct concern.[509] Indeed this would be so under the interpretation of AG Cruz Villalon, and it would accordingly lead to a different result in the main action as the applicants had failed to establish individual concern. It remains however highly doubtful under that under the interpretation of the CJEU, as there is the possibility of some intervention by national authorities which could be regarded as implementing measures regardless of their mechanical nature. It seems accordingly arguable that although the CJEU accepted that the Lisbon Treaty reform intended to reverse the situation where a private party would have to break the Law in order to obtain access to a national court, its interpretation of implementing measures may not even be capable of reversing *Jego Quere*, which was the judgment that generated much of the discussion on this shortcoming of the previous locus standi rules.

6. The *Plaumann* case

The founding case of the test for individual concern naturally attracts particular attention. In *Plaumann v. Commission*,[510] the measure in question was Decision No. SIII 03079 of the Commission of 22/5/1962, refusing to authorise the Republic of Germany to suspend in part customs duties applicable to fruit imported fresh from third countries. This was a Decision of the Commission upon an authorisation by a prior measure, something likely to be considered as a delegated or implementing act under the Lisbon Treaty and accordingly a non legislative act. This was addressed

[509] See also S. Peers and M. Costa, "Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and others v. Commission* & Judgment of 25 October 2011, Case 262/10 *Microban v. Commission*" (2012) 8 *European Constitutional Law Review* 82, at p. 99-100, taking a similar view for the contested measures in *UPA* and *Jego Quere*.
[510] Case 25/62 *Plaumann v. Commission* [1963] ECR 95.

only to the Republic of Germany but was of general application as it affected any importer of fresh fruit in Germany.[511] Under the interpretation of AG Cruz Villalon, an act of the German national authorities not suspending such duties would not be considered as implementing measures, and the measure would accordingly be challengeable by showing only direct concern. However, under the CJEU's interpretation, such acts would constitute implementing measures, maintaining the need to show individual concern.

7. General open and closed class

It is interesting to review some of the cases coming under the general application of the *Plaumann* test, commonly referred to as the open and closed class category. In *Calpak v. Commission*,[512] the challenge was against Regulations 1731/79 and 1732/79 adopted by the Commission under an authorisation from Council Regulation 516/77 which altered the amount of financial aid for producers of Williams pears preserved in syrup. Standing was denied as the applicant producers belonged to an open class. This was a regulation based on an earlier legislative act, and would accordingly be considered as a delegated or implementing act under the Lisbon Treaty. It was of general application and would accordingly be considered as a regulatory act under the Lisbon Treaty. Under the interpretation of AG Cruz Villalon, this act would not entail implementing measures and would not require the applicant to show individual concern under Article 263(4) TFEU, while under the test of the CJEU this would lead to the opposite conclusion. It is interesting to note that in the scenario of the interpretation of AG Cruz Villalon, this would provide an awkward contrast with the position in *UPA*, where, similarly, the financial aid scheme for producers of olive oil

[511] As in Case C-274/12 P *Telefonica v. Commission* EU:C:2013:852.
[512] Joined Cases 789/79 and 790/79 *Calpak v. Commission* [1980] ECR 1949.

was altered by the contested measure. Although both measures had similar effects on the applicants in these two cases, just because the measure in *UPA* was adopted under a legislative procedure the applicants in that case would be unable to challenge it as they would fail to establish individual concern.[513] Under the interpretation of the CJEU, the position is unaltered.

There are also two good examples where value was removed from existing contracts because of Community measures, but the applicants would still not be able to challenge them directly as they would be legislative acts. The first is *Buralux v. Council*,[514] where the action for annulment was against Council Regulation 259/93 which allowed Member States to prohibit, under certain conditions, shipments of waste. The applicants carried out collection, shipment and dumping of household waste originating in Germany and exportation to France, having concluded renewable 5 year contracts with public bodies in Germany. Pursuant to the contested Regulation, France effectively prohibited the importation of household waste for dumping purposes. The applicants were denied standing as they belonged to an open class. The contested Regulation was adopted by the Council upon a proposal of the Commission, having regard to the opinion of the European Parliament. The involvement of the European Parliament makes this likely to be classified as a legislative act under the Lisbon Treaty, so the locus standi conditions remain unaltered.

The second such example is *The Galileo Company and Galileo International LLC v. Council*.[515] The action was against Council Regulation 323/99 which amended Council Regulation 2299/89. Regulation 323/99 was adopted by the Council under the

[513] See also A. Arnull, *The European Union and its Court of Justice* (OUP, 2nd edition, 2006), Chapter 3, at p. 90.
[514] Case C-209/94P *Buralux and others v. Council* [1996] ECR I-615.
[515] Case C-96/01P *The Galileo Company and Galileo International LLC v. Council* [2002] ECR I-4025.

procedure laid down in Article 189c (later Article 252 EC) with the participation of the European Parliament, upon a proposal of the Commission, and would be a legislative act under the Lisbon Treaty. The contested provision affected the use of travel reservation systems and removed value from existing contracts the applicants had. It sought to ensure that small or medium sized airlines and travel agents had access to information on large databases owned by airline companies, on services provided by the travel industry. Standing was again denied as the applicants belonged to an open class and could not satisfy individual concern.

In *Buralux*, it was in a sense the French measure that directly caused the loss of value to the applicants' contracts and there could be an argument that the Community measure as a legislative act was not the direct cause of this loss. This challenge could have failed on direct concern anyway, something which was not considered by the ECJ, given its finding on individual concern.[516] The legislative act in *The Galileo* seems however to have been the direct cause of the applicants' loss.

7.1. *Cases related to control of substances*

Cases on Community measures on control of the use of substances also provide interesting comparisons. In *Alpharma Inc v. Council*,[517] the contested measure was Council Regulation (EC) 2821/98 which amended Directive 70/524/EEC concerning additives in feeding stuffs, by banning virginiamycin and other antibiotic growth promoters in animals. Standing was granted since, first, the process of authorising the marketing of virginiamycin vested the applicants with procedural guarantees,[518] and, secondly, because they had already made applications to market virginiamycin before

[516] See para 9 of the judgment in *Buralux*.
[517] Case T-70/99 *Alpharma Inc v. Council* [2002] ECR II-3495.
[518] Based on Case C-152/88 *Sofrimport SARL v. Commission* [1990] ECR I-2477.

the ban took effect, the authorisation scheme established by the EC provided them with legal safeguards. The contested Regulation was adopted by the Council upon the proposal of the Commission, under an authorisation granted under Article 11 of Council Directive 70/524, but without the involvement of the European Parliament. This Directive was adopted under Article 43 on the common agricultural policy, for which the ordinary legislative procedure is now specified.[519] The lack of participation of the European Parliament in the adoption of the contested Regulation suggests that this would not have been a legislative act under the Lisbon Treaty. It would have been a non legislative act of general application and accordingly a regulatory act. Under the interpretation of AG Cruz Villalon, this would not entail implementing measures, and would be challengeable without the need to show individual concern, but the necessary involvement of national authorities in the enforcement and supervision of its application are likely to be regarded as implementing measures under the interpretation of the CJEU.

The case of *Pfizer Animal Health SA v. Council*[520] was decided on very similar facts. This was another application for annulment of Council Regulation (EC) 2821/98, amending Directive 70/524/EEC. As already mentioned, the contested regulation actually withdrew from an annex of this Directive some antibiotics and thereby revoked the authorisation for their use in feeding stuffs. Having been adopted by the Council upon the proposal of the Commission but without the involvement of the European Parliament, this would be a regulatory act under Lisbon. Direct and individual concern were found to exist in this case. The applicants were said to be the only manufacturers of virginiamycin in the world, and this substance was prohibited by the contested measure. The measure would have been challengeable without the

[519] Under Article 43 TFEU.
[520] Case T-13/99 *Pfizer Animal Health SA v. Council* [2002] ECR II-3305.

need to show individual concern had the interpretation of AG Cruz Villalon for implementing measures been adopted, but this again seems very questionable under the interpretation of the CJEU, given the possible involvement of national authorities despite the mechanical nature of such involvement.

The action in *DOW AgroSciences BV v. European Parliament and Council*[521] was for the partial annulment of Decision 2455/2001/EC of the European Parliament and the Council, establishing a list of priority substances in the field of water policy and amending Directive 2000/60/EC of the European Parliament and the Council. The contested Decision was adopted under the co-decision procedure of Article 251 EC and would accordingly be a legislative act under Lisbon as that procedure is now the ordinary legislative procedure in Article 294 TFEU. The applicants failed on both direct and individual concern in this case, and it would not be decided differently under Lisbon.

Similarly, *Campo Ebro Industrial SA v. Council*[522] was an action for the annulment of Council Regulation (EEC) 3814/92, amending Regulation (EEC) 1785/81 and introducing application in Spain of the sugar sector prices provided for by that Regulation. The CFI considered that the contested Regulation was a measure of general application, which applied to objectively determined situations and produced legal effects for classes of persons envisaged in a general and abstract manner, namely producers within the sugar sector.[523] Producers of isoglucose were not mentioned in the provisions. Even if, as the applicants claimed, they were the only producers of isoglucose in Spain, they were affected in the same way as any other trader.

[521] Case T-45/02 *DOW AgroSciences BV and another v. European Parliament and Council* [2003] ECR II-1973.
[522] Case T-472/93 *Campo Ebro Industrial SA and others v. Council* [1995] ECR II-421.
[523] At para 31 of the judgment.

Accordingly, the applicants failed under individual concern and their appeal was also dismissed.[524] The contested Regulation was adopted by the Council having regard to the proposal of the Commission and the opinion of the European Parliament, under Article 43 on the common agricultural policy. Under Lisbon it would have been a legislative act so individual concern would still be required.

The contrary result could have been produced by *Bactria Industriehygiene-Service Verwaltungs GmbH v. Commission*[525] under the interpretation of AG Cruz Villalon. This was an application for annulment of Commission Regulation (EC) 1896/2000 on the first phase of the programme referred to in Article 16(2) of Directive 98/8/EC of the European Parliament and the Council on biocidal products. The purpose of this directive was to establish Community rules for the authorisation and placing on the market of biocidal products. The contested Regulation was designed to initiate the evaluation of existing active substances of biocidal products. Under Article 28(3) of the Directive, Commission Decisions addressed to Member States would state substances that will not be included in some annexes of the Directive and these substances will no longer be placed on the market for biocidal purposes. The contested regulation set the regime for the examination of existing active substances. The applicants claimed that the contested regulation was incompatible with its legal basis, this being the Directive, and that it distorted competition. They argued that they were individually concerned in that they belonged to a closed class, they had participated in the process leading to the adoption of the Regulation and that this action for annulment was the only remedy available to them. They failed on all grounds. In relation to this last argument, the CFI replied that it must be held that the

[524] Case C-138/95P *Campo Ebro Industrial SA and others v. Council* [1997] ECR I-2027.
[525] Case T-339/00 *Bactria Industriehygiene-Service Verwaltungs GmbH v. Commission* [2002] ECR II-2287.

possible absence of remedies, supposing it is established, cannot justify an amendment by way of judicial interpretation of the system of remedies and procedures laid down in the Treaty,[526] and further held that in no case does it allow standing where the conditions of Article 230(4) EC are not satisfied. Under Lisbon, the contested Regulation is likely to be regarded as a regulatory act. Under the interpretation of AG Cruz Villalon, it would not entail implementing measures, being a complete set of rules, but it is very likely that the interpretation of the CJEU would lead to the contrary conclusion.

Under the interpretation of AG Cruz Villalon for implementing measures, it would interestingly seem difficult to understand the rationale for the difference in treatment between *DOW* and *Campo Ebro*, on the one hand, and *Bactria, Alpharma* and *Pfizer* on the other. All involve measures dealing with substances that have similar or comparable effects on private parties, yet in some of the cases the applicants would under Lisbon still be required to show individual concern to challenge them, just because they would be considered to be legislative acts. The interpretation of the CJEU for implementing measures renders all these cases back to the position they would have been before the reform.

7.2. *Cases related to quotas*

Had again the interpretation of AG Cruz Villalon for implementing measures been adopted, such differing results could also be produced in challenges to regulations related to quotas. In *Chiquita Banana v. Council*,[527] the challenge was against Council Regulation 404/93 which was adopted by the Council upon the proposal of the Commission, having regard to the opinions of the European Parliament and the

[526] Para 54 of the Order.
[527] Case C-276/93 *Chiquita Banana v. Council* [1993] I-3345.

Economic and Social Committee. This Regulation established certain arrangements for trade in bananas with third countries and a mechanism for the allocation of tariff quotas between categories of traders. The applicants were one of the few traders of bananas that were affected but they were denied standing as they belonged to an open class. The contested regulation would be a legislative act under the Lisbon Treaty and the applicants would still be required to show individual concern. A challenge against the same measure, Council Regulation 404/93, can be found in *Leon Van Parijs v. Council and Commission*.[528] The applicants were traders of bananas and sought to challenge the imposed tariff quota on the import of bananas from third countries. This was also dismissed as inadmissible since they belonged to an open class.

On the other hand, *Comafrica SpA and another v. Commission*[529] was an action for annulment of two measures adopted by the Commission. These were Commission Regulation (EC) 896/2001, laying down detailed rules for applying Council Regulation (EEC) 404/93, and Commission Regulation (EC) 1121/2001, fixing the adjustment coefficients to be applied to each traditional operator's reference under the tariff quotas for imports of bananas. Commission Regulation 896/2001 was adopted under Article 20 of Council Regulation 404/93, as amended. Under Lisbon and the interpretation of AG Cruz Villalon, this would be a delegated or implementing act of general application and would accordingly have been classed as a regulatory act not entailing implementing measures, making it challengeable without the need to show individual concern. Likewise, Regulation 1121/2001 which set tariff quotas would also have been interpreted as a regulatory act not entailing implementing measures under this interpretation. It was adopted on the basis of Article 5(2) of Commission Regulation 896/2001. In the action, the applicants were held not to be individually

[528] Case C-257/93 *Leon Van Parijs and others v. Council and Commission* [1993] ECR I-3335.
[529] Case T-139/01 *Comafrica SpA and another v. Commission* [2005] ECR II-409.

concerned by both contested regulations and under the interpretation of the CJEU for implementing measures they would likewise probably fail as they would still be required to show individual concern.

Worthy of particular mention is *Roquette v. Council*.[530] The contested measure was Council Regulation (EEC) 1293/1979, amending Council Regulation (EEC) 1111/77 laying down common provisions for isoglucose. The applicants were manufacturers of isoglucose and the contested Regulation fixed the production quota for the applicant in an annex that it inserted in Regulation 1111/77. The contested measure was adopted by the Council upon the proposal of the Commission, having regard to the opinion of the Economic and Social Committee and after consulting the European Parliament. The involvement of the European Parliament suggests that under Lisbon this would have been a legislative act and individual concern would still be required. Interestingly, individual concern was found in this case and standing was granted. The annex referred to the applicants and other manufacturers by name and this was held to be a bundle of decisions, the addressees of which were individually concerned. This is an example of a Council Regulation, which would be a legislative act under Lisbon, fixing quotas specifically for certain manufacturers referred to by name. And yet, under Lisbon the applicants would still be required to show individual concern because of the procedure under which it was adopted. Whereas, for measures of a more general nature, like Commission Decision 2010/169/EU in *Microban*,[531] generally and abstractly providing for the non inclusion of triclosan in the list of additives which may be used in the manufacture of plastic materials and articles that come into contact with food, individual concern would not be required in cases where no implementing measures are entailed. However, it might be that on the authority of

[530] Case 138/79 *Roquette v. Council* [1980] ECR 3333.
[531] Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v. Commission* EU:T:2011:623

Roquette, considering similar measures specifically referring to private parties by name as a bundle of decisions, the same protection is afforded to these parties as individual concern is satisfied.

Other examples from various areas of EU activity also offer interesting results. In *Josef Buckl & Sohne OHG v. Commission*,[532] the applicants operated duck and geese slaughterhouses in Germany and brought an action for the annulment of a Commission Decision dated 18/1/1991 in which it refused their request to re-establish completely the levies on the import of certain quantities of ducks and geese originating in Poland and Hungary that had been reduced by 50% by Council Regulation 3899/89. The Commission was vested with such an authority under Articles 4 and 5 of this Regulation. The ECJ began by noting that a decision of the Commission which amounts to a rejection must be appraised in the light of the nature of the request to which it constituted a reply.[533] It then concluded that a regulation which re-established completely the levies would concern importers without distinction, and it was accordingly clear that the measure sought by the applicants would be one of general application.[534] The action for annulment was declared inadmissible as the applicants belonged to an open class, being affected only in their objective capacity as traders, in the same way as any other trader. If the rule that a decision of the Commission rejecting a request must be appraised in the light of the nature of the initial request is employed in deciding whether such a rejection would under the Lisbon Treaty be considered as a regulatory act, then the contested decision in this case would be so considered as a regulatory act. And once again, most likely under the test of AG Cruz Villalon it would not entail implementing measures, so it

[532] Joined Cases C-15/91 and C-108/91 *Josef Buckl & Sohne OHG and others v. Commission* [1992] EC I-6061.
[533] At para 22 of the judgment.
[534] Paras 26-27 of the judgment.

would be challengeable without the need to show individual concern, whereas this would not the case under the test of the CJEU.

A similar case is *Commission v. Camar Srl*.[535] This appeal involved various issues but of main interest is the appeal from the judgment of the CFI in Case T-117/98. This concerned an action for annulment of a Commission Decision rejecting a request of the applicants, who were the main importers of Somalian bananas, for adjustment of the tariff quota which was filed under Article 16(3) of Council Regulation 404/93. The CFI had granted them standing on the basis that they were the main importers of Somalian bananas and annulled the contested decision. The ECJ allowed the appeal, holding that they would not have been individually concerned by the regulation they asked the Commission to adopt, as they belonged to an open class, the contested decision was a rejection of a request for a regulation of a general nature and not of individual concern to them. As in *Josef Buckl*, if the same test is applied, under Lisbon such a regulation would have been a regulatory act. There now seems to be some inherent difficulty however in deciding whether such a potential regulatory act would entail implementing measures, and this seems rather as an anomaly. Except in the cases where the potential measure has to be adopted based on a prescribed procedure that is well in place subject to a Treaty Article or other governing legislation that puts it likewise in context with sufficient clarity, it seems difficult to make such predictions.

In *Abertal SAT Ltda v. Commission*,[536] the applicants who were Spanish producers of nuts and locust beans sought the annulment of Article 1 of Commission Regulation 1304/91 amending Commission Regulation 2159/89 which laid down detailed rules for applying the specific measures for nuts and locust beans as provided by Council

[535] Case C-312/00P *Commission v. Camar Srl and another* [2002] ECR I-11355.
[536] Case C-213/91 *Abertal SAT Ltda v. Commission* [1993] ECR I-3177.

Regulation 1035/72. The contested Article restricted the conditions under which producers' organisations could apply to change plans which had already been approved in order to extend the surface area covered by the plan. It also restricted the payment of advances on the annual instalment of aid and brought in stricter requirements concerning the administrative information which such organisations had to supply in order to receive Community aid for improvement plans. The applicants were denied standing. Commission Regulation 1304/91 would have been a regulatory act under Lisbon, but it seems clear that under the interpretation of the CJEU, it would entail implementing measures and accordingly individual concern would still be required. It is not straightforward to say whether this is a provision that would not entail implementing measures even under the interpretation of AG Cruz Villalon, since what it did was to lay down general rules to be followed by competent authorities in reaching a decision on a private party's request.

7.3. *General examples*

In *CNPAAP v. Council*,[537] the action was against Council Regulation (EC) 3604/93 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty. It provided for example, a definition of the terms "financial institutions" and "prudential considerations", encountered in the text of Article 104a of the Treaty. This was adopted by the Council upon a proposal of the Commission and in cooperation with the European Parliament. This would accordingly be regarded as a legislative act under the Lisbon Treaty and individual concern would still be required, despite its effects on private parties.

[537] Case C-87/95P *CNPAAP v. Council* [1996] ECR I-2003.

In *Sociedade Agricola dos Arinhos Ld v. Commission*,[538] the contested measure was Article 2(a) of Commission Decision 98/653/EC concerning emergency measures made necessary by the occurrence of bovine spongiform encephalopathy in Portugal. Among others, it ordered Portugal to ensure that live bovine animals and embryos are not dispatched from its territory to other Member States or third countries. The applicants were all Portuguese breeders of fighting bulls for cultural and sporting events. They unsuccessfully claimed to be individually concerned on the basis that fighting bulls are a different category and are accordingly differentiated from other breeders. The CFI recognised that the purpose of the fourth paragraph of Article 173 of the Treaty was to ensure that legal protection is also available to a person who, whilst not the person to whom the contested measure is addressed, is in fact affected by it in the same way as is the addressee.[539] However, it found that the arguments put forward by the applicants did not show that they were differentiated from other breeders. The contested decision was addressed in general and abstract terms to indeterminate classes of persons and applied to objectively determined situations. There was also no procedural safeguard or right of the applicants to be heard during the process of adoption of the decision. The contested decision was addressed to all Member States. It was adopted by the Commission based on Article 9(4) of Directive 89/662/EEC and Article 10(4) of Directive 90/425/EEC authorising it to take emergency measures to avert dangers of disease outbreak. Under Lisbon, this is likely to be classed as a regulatory act, which would not entail implementing measures under the interpretation of AG Cruz Villalon, whereas it would so entail implementing measures under the interpretation of the CJEU.

[538] Joined Cases 38/99 to 50/99 *Sociedade Agricola dos Arinhos Ld and others v. Commission* [2001] ECR II-585.
[539] Para 37 of the judgment.

In *Agricola Commerciale Olio v. Commission*,[540] the application was for the annulment of Commission Regulations (EEC) 2238/81 and 2239/81. Regulation 2238/81 repealed Regulation (EEC) 71/81 which provided for the sale of a specific quantity of olive oil at a fixed price following complaints by some of the tenderers. Regulation 2239/81 reopened the sale by tender of this quantity by the Italian intervention agency. Both contested Regulations were passed by the Commission having regard to Council Regulation 136/66/EEC. Under Regulation 2239/81 the sale was restricted to the six undertakings designated by the drawing of lots and was no longer to take place at a fixed price but on the basis of the best tender received and on the condition that the price offered was at least equal to the minimum selling price to be fixed by 31/8/1981. The Commission argued that the regulations were of a general and abstract nature and not of individual concern to the applicants. The ECJ emphasised that Regulation 71/81 fixed unconditionally not only the price and the quantities of oil put up for sale, but also all the other conditions of sale, leaving no place for additional contractual stipulations. The applications to purchase could not be withdrawn and the Regulation provided that designation of the purchasers among those who submitted applications was to be by the drawing of lots, without the effect of the latter being subject to any letter of allocation being sent. From the time the lots were drawn, the situation as between the parties to the sale was determined. Regardless of when ownership was transferred, it follows that any intervention on the part of the Community institutions preventing the Italian authority from carrying out its obligations to the tenderers designated by the drawing of lots necessarily constitutes a measure of direct and individual concern to them. Both regulations were annulled in the action. Under Lisbon, both the contested Regulations would be

[540] Case 232/81 *Agricola Commerciale Olio v. Commission* [1984] ECR I-3881.

regulatory acts. They would not entail implementing measures under the interpretation of AG Cruz Villalon, whereas the intervention of the Italian authorities would be considered as implementing measures under the interpretation of the CJEU.

In *Weddel & Co BV v. Commission*,[541] the application was for the annulment of Commission Regulation (EEC) 2806/87 on the issue of import licenses for high quality fresh, chilled or frozen beef and veal. This Regulation fixed in great detail the criteria on the basis of which import licences must be granted, without leaving any discretion to the agencies of the Member States responsible for issuing licences, and was accordingly held to be of direct concern to the applicants. As for individual concern, the ECJ noted that the contested Regulation was adopted in view of the quantities of beef and veal in respect of which individual applications for import licenses had been lodged in the first 10 days of September 1987. When it was adopted, the number of applications which were likely to be affected was known and no new application could be added. On the basis of the total quantity for which applications had been lodged, the percentage up to which applications were to be granted was determined. Consequently, even if the Commission was aware only of the quantities applied for when it adopted the contested Regulation, it thereby decided on the treatment to be accorded to each application. This was accordingly considered as a bundle of individual decisions taken by the Commission pursuant to Commission Regulation (EEC) 3985/86 in the guise of a Regulation, each of those affecting the legal position of each applicant individually. The application was however dismissed on its substance. Under Lisbon, the contested Regulation would have been a regulatory act. Commission Regulation (EEC) 3985/86 was itself based on Council Regulations (EEC) 3927/86 and 3928/86 and would accordingly, along with the

[541] Case C-354/87 *Weddel & Co BV v. Commission* [1990] ECR I-3847.

contested Regulation, be considered as delegated or implementing acts under Lisbon. The same conclusion as in previously examined cases is also reached in respect of implementing measures, which would not be entailed under the interpretation of AG Cruz Villalon, whereas the involvement of the national authorities would mean that implementing measures are entailed under the interpretation of the CJEU.

In *CAM v. Commission*,[542] the action was against Commission Regulation 2546/74 concerning certain measures to be taken following the raising of threshold prices for cereals and rice and trading licenses for these products. This Regulation was itself adopted further to Council Regulations 120/67/EEC and 359/67/EEC, as amended, and is very likely to be considered as a regulatory act, along with the same conclusion as above in relation to the question of entailing implementing measures. Standing was anyway granted to the applicants in that case as they belonged to a closed class, but the application was eventually dismissed as no grounds for annulment were found.

In *Eridania SpA and others v. Council*,[543] the contested measure was Council Regulation 1534/95 fixing the derived intervention prices for white sugar for the 1995-1996 marketing year, some other relevant matters for related products and the amount of compensation for storage costs. The applicant companies held together 92% of the sugar production quotas allocated to Italy. They were denied standing as they belonged to an open class, despite their share of quotas allocated to Italy. The contested Regulation was adopted by the Council on a proposal of the Commission, under Articles 3, 5 and 8 of Council Regulation (EEC) 1785/81 which was itself adopted under Article 43 on common agricultural policy with the participation of the European Parliament. The non participation of the European Parliament in the adoption of the contested measure suggests that this would be a non legislative act

[542] Case 100/74 *CAM v. Commission* [1975] ECR 1393.
[543] Case C-352/99P *Eridania SpA and others v. Council* [2001] ECR I-5037.

under Lisbon. It was of general application, fixing prices and compensation for a particular marketing year, rendering it a regulatory act under Lisbon. It would not entail implementing measures under the interpretation of AG Cruz Villalon, so individual concern would not be required, but the opposite conclusion is reached under the interpretation of the CJEU. This area is now regulated under Council Regulation (EC) 318/2006 on the common organisation of the markets in the sugar sector, which was adopted under Article 37 EC on common agricultural policy with the opinion of the European Parliament. Changes to national quotas and several other tasks have under this Regulation been delegated to the Commission, so measures similar to the contested Regulation in this case would still be regulatory acts. There have of course been several amendments to this Regulation by the Council with the participation of the European Parliament, and those would be legislative acts.

Another case in the sugar sector where the contested measure was adopted by the Commission is *Hans-Otto Wagner GmbH v. Commission*.[544] The application was for the partial annulment of Commission Regulation (EEC) 1837/78 defining the scope of Article 4(5) of Commission Regulation (EEC) 1380/75 laying down detailed rules for the application of monetary compensatory amounts. Commission Regulation 1380/75 was itself based on Council Regulation (EEC) 974/71. The applicants were sugar exporters who had been granted before 1/7/1978 licenses to export sugar in which the refunds had been set in a national currency, and who claimed that they suffered damage as a result of the contested regulation. Direct concern was found. They claimed to be individually concerned as belonging to a closed class, but the ECJ disagreed on the ground that the system applied to all successful tenderers, whatever the date of the award, provided that exportation took place after 1/7/1978. Regulation

[544] Case 162/78 *Hans-Otto Wagner GmbH Agrarhandel KG and another v. Commission* [1979] ECR 3467.

1837/78 would under Lisbon be classed as a regulatory act, which would most probably not entail implementing measures under the interpretation of AG Cruz Villalon, but would fail under the interpretation of the CJEU due to the involvement of national authorities.

In *FRSEA and FNSEA v. Council*,[545] the action was for the annulment of Council Regulation (EEC) 125/93 amending Council Regulation (EEC) 805/68 on the common organisation of the market in beef and veal. The applicants were two associations of agricultural trade organisations representing the interests of French farmers. The contested Regulation laid down certain rules that would apply by amending the existing rules in Regulation 805/68. It was adopted by the Council upon the proposal of the Commission, having regard to the opinion of the European Parliament, and would have been a legislative act under Lisbon. Individual concern was not found in this case.

In *Kik v. Council and Commission*,[546] the applicant was a lawyer and trademark agent who sought to challenge Article 115 of Council Regulation (EC) 40/94 on the Community Trademark, in so far as this excluded Dutch from the languages of the Office for Harmonisation of the Internal Market. The action was dismissed as manifestly inadmissible by the CFI. It was noted that Regulation 40/94 is clearly intended to establish a single procedural system whereby undertakings can obtain a Community trademark.[547] As part of that single system, the language regime set by Article 115 produces legal effects with respect to a category of persons envisaged in the abstract, namely persons seeking to obtain a Community trademark on their own behalf or on behalf of their principals. The applicant was affected by the contested

[545] Case T-476/93 *FRSEA and FNSEA v. Council* [1993] ECR II-1187.
[546] Case T-107/94 *Kik v. Council and Commission* [1995] ECR II-1717.
[547] At para 36 of the Order.

measure solely in her objective capacity as a trademark agent, in the same way as any other trademark agent who is, or might be in the future, in the same situation regarding the language used until now in his or her professional capacity. The contested Regulation was adopted by the Council upon the proposal of the Commission and having regard to the opinion of the European Parliament and the Economic and Social Committee. It would accordingly be a legislative act under Lisbon. It is interesting to observe that if exactly the same act was adopted by the Commission through a non legislative procedure, then it would be a regulatory act not entailing implementing measures at least in relation to the exclusion of the Dutch language from the official languages of the Office, and individual concern would not be required. This seems to be so under both the interpretation of the CJEU and AG Cruz Villalon.

In *Spijker Kwasten BV v. Commission*,[548] there was a challenge against a Commission Decision dated 7/7/1982, authorising the Netherlands not to apply Community treatment to certain brushes originating in China and in free circulation in other Member States. This Decision was not addressed to the applicants, but to the Benelux States alone, and it was necessary to determine whether it was of direct and individual concern to them. Individual concern was not satisfied as they belonged to an open class and this could not be invalidated by the fact that they were the only importers established in the Benelux States regularly importing into the Netherlands brushes originating in China and that it was one of its imports which led to the adoption of the contested Decision. This was published in the Official Journal as a Commission communication under Article 115 of the EEC Treaty, allowing the Commission to take such Decisions in areas of Commercial policy. This became Article 134 EC and

[548] Case 231/82 *Spijker Kwasten BV v. Commission* [1983] ECR 2559.

was then repealed under the Lisbon Treaty, something which creates some uncertainty as to whether this would be a legislative act. It does however resemble to a regulatory act of general application, having been issued by the Commission acting alone, in which case the same conclusion would be reached as to the question of implementing measures, in that they would not be entailed under the interpretation of AG Cruz Villalon, whereas they would be entailed under that of the CJEU.

7.4. *Cases related to use of descriptions and designations*

Challenges against Community acts regulating the use of descriptions and designations also provide interesting comparisons and produce results showing the potential of difference in treatment for measures of similar or comparable effect to private parties. In *Deutz und Geldermann v. Council*,[549] the measure in question was Regulation 3309/85 of the Council, laying general rules about the description of sparkling wines. This was adopted by the Council upon a proposal of the Commission, having regard to the opinions of the European Parliament and the Economic and Social Committee. The authorising act was Regulation 337/79 of the Council which was adopted under ex Article 37 EC, the equivalent of which is now Article 43 TFEU employing the ordinary legislative procedure for such measures. Regulation 337/79 would accordingly be a legislative act under the Lisbon Treaty.

Similarly, in *FNAB v. Council*,[550] the contested measure was Council Regulation 1804/99, supplementing Council Regulation 2092/91, related to the use of certain designations of organic products. The applicants were denied standing as they belonged to an open class and the fact that their competitive position was affected by that measure was not sufficient to distinguish them individually from other traders.

[549] Case 26/86 *Deutz und Geldermann v. Council* [1987] ECR 941.
[550] Case C-345/00 P *FNAB and others v. Council* [2001] ECR I-3811.

The contested Regulation was adopted by the Council upon a proposal of the Commission, having regard to the opinion of the European Parliament, and would also be classified as a legislative act under the Lisbon Treaty.

On the contrary, the contested measure in *Molkerei and another v. Commission*[551] was Commission Regulation 123/97 supplementing the Annex to Commission Regulation 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Council Regulation 2081/92. The applicants were producers of cheese affected by the inclusion of "Altenburger Ziegenkaese" as a protected designation in the contested Regulation. They also had been heard by the Commission during the procedure which led to the adoption of the contested regulation. They were denied standing as they belonged to an open class, with the ECJ regarding the contested regulation as a measure of general application, and hence of a legislative nature.[552] This would be a regulatory act under Lisbon and under the interpretation of AG Cruz Villalon it would not entail implementing measures, while it would under the interpretation of the CJEU. In the scenario of the interpretation of AG Cruz Villalon, it would appear difficult to reconcile or justify this difference in treatment between *Deutz*, *FNAB* and also *Codorniu*[553] on the one hand, and *Molkerei* on the other.

Also of interest is *La Conqueste SCEA v. Commission*.[554] The action was for the annulment of Commission Regulation 1338/2000, completing the Annex to Commission Regulation 2400/96 on the entry of certain names in the Register of protected designations of origin and protected geographical indications provided for

[551] Case C-447/98 P *Molkerei and another v. Commission* [2000] ECR I-9097.
[552] Para 67 of the judgment.
[553] Case C-309/89 *Codorniu SA v. Council* [1994] ECR I-1853, considered below.
[554] Case C-151/01P *La Conqueste SCEA v. Commission* [2002] ECR I-1179.

in Council Regulation 2081/92 on the protection of such indications and designations for agricultural products and foodstuffs, as regards registration as a protected geographical indication of the name “Canard a foie gras du Sud-Ouest”. The applicants were denied standing as they belonged to an open class, despite the economic impact the contested measure had on them which they claimed that essentially ousted them from the market in ducks for “foie gras du Sud-Ouest”. The contested Regulation is now likely to be considered as a regulatory act under Lisbon which, under the interpretation of AG Cruz Villalon would not entail implementing measures but would under the interpretation of the CJEU due to the involvement of national authorities. It would be a delegated or implementing act under the authority Council Regulation 2081/92. Commission Regulation 2400/96 would not entail implementing measures under the interpretation of AG Cruz Villalon but would under the interpretation of the CJEU. These Commission Regulations basically inserted protected names in an Annex. It also seems that the same considerations as to implementing measures apply to Council Regulation 2081/92.

The question that seems to arise from these cases is whether the task of determining if an act entails implementing measures encompasses an examination of whether the authorising legislative act on which it is based and which contains general provisions about the enforcement or the rules that apply also entails implementing measures. In other words, if there is an authorising legislative act that sets complete rules and the delegated act only amends an annex by inserting a designation or a description to the list, whether such a delegated act should be considered along with the legislative act in order to decide if the end result requires implementing measures. An answer seems

to have come from *Microban*,[555] where the contested measure was a Commission decision amending an annex to a directive. The GC accepted that it did not entail implementing measures despite the fact that the directive required implementing measures, on the justification that the directive had already been transposed by the Member States.[556] It should however be borne in mind that *Microban* was decided before *Telefonica* and *T & L Sugars* which applied a different interpretation to the notion of implementing measures. Accordingly, the possible intervention of national authorities would very likely constitute implementing measures anyway.

8. Legal and procedural guarantees

Of particular interest appears to be the review of the Case-Law in another category of applications of the *Plaumann* test, which exceptionally recognises individual concern as satisfied where there are legal provisions protecting the interests of a private party or requiring an institution to take a private party's interests into account. The most commonly cited case in this category is perhaps *Sofrimport SARL v. Commission*.[557] This was an application for the annulment of Commission Regulations (EEC) 962/88 and 984/88 suspending the issue of import licenses for dessert apples originating in Chile, and Commission Regulation (EEC) 1040/88 fixing quantities of imports of dessert apples originating in third countries and amending Regulation (EEC) 962/88 suspending the issue of import licenses. All the contested Regulations were adopted under the system of surveillance of imports of dessert apples from third countries established under Commission Regulation (EEC) 346/88. The applicants were importers and wholesalers of fresh fruit with apples in transit to the Community. Their

[555] Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v. Commission* EU:T:2011:623, at paras 33-39.
[556] See para 35 of the judgment.
[557] Case C-152/88 *Sofrimport SARL v. Commission* [1990] ECR I-2477.

application for an import license was rejected based on the contested Regulations. Direct concern was satisfied as Regulation 962/88 required the national authorities to reject pending applications for import licenses without allowing them any discretion. The ECJ held that the applicants were in the position referred to in Article 3(3) of Council Regulation (EEC) 2707/72 which required the Commission, in adopting such measures, to take account of the special position of products in transit to the Community. Only importers of Chilean apples whose goods were in transit when Regulation 962/88 was adopted were in that position, and accordingly formed a closed class that was sufficiently well defined and could not be extended after the measures took effect. Secondly, since Regulation 2707/72 gave specific protection to those importers, they must have been able to enforce observance of that protection and bring legal proceedings for that purpose. The criterion of individual concern was accordingly satisfied. The contested Regulations were then annulled on the merits of the case. Their claim for compensation for non contractual liability also succeeded. The contested measures, as described above, would all be considered as regulatory acts, which under the interpretation of AG Cruz Villalon would not entail implementing measures, but would under the interpretation of the CJEU.

Regularly cited in this category is also *Piraiki-Patraiki v. Commission*.[558] This was an application for annulment of Commission Decision 81/988/EEC authorising France to take protective measures with regard to imports of cotton yarn from Greece, as provided for in Article 130 of the Act of Accession of Greece to the European Communities.[559] This Decision was addressed to the French Republic and the Hellenic Republic, and authorised France to limit imports of cotton yarn from Greece. The Commission was specifically authorised to adopt such measures under Article

[558] Case 11/82 *SA Piraiki-Patraiki and others v. Commission* [1985] ECR 207.
[559] OJ No. L291, 19/11/1979, p. 17.

130 of the Act of Accession of Greece. As to the issue of direct concern, the ECJ noted that without implementing measures adopted at national level, the contested Decision could not have affected the applicants, but held that in this case, that fact does not in itself prevent the Decision from being of direct concern if other factors justify the conclusion that they have a direct interest in bringing the action. It was concluded that under the circumstances the possibility that France might decide not to make use of the authorisation granted by the contested Decision was entirely theoretical, since there could be no doubt as to their intention to apply the Decision, and direct concern was satisfied. As for individual concern, the applicants belonged to an open class and could not succeed on that ground. Some of them had however concluded agreements with customers in France. In order to ascertain whether the measure whose authorisation was being considered meets the conditions laid down in Article 130(3) of the Act of Accession of Greece, the Commission had to take into account the situation in the Member State with regard to which the protective measure was requested. In particular, in so far as the circumstances permitted, the Commission must have inquired into the negative effects which its decision might have on the economy of that Member State as well as on the undertakings concerned. It was accordingly under an obligation to consider the contracts some of the applicants had entered into. Those undertakings were held to be individually concerned on this ground. The contested Decision was annulled on the merits of the action. Under Lisbon the contested Decision is likely to have been a regulatory act since it was not adopted under one of the legislative procedures and was of general application. It is evident however that it did entail implementing measures and individual concern would accordingly still be required.

This case seems to provide a good example of the differences between the notion of direct concern and the notion of entailing implementing measures even if the interpretation of AG Cruz Villalon had been accepted. Direct concern would in any case have to be wider and found in cases such as this, where a Member State has discretion in applying the act, but the possibility of not making use of it is found under the circumstances to be entirely theoretical.

In *Antillean Rice Mills NV v. Commission*[560] which was a challenge against an anti-dumping measure, the reasoning for finding individual concern was very similar to *Piraiki-Patraiki* due to the resemblance of Article 130(3) of the Act of Accession of Greece to Article 109(2) of Council Decision 91/482/EEC on the association of the overseas countries and territories with the European Economic Community. The contested measure was Commission Decision 93/127/EEC introducing safeguard measures in respect of rice originating in the Netherlands Antilles, adopted under Article 109 of Council Decision 91/482/EEC. Unlike the Decision in *Piraiki-Patraiki*, which was addressed only to France and Greece, the contested Decision was addressed to all Member States and set detailed measures and procedures to be followed in respect of rice originating from the Netherlands Antilles, without requiring implementing measures. Under Lisbon, it would have been a regulatory act which would probably not entail implementing measures under the interpretation of AG Cruz Villalon, but would under that of the CJEU. The applicants were actually held to be individually concerned in this case, having rice in transit to the Community, the ECJ holding that the judicial protection an individual enjoys cannot depend on whether the contested Decision is addressed to one Member State or to several, but

[560] Case C-390/95P *Antillean Rice Mills NV and others v. Commission* [1999] ECR I-769.

must be established on the basis of the specific situation of that individual compared to all other persons concerned.

In *Unifruit Hellas EPE v. Commission*,[561] the contested measure was Commission Regulation (EEC) 846/93 introducing a countervailing charge on apples originating in Chile, and Commission Regulations (EEC) 915/93 and 1467/93 amending that Regulation. The enabling legislation for the adoption of the contested measures was Council Regulation (EEC) 1035/72 on the common organisation of the market in fruit and vegetables. The CFI repeated that it is settled Case-Law that the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom a measure applies at any given time is not sufficient to call into question the legislative nature of the measure, as long as it is established that it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose.[562] The CFI then considered that the contested Regulations were not directed specifically to the applicant and that the applicant's concern was only in its objective capacity as an importer of Chilean apples, in the same way as any other trader in an identical situation.[563] The CFI was also faced with an argument that the applicant had goods in transit and that those importers whose goods were in transit at the time of adoption of the contested measures constituted a closed class. The CFI noted that belonging to a closed class is, according to settled Case-Law, not enough on its own.[564] It then noted that unlike the *Sofrimport* case, where Regulation 2707/72 required the Commission to take into account the special position of products in transit, there was no such provision in Regulation 1035/72 or

[561] Case T-489/93 *Unifruit Hellas EPE v. Commission* [1994] ECR II-1201.
[562] At para 21 of the judgment.
[563] Para 23 of the judgment.
[564] Para 25 of the judgment.

in any other measure.[565] Individual concern was consequently not found and this was not appealed. The CFI also dismissed the action for damages for non contractual liability, and the ECJ dismissed the appeal.[566] All these contested Regulations would have been regulatory acts not entailing implementing measures under Lisbon and the interpretation of AG Cruz Villalon, but would be considered as entailing implementing measures under the interpretation of the CJEU.

In *Rica Foods (Free Zone) NV v. Commission*,[567] the action was for the annulment of Commission Regulation (EC) 465/2000, introducing safeguard measures for imports from the overseas countries and territories of sugar sector products with "EC/OCT" cumulation of origin. The applicants also put forward a claim for damages. In this action, the contested Regulation was considered to be of general application, applying to all imports of sugar into the Community, in the unaltered state or in the form of mixtures. It was accepted to be of direct concern to the applicants as it left no discretion to the national authorities of the Member States responsible for implementing it.[568] For individual concern, the CFI cited *Antillean Rice Mills*[569] and held that under a specific provision, this being Article 109 of Council Decision 91/482/EEC, the Commission had the obligation to inquire into the negative effects which its decision might have on the economy of that Member State as well as on the undertakings concerned. It then noted that this finding is not sufficient in itself to establish that those undertakings affected by a safeguard measure are individually concerned.[570] They still had to show that they were affected by reason of a factual situation which differentiates them from all other persons. Citing *Piraiki-Patraiki*, the

[565] Para 26 of the judgment.
[566] In Case C-51/95 *Unifruit Hellas EPE v. Commission* [1997] ECR I-727.
[567] Joined Cases T-94/00 *Rica Foods (Free Zone) NV and others v. Commission* [2002] ECR II-4677.
[568] At para 49 of the judgment.
[569] Case C-390/95P *Antillean Rice Mills NV and others v. Commission* [1999] ECR I-769.
[570] At para 56 of the judgment.

CFI further noted that undertakings which had already entered into contracts which had been prevented from being performed, in part or at all, by the contested measure were individually concerned. The applicants in this case were proved to have had such contracts in place and were accordingly individually concerned. However, the action was dismissed on its substance. Under Lisbon this would also be have been classified as a regulatory act which would not entail implementing measures under the interpretation of AG Cruz Villalon, but would under that of the CJEU.

This commonly quoted Case-Law in this category of exceptions to the normal *Plaumann* test seems to be against Commission measures adopted under the authority of a Council measure. It is very difficult for any accurate finding to be substantiated in quantitative terms, but at least this is what the commonly cited Case-Law reflects. It seems that such requirements can be imposed directly by the Treaty article forming the basis of the measure or by another act of an EU institution or joint act of institutions. Provided that the Treaty articles do not generally provide for such rights to private parties, the reality under the Lisbon Treaty seems to be that such requirements will be imposed by a legislative act or by a non legislative act. If they are imposed by a non legislative act, it is highly unlikely, if not impossible in view of Articles 290 and 291 TFEU, that such a non legislative act will prescribe the use of a legislative procedure for the adoption of further measures. Such further measures will normally also be non legislative acts.

If these requirements are imposed by a legislative act, then again any further measures adopted under a legislative act are likely to be non legislative, in the form of delegated or implementing acts. There is of course the chance that the Council and the European Parliament may amend the original legislative act or in certain cases choose to retain

the power of adopting such further measures,[571] as a continuation of their initial legislative act imposing such requirements to take into account a private party's interests.

It then follows that a high number of such acts that are adopted under the authority of a prior measure imposing requirements to take into account a private party's interests before their adoption, will be non legislative and of general application. This exception could accordingly have had a reduced role, perhaps even a significantly reduced role, under the Lisbon Treaty since it will not have any place in challenges against regulatory acts not entailing implementing measures. However, the interpretation of implementing measures by the CJEU renders it even questionable as to whether the reform would have any effect at all in this area, since it seems inevitable that there will be some degree of intervention or involvement, although possibly even purely automatic or mechanical, by national authorities.

9. Exclusive right and exceptional economic impact

Another category of applications of the *Plaumann* test which is seen as an exception to its general application, consists of the cases where a measure causes economic impact on a private party which is so exceptional that it differentiates this party from all others, despite belonging to an open class, and so causes individual concern to be satisfied. The instances where this has been accepted are however extremely limited and the Case-Law is full of unsuccessful attempts to establish individual concern on these grounds.[572]

[571] An example of such reservation can perhaps be found in Case C-309/89 *Codorniu SA v. Council* [1994] ECR I-1853.
[572] See for example Case C-96/01 P *The Galileo Company and Galileo International LLC v. Council* [2002] ECR I-4025.

In *Codorniu SA v. Council*,[573] the action for annulment was against Council Regulation 2045/89 amending Regulation 3309/85 on the common organisation of the market in wine. This was adopted by the Council, having regard to the opinion of the European Parliament. It concerned the descriptions used for wine production methods, presentation and designations and restricted the use of the word "cremant" only for wines produced in France and Luxembourg under a particular method. Regulation 3309/85 was adopted on the basis of Article 54(1) of Council Regulation 337/79 which provided that the Council could adopt this by a qualified majority upon a proposal of the Commission, a procedure which was at the time the ordinary legislative procedure and the predecessor of the co-decision procedure, now the ordinary legislative procedure. Regulation 337/79 was also in itself adopted under this same procedure. Council Regulation 2045/89 was adopted by the Council having regard to the opinion of the European Parliament under Article 43 on the common agricultural policy. This would accordingly be classified as a legislative act under the Lisbon categorisation. Standing was granted to the applicants in this case, who were the holders of a trademark containing the word "cremant" since 1924 and the deprivation of use of this trademark would result in considerable benefit to the applicant's competitors. This exceptional impact distinguished the applicant from other traders.

In *Extramet v. Council*,[574] the challenge was against Council Regulation 2808/89 adopted under authorisation from Article 12 of Council Regulation 2423/88. Under this Article, such regulations could be passed by the Council acting by qualified majority upon the proposal of the Commission, but without the participation of the European Parliament and is likely to be considered as a non legislative act under

[573] Case C-309/89 *Codorniu SA v. Council* [1994] ECR I-1853.
[574] Case C-358/89 *Extramet v. Council* [1991] ECR I-2501.

Lisbon. It was of general application and would not entail implementing measures under the interpretation of AG Cruz Villalon, but again would so entail implementing measures under the interpretation of the CJEU. This regulation concerned anti-dumping duties imposed on certain products from China and the Soviet Union. The applicant was granted standing on an exceptional basis due to the extremely adverse economic impacts this had on it. It was the largest importer and this regulation would actually force it to obtain its supplies from its main competitor. The contested regulation was eventually annulled.

This category continues to have its place under Lisbon. Both legislative and regulatory acts can of course produce such an impact on private parties.

10. Anti-dumping

The area of anti dumping has also been considered as an area where the ECJ has taken a more relaxed approach to individual concern, because of the nature of the measures that are adopted. The first example in this category was *Extamet*, already considered above. Before further examples are examined, it should be noted that before the adoption of the Lisbon Treaty, the founding provision for all measures was found in Articles 133(1) and (2) EC, which dealt with the common commercial policy. Article 133(2) EC provided that the Council could adopt measures for implementing the common commercial policy upon proposals of the Commission. The relevant provisions are now found in Article 207 TFEU, paragraph (2) of which now provides that the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt measures defining the framework for implementing the common commercial policy.

There was always a "basic" Council regulation setting out the general framework in this area.[575] The process for anti-dumping measures remained similar in general terms throughout the years, despite the changes in the basic regulations. Normally, there will be an investigation by the Commission which would lead to the adoption of a provisional measure imposing anti-dumping duties. The Commission would then submit a proposal to the Council for the adoption of a definitive measure and the Council would decide on this.[576] The basic regulation currently in force is Council Regulation (EU) 2016/1036. The provisions related to the adoption of measures imposing provisional anti-dumping duties by the Commission are found in Article 7 of this Regulation. The provisions for the adoption of Regulations imposing definitive anti-dumping duties are contained in Article 9 of this Regulation, which provides that these will be imposed by the Commission.

Commission measures imposing provisional or definitive anti-dumping duties under this Regulation will be non legislative acts under the Lisbon Treaty and will normally be of general application, and accordingly regulatory acts. It is very likely that such measures would not entail implementing measures under the interpretation of AG Cruz Villalon, and would have been challengeable without the need to show individual concern. This is unfortunately not the case with the interpretation of the CJEU, since it is inevitable that there will be some degree of intervention by national authorities sufficient to bring this within the meaning of implementing measures in *T & L Sugars*. The same result seems to be produced from a review of some of the older cases.

[575] See for example, Council Regulations 3017/79, 2423/88 and 384/96.
[576] See for example, Articles 11 and 12 of Council Regulation 3017/79, Articles 11 and 12 of Council Regulation 2423/88, Articles 7 and 9 of Council Regulation 384/96.

In *Alusuisse Italia SpA v. Council and Commission*,[577] the applicants sought the annulment of Commission Regulation 1411/81 imposing a provisional anti-dumping duty on a type of orthoxylene originating in Puerto Rico and the United States, and Council Regulation 2761/81, imposing a definitive anti-dumping duty for the same substance. Standing was denied as they belonged to an open class and could not satisfy individual concern. Commission Regulation 1411/81 was adopted under Article 11 of Council Regulation 3017/79 and is likely to be a regulatory act under Lisbon. Council Regulation 2761/81 was adopted under Article 12 of Council Regulation 3017/79, having regard to the relevant proposal of the Commission, but as aforesaid, without the involvement of the European Parliament, and would accordingly also be a regulatory act. Unfortunately, the conclusion is the same in relation to implementing measures, as these measures would not be considered as so entail any under the interpretation of AG Cruz Villalon, but would under that of the CJEU.

In *Allied Corporation v. Commission*,[578] the contested measure was Commission Regulation (EEC) 1976/82, imposing a provisional anti-dumping duty on certain chemical fertilisers originating in the United States, and Commission Regulation (EEC) 2302/1982 amending that Regulation. Both were adopted pursuant to Council Regulation (EEC) 3017/79 on protection against dumped and subsidised imports from third countries. Council Regulation (EEC) 349/81 previously imposed a definitive anti-dumping duty and three of the applicants were individually referred to in this Regulation, having given relevant undertakings. The ECJ held that measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the

[577] Case 307/81 *Alusuisse Italia SpA v. Council and Commission* [1982] ECR 3463.
[578] Joined Cases 239/82 and 275/82 *Allied Corporation and others v. Commission* [1984] ECR 1005.

measures adopted by the Commission or the Council or were concerned by the preliminary investigations. The actions of the three applicants that gave undertakings under Article 10 of Council Regulation 3017/79 with the result that they were referred to individually in Article 2 of Council Regulation 349/81, and after withdrawing their undertakings, their individual circumstances formed the subject matter of the two contested Commission Regulations, were held admissible. Under Lisbon, both of the contested Regulations would be classed as regulatory acts which would not entail implementing measures under the interpretation of AG Cruz Villalon, but would under that of the CJEU.

In *Nashua Corporation v. Commission and Council*,[579] one of the two joined cases was an application for annulment of the Commission's decision rejecting the undertaking offered by the applicant in an anti-dumping proceeding concerning the importation of photocopiers originating in Japan. The other case was an application for annulment of Council Regulation (EEC) 535/87 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan. The action against the Commission's decision was not admissible as this was a preparatory measure for the Council and could not be challenged. In relation to Council Regulation 535/87, the ECJ noted that Regulations introducing anti-dumping duties are legislative in nature and scope, inasmuch as they apply to all traders generally.[580] Nevertheless, it is conceivable that some provisions of those Regulations may be of direct and individual concern to those producers and exporters of the product in question who are alleged on the basis of information about their business activities to be dumping. This was true, in the ECJ's view, generally for producers and exporters

[579] Joined Cases C-133/87 and C-150/87 *Nashua Corporation and others v. Commission and Council* [1990] ECR I-719.
[580] At para 14 of the judgment.

who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations. The ECJ also noted that the same is true of those importers whose resale prices were taken into account for the construction of export prices and who are consequently concerned by the findings relating to the existence of dumping.[581] It went on to find the applicants individually concerned without any need to define the applicant as an importer or an exporter. In the light of its business dealings with another manufacturer, Nashua was directly and individually concerned by the findings relating to the existence of dumping by that manufacturer, and the provisions of the contested Regulation regarding that manufacturer's dumping practices were of direct and individual concern to Nashua. This applicant's action failed however on its substance. The contested measures would also have been regulatory acts under Lisbon which would not entail implementing measures under the interpretation of AG Cruz Villalon but would under that of the CJEU. A very similar case, concerning the same Council Regulation and decided similarly on its substance, is *Gestetner Holdings plc v. Council and Commission*.[582]

In *Timex Corporation v. Council and Commission*,[583] the action was for the partial annulment of Article 1 of Council Regulation (EEC) 1882/82 imposing a definitive anti-dumping duty on mechanical wrist watches originating in the USSR. The applicants were the leading manufacturers of mechanical watches and watch movements in the Community and the only manufacturer of those products in the United Kingdom. The ECJ noted that the contested Regulation was based on the applicants' own situation as the preamble made it clear that the definitive anti-

[581] At para 15 of the judgment.
[582] Case C-156/87 *Gestetner Holdings plc v. Council and Commission* [1990] ECR I-781.
[583] Case 264/82 *Timex Corporation v. Council and Commission* [1985] ECR 849.

dumping duty was made equal to the dumping margin which was found to exist taking into account the extent of injury caused to Timex by the dumped imports.[584] It then held that the contested Regulation constituted a decision of direct and individual concern to the applicants.[585] The contested Article 1 of this Regulation was annulled. Under Lisbon, this Regulation would again be considered as a regulatory act not entailing implementing measures under the interpretation of AG Cruz Villalon, but so entailing implementing measures under that of the CJEU.

In *Commission v. Nederlandse Antillen*,[586] the contested measure was Commission Regulation (EC) 2352/97 introducing specific measures in respect of imports of rice originating in overseas countries and territories and Commission Regulation (EC) 2494/97 on the issuing of import licences for rice falling within CN code 1006 and originating in overseas countries and territories under the specific measures introduced by Regulation (EC) 2352/97. The application succeeded before the CFI and the contested Regulations were annulled. The arguments put forward were similar to those in *Antillean Rice Mills NV and others v. Commission*.[587] The ECJ noted that both the contested Regulations were by their nature of general application.[588] The ECJ then noted that whilst it was true that the imposition of safeguard measures affected the rice milling sector in the Netherlands Antilles, and that when the contested Regulations were adopted, most imports of rice originating in the overseas countries and territories into the Community came from the Netherlands Antilles, the fact nevertheless remained that that sector constituted only 0.9% of their gross national

[584] Para 15 of the judgment.
[585] Para 16 of the judgment.
[586] Case C-142/00P *Commission v. Nederlandse Antillen* [2003] ECR I-3483.
[587] Case C-390/95P *Antillean Rice Mills NV and others v. Commission* [1999] ECR I-769, referred to previously.
[588] At para 63 of the judgment.

product.[589] It was also noted that the Netherlands Antilles were not the only rice producing overseas country and territory. In those circumstances, the ECJ held that it was not established that the contested Regulations had serious consequences in a significant sector of the economy of the Netherlands Antilles as distinct from every other overseas country and territory. It then held that in any event, the general interest an overseas country and territory may have in obtaining a favourable result for its economic prosperity is not sufficient on its own to enable it to be regarded as individually concerned.[590] It then moved on to consider whether individual concern could be established as a result of the fact that under Article 109 of Council Decision 91/482/EEC ("the OCT Decision"), the Commission was under an obligation to inquire into the effects of the measure on the economy of the particular overseas country and territory. It held that it was clear from *Piraiki-Patraiki* that the finding of the existence of that obligation is not sufficient to establish that those overseas countries and territories are individually concerned by those measures.[591] It noted that para 28 of the judgment in *Piraiki-Patraiki* shows precisely that only those undertakings which had already entered into contracts which were due to be performed during the period of the application of the contested measure but which were prevented from being performed, in part or at all, were individually concerned. This meant that the Netherlands Antilles in this case were not discharged from the burden of showing that they were affected by the contested Regulations by reason of a factual situation which differentiates them from all other persons. The ECJ held that the fact that the Netherlands Antilles exported by far the most rice originating in the overseas countries and territories was not such as to distinguish them individually.[592]

[589] Para 67 of the judgment.
[590] Para 69 of the judgment.
[591] Para 74 of the judgment.
[592] Para 77 of the judgment.

The contested judgment was set aside and the applications were dismissed as inadmissible. Regulation 2352/1997 would be a regulatory act not entailing implementing measures under Lisbon had the interpretation of AG Cruz Villalon been adopted, but not under the interpretation of the CJEU. It was passed upon authorisation from the OCT Decision and set up the regime to followed without leaving discretion to the Member States on how this should be implemented. The conclusion is also the same for Regulation 2494/97 which was a form of implementation of Regulation 2352/97 in a particular case.

In *Antillean Rice Mills v. Council*,[593] the contested measure was Council Regulation 304/97 introducing safeguard measures in respect of imports of rice from overseas countries and territories. The applicants were denied standing as they belonged to an open class of exporters of rice to the Community, although this Regulation would effectively force them to cease their operations. This Regulation was adopted under Article 109 in conjunction with Article 1(7) of Annex IV of the OCT Decision. This provided that where a Member State asked the Commission to adopt a certain measure and the Commission did not do so, the Member State could apply to the Council and the Council could adopt a different decision acting by qualified majority. There was no participation of the European Parliament and again, this measure would be a regulatory act under Lisbon, not entailing implementing measures under the interpretation of AG Cruz Villalon, but so entailing implementing measures under that of the CJEU.

[593] Case C-451/98 *Antillean Rice Mills v. Council* [2001] ECR I-8949.

In *British Shoe Corporation Footware Supplies v. Council*,[594] the application was for the annulment of Council Regulation (EC) 2155/97 imposing a definitive anti-dumping duty on imports of certain footwear with textile uppers originating in the People's Republic of China and Indonesia and collecting definitively the provisional duty imposed. The Commission published a notice of initiation for this anti-dumping proceeding and this stated that interested parties should make themselves known in writing and submit all relevant information to the Commission. The applicants were importers and distributors of shoes in the European Union and responded to the Commission's notice. The investigation led to the adoption of Commission Regulation (EC) 165/97, imposing a provisional anti-dumping duty, against which the applicants filed Case T-73/97 before the CFI. Meanwhile, the contested Regulation 2155/97 was adopted and the CFI decided that there was no need to adjudicate on the action in Case T-73/97, as the adoption of the definitive measure manifestly removed any interest of the applicants in continuing with those proceedings. In considering standing, the CFI started by noting that although regulations imposing anti-dumping duty are, by virtue of their nature and scope, of a general nature, in that they apply generally to the economic operators concerned, their provisions may nonetheless be of individual concern to particular traders.[595] It then further noted that this is generally the case where producers or exporters are able to demonstrate that they were identified in the measures adopted by the Commission or the Council, or were concerned by the preliminary investigations. By further analysing its existing Case-Law, it noted that certain provisions of such regulations are also of individual concern to those of the importers whose resale prices were taken into account for the construction of export prices. It also noted that importers associated with exporters in

[594] Case T-598/97 *British Shoe Corporation Footware Supplies and others v. Council* [2002] ECR II-1155.
[595] At para 43 of the judgment.

non Member countries on whose products anti-dumping duties are imposed may challenge the regulations imposing such duties, particularly where the export price has been calculated on the basis of their selling prices on the Community market. It further noted that the ECJ in *Extramet* has also held an action brought by an unrelated importer against such a regulation to be admissible where there were exceptional circumstances, in particular where that regulation seriously affected that importer's business activities.[596] The CFI then found that the applicants did not belong to any of these categories. On the one hand they were unrelated importers. On the other hand, it was clear from the contested Regulation that the existence of dumping was established not by reference to their resale prices but by reference to the prices actually paid or to be paid on export. Comparing the applicants with that in *Extramet*, the CFI noted that in *Extramet* the applicant had proved, first, that it was the largest importer of the product to which the duty was imposed, and, at the same time, the end user of the product, secondly that its business activities depended to a very large extent on those imports, and, thirdly, that it was seriously affected by the contested regulation in view of the limited number of manufacturers of the product concerned and of the difficulties which it encountered in obtaining supplies from the sole Community producer, who, moreover, was its main competitor for the processed product. The CFI noted that in this case, all the applicants taken collectively accounted for only 9.5% of all imports of the product at issue. They had also failed to otherwise prove a comparable severity of results flowing from the imposition of the duties. The CFI also noted that *Extramet* did not lay down an exhaustive list of the conditions which an unrelated importer must meet in order to be regarded as

[596] Paras 45-48 of the judgment.

individually concerned by a regulation imposing anti-dumping duties.[597] The applicants also claimed that they were individually concerned by virtue of the fact that they were actively involved in the administrative procedure and that they provided information which the institutions received and evaluated specifically in the context of the examination of the Community interest in adopting the contested measures, citing *Timex* and *Sinochem Heilongjiang v. Council*.[598] In relation to *Timex*, the CFI stated that in that case the ECJ found that the applicant was the leading manufacturer of mechanical watches and watch movements in the Community and the only remaining manufacturer of those products in the United Kingdom. The anti-dumping duty had also been fixed in the light of the consequences which the dumping had entailed for the applicant.[599] As regards the judgment in *Sinochem*, the CFI noted that the applicant in that case was an exporter of the product in question, that it had intensively involved itself in the preliminary investigation, that all the information and arguments were received and evaluated by the Commission, and that furthermore, it was the only Chinese undertaking to have participated in the investigation.[600] It then concluded that although participation by an undertaking in anti-dumping proceeding may be taken into account, amongst other factors, in order to establish whether that undertaking is individually concerned, if there are no other factors giving rise to a particular situation which distinguishes that undertaking from all other traders, such participation does not of itself satisfy individual concern.[601] Since the applicants in this case had not proved the existence of other factors capable of distinguishing them from all other traders, they could not rely on such participation alone. For that purpose, the mere fact that a number of the applicants were specifically named in the

[597] Paras 50-56 of the judgment.
[598] Case T-161/94 *Sinochem Heilongjiang v. Council* [1996] ECR II-695.
[599] Para 58 of the judgment.
[600] Para 59 of the judgment.
[601] Para 61 of the judgment.

contested Regulation could not lead to a different conclusion. The action was accordingly dismissed as inadmissible. The contested Regulation was based on Council Regulation (EC) 384/96, and was adopted on the proposal of the Commission and after consultation with the Advisory Committee. It would under Lisbon also be regulatory act not entailing implementing measures under the interpretation of AG Cruz Villalon, but which again would entail implementing measures under the interpretation of the CJEU.

Anti-dumping seems to be an area where the problem of access to justice could have been greatly improved after the adoption of the Lisbon Treaty but for the interpretation of the CJEU on implementing measures. Most private parties affected would have been able to challenge both the provisional and the definitive measures imposing the anti-dumping duties without the need to show individual concern, had the interpretation of AG Cruz Villalon been adopted. Accordingly, under the interpretation of the CJEU, the relaxed approach taken by the EU courts for individual concern in this area and the Case-Law that developed continues to have its importance.

11. State aid

State aid is another area where the ECJ traditionally took a more relaxed approach to individual concern. In *Kingdom of Spain v. Commission*,[602] the ECJ heard an appeal from the CFI's judgment in *Lenzing v. Commission*[603] by which the CFI partly annulled Commission Decision 1999/395/EC on state aid implemented by Spain in favour of Sniace SA, as amended by Commission Decision 2001/43/EC which was

[602] Case C-525/04P *Kingdom of Spain v. Commission* [2007] ECR I-9947.
[603] Case T-36/99 *Lenzing v. Commission* [2004] ECR II-3597.

the contested Decision. Spain and the Commission argued on appeal that Lenzing's action was inadmissible. The ECJ noted[604] that with regard more particularly to the field of state aid, persons other than those to whom a decision is addressed who call in question the merits of a decision appraising the aid are regarded as being individually concerned by that decision where their position on the market is substantially affected by the aid which is the subject of the decision in question, citing *Cofaz v. Commission*[605] and *Commission v. Aktionsgemeinschaft Recht und Eigentum*.[606] It then noted[607] that as regards establishing such an effect, the ECJ has had occasion to clarify that the mere fact that a measure such as the contested Decision may exercise an influence on the competitive relationship with the addressee of that measure cannot in any event suffice for that undertaking to be regarded as individually concerned by that measure, citing *Eridania v. Commission*.[608] It then statedthat, accordingly, an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of the aid, but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, [609] citing *Comite d' enterprise de la Societe francaise de production and others v. Commission*.[610] It moved on to state that it does not follow from the Case-Law that a particular position of this kind has to be inferred from factors such as a significant decline in turnover, appreciable financial losses or a significant reduction in market share following the grant of the aid. The grant of state aid can have an adverse effect on the competitive situation of an operator in other ways too, in particular by causing loss of an opportunity to make a

[604] At para 31 of the judgment.
[605] Case 109/84 *Cofaz and others v. Commission* [1986] ECR 391.
[606] Case C-78/03P *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737.
[607] Para 32 of the judgment.
[608] Joined Cases 10/68 and 18/68 *Eridania and others v. Commission* [1969] ECR 459.
[609] Para 33 of the judgment.
[610] Case C-106/98P *Comite d' enterprise de la Societe francaise de production and others v. Commission* [2000] ECR I-3659.

profit or a less favourable development than would have been the case without such aid. Similarly, the seriousness of such an effect may vary according to a large number of factors such as, in particular, the structure of the market concerned or the nature of the aid in question. Demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in its commercial or financial performance.[611] It cannot be ruled out that an undertaking will succeed in avoiding or at least limiting such a decline in some circumstances, by for example making savings or by expanding in more profitable markets. The ECJ then dismissed the appeal on admissibility.[612] It held that the CFI correctly took into account the various factors adduced by Lenzing to show in essence the distinctiveness of the competitive situation of the viscose fibres market, which was characterised by a very small number of producers and by serious production overcapacity, the significance of the distortion created by the aid to Sniace and the effect of that aid on the prices supplied by Sniace. It was for Lenzing alone to adduce pertinent reasons to show that the Commission's Decision may adversely affect its legitimate interests by seriously jeopardising its position on the market in question, and the factors adduced showed such an adverse effect. Both Decision 2001/43/EC and Decision 1999/395/EC were adopted by the Commission on the basis of Article 88(2) EC. They were addressed to the Kingdom of Spain on particular cases of state aid. This does not seem to be a legislative procedure under Lisbon, and the Decisions could be regarded as not entailing implementing measures under the interpretation of AG Cruz Villalon, but would entail implementing measures under that of the CJEU due to the involvement of national authorities. They are also

[611] Paras 34-36 of the judgment.
[612] Paras 37-42 of the judgment.

considered as measures of general application as they create general effects within the Member State following *Telefonica*[613] and the existing Case-Law.

Another example is *Germany v. Kronofrance SA*.[614] Germany notified the Commission of a project to grant investment aid to Glunz for the construction of a wood processing centre and the Commission decided, under Article 4(3) of Council Regulation (EC) 659/99, laying down detailed rules for the application of Article 88 EC, not to raise objections. Kronofrance, being a competitor of Glunz, succeeded before the CFI in annulling the contested Decision of the Commission. The CFI accorded Kronofrance the status of an interested party in terms of Article 88(2) EC and Regulation 659/99. The ECJ noted that since this was an action on a Commission Decision on state aid, it must be borne in mind that the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which merely allows the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under the formal investigation procedure under Article 88(2) EC.[615] It is only under the formal investigation procedure which is designed to allow the Commission to be informed of all the facts of the case that the Treaty imposes obligation on the Commission to give the parties concerned notice to submit their comments. It further noted that it followed that where, without initiating the formal investigation procedure, the Commission finds on the basis of Article 88(3) EC that the aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the

[613] Case C-274/12 P *Telefonica v. Commission* EU:C:2013:852.
[614] Joined Cases C-75/05P and C-80/05P *Federal Republic of Germany and others v. Kronofrance SA* [2008] ECR I-6619.
[615] At para 37 of the judgment.

Community courts, and to that extent such actions are admissible.[616] Citing *Eigentum*, it stated that persons, undertakings or associations whose interests might be affected by the aid fall within this category. On the other hand, as the ECJ noted, if the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as "concerned" within the meaning of Article 88(2) EC cannot suffice for the action to be considered admissible, citing *Cofaz* and *Eigentum* on this.[617] Since Kronofrance had established that it was a competitor of Glunz, the action was admissible. Again, under Lisbon, this would be a regulatory act which would not entail implementing measures under the interpretation of AG Cruz Villalon, but would under the interpretation of the CJEU.

12. Competition

The CJEU had also developed a more relaxed approach to individual concern in the area of Competition Law, and the application of Articles 101 and 102 TFEU, treating complainants of competition violations more generously. Complainants were allowed standing on the basis of individual concern when the Commission found the conduct that was the subject matter of their complaint not to be in breach of competition rules and also where it granted an exception. Such decisions of the Commission were not however usually of general application, so they will not normally be considered as regulatory acts under the Lisbon Treaty. Similarly, Commission decisions finding violations and imposing fines were not also of general application, and will also not be considered as regulatory acts.

[616] Paras 38-39 of the judgment.
[617] Para 40 of the judgment.

A common example is *Metro v. Commission*.[618] The applicants were wholesalers of electronics and a particular manufacturer, called SABA, refused to supply them with products as it did not belong to its distribution and sales network. The applicants complained to the Commission, which found SABA's practice not to be in violation of the competition rules. The Commission addressed this decision to SABA only, not to the applicants. As regards the applicants, this decision would not, under strict *Plaumann* considerations, be of individual concern to the applicants, as they belonged to an open class. The ECJ however, considered that such parties that had a right to complain under the then Article 3(2) of Council Regulation 17/62[619] of a competition violation should be able to institute proceedings in order to protect their legitimate interests if their complaint is not upheld by the Commission.[620] The Commission's decision in this case would under Lisbon be a non legislative act, but not being of general application, it would not be considered as a regulatory act, so the reform of the standing criteria has not brought any change in this respect.

There are of course Commission acts in this area that of general application. An example can be found in *Bond van de Fegarbel-Beroepsverenigingen v. Commission*.[621] This was an application for the annulment of Commission Regulation (EC) 2790/1999 on the application of Article 81(3) EC to categories of vertical agreements and concerted practices. The applicants were a representative body seeking to safeguard the interests of regional associations of garage owners and two economic operators bound by vertical agreements falling with the scope of the contested Regulation. The CFI found the Regulation to be of general application to

[618] Case 26/76 *Metro v. Commission* [1977] ECR 1875.
[619] Now Article 7(2) of Council Regulation 1/2003.
[620] At para 13 of the judgment.
[621] Case T-58/00 *Bond van de Fegarbel-Beroepsverenigingen and others v. Commission* [2000] ECR II-3301.

undertakings involved in vertical agreements and concerted practices, and accordingly of a legislative nature.[622] Their arguments as to economic dependence were also not sufficient to establish individual concern. Under Lisbon, this is likely to have been a regulatory act, but it would certainly entail implementing measures under the interpretation of the CJEU. It is also rather questionable whether it would entail implementing measures under the interpretation of AG Cruz Villalon, since there are various parts of it, under which there could be involvement and independent assessment of specific vertical agreements or concerted practices by national authorities, despite the fact that it seems to be a rather complete set of rules. Accordingly, the likelihood is that it would be considered as entailing implementing measures under the interpretation of AG Cruz Villalon as well.

13. The *Greenpeace* case

Brief reference can be made to the commonly quoted *Stichting Greenpeace Council v. Commission*,[623] where the contested measure was a Commission decision granting financial assistance to Spain for the construction of two power stations in the Canary Islands. This was based on a previous decision of the Commission, Decision C (91) 440, authorising a maximum financial assistance for this, which, itself, was based on Council Regulation 1787/84, an act adopted by the Council upon the proposal of the Commission and having regard to the opinion of the European Parliament. Council Regulation 1787/84 is likely to be considered as a legislative act under the Lisbon categorisation as it was adopted under a legislative procedure, and the contested measure would be a non legislative act. However, the nature of this decision, which gives financial assistance for a specific purpose renders it questionable whether it will

[622] At para 12 of the Order.
[623] Case C-321/95P *Stichting Greenpeace Council v. Commission* [1998] ECR I-1651.

be interpreted as being of general application, and could accordingly fail to fall within the definition of a regulatory act.

14. Outcomes of this review

This review corroborates the conclusion that the reform in Article 263(4) TFEU offered a great opportunity for significant improvement in the availability of a direct action for annulment for private parties. This opportunity seems indeed a missed one to a great extent, and this is largely due to the interpretation of the term "implementing measures" by the CJEU, which, as mentioned above, effectively limits the reform to the very few exceptional cases where the EU measure reaches private parties without any intervention by the national authorities. As it has been seen, a significant proportion of the cases in this sample, could have been decided differently under the interpretation of AG Cruz Villalon.

14.1. *Lost opportunity for higher protection in anti-dumping*

The review also illustrates the great improvement that could have been achieved in some areas, such as anti-dumping, had the interpretation of AG Cruz Villalon been adopted by the CJEU. Of course, the area of anti-dumping is one of those where the CJEU adopts a more relaxed approach to individual concern, something which is evident from the Case-Law.[624] This is also corroborated by the statistical study of T. Tridimas and G. Gari, where they find that the rate of admissibility in relation to anti-dumping measures reaches a high 80%.[625] Accordingly, judicial protection in this area seems already enhanced, compared to other areas, at least for the categories of

[624] See also M. Hedemann-Robinson, "Article 173 EC, General Community Measures and *Locus Standi* for Private Persons: Still a Cause for Individual Concern?" (1996) 2(1) *EPL* 127, at p.p. 142-147.
[625] T. Tridimas and G. Gari, "Winners and losers in Luxembourg: A Statistical Analysis of Judicial Review Before the European Court of Justice and the Court of First Instance (2001-2005)" (2010) 35 *European Law Review* 131, at p.p. 155-158.

applicants generally found to satisfy individual concern under the existing Case-Law, these generally being producers and exporters of goods subject to anti-dumping duties. However, this does not necessarily mean that the wider availability of an action for annulment which could have resulted under the interpretation of implementing measures by AG Cruz Villalon is not desirable. Such a development would have potentially offered the possibility of an action for annulment to other parties affected by anti-dumping measures, other than those that are normally considered to satisfy individual concern under the existing Case-Law.

14.2. *Possibly locus standi irrespective of content or effects of an act*

It was interesting to observe while conducting this review, that in examining the admissibility of an action for annulment, there seems to be, after the Lisbon Treaty, a change of initial focus to some degree. This would have been especially so had the interpretation of implementing measures proposed by AG Cruz Villalon been adopted, but also exists to a more limited extent under the interpretation of the CJEU. The initial task previously involved the determination of the nature of an act based on its substance in order to consider direct and individual concern, although the CJEU on occasions continued to consider whether it was a measure of general application or a bundle of decisions. This approach seems to have sometimes continued despite the judgment in *Codorniu*, and the abandonment of the abstract terminology test, perhaps more as a factor taken into account in assessing individual concern.

To a certain extent, the initial task after the Lisbon Treaty focuses on the procedure under which the contested measure was adopted in order to determine whether it is a legislative or a non legislative act. If it is a non legislative act, then focus will be placed on its content but again only in order to determine whether it is of general

application and whether it entails implementing measures, so that the applicable locus standi criteria are determined. None of these new tasks are, strictly speaking, related to the substance of a measure or its effect on private parties. Not even the criterion of direct concern is in a sense focused on the effects of a measure on private parties, but simply on the question whether someone exercises any discretion in applying the measure to a private party.

In this sense, for regulatory acts that do not entail implementing measures, where a private party need only satisfy direct concern, it may be argued that an action for annulment becomes admissible and available without the applicant having to satisfy any criteria that are related to the core substance of the contested measure or its effects on this applicant. The question whether a measure was in fact a bundle of decisions or any question relating to the substance of the measure or its effects on the applicant come into play only where the measure is not a regulatory act that does not entail implementing measures and individual concern is still required. Only then does the substance of a measure and its effect on private parties become relevant for the assessment of standing. Due to the interpretation of implementing measures by the CJEU, this will however still be true in the majority of cases.

It could of course also be argued that the primary consideration really is the question of whether an act entails implementing measures. If it does, the question moves immediately to the standard position of requiring direct and individual concern, and the procedure under which a measure was adopted as well as the question whether it is of general application are not relevant.

14.3. *Possible concerns for legislative acts*

Some concerns emerge from this review and largely relate to the rationale for dispensing the individual concern criterion only for regulatory acts that do not entail implementing measures, and not for legislative acts, or put another way, as a result of the exclusion of legislative acts from the interpretation of the notion of regulatory acts. These concerns are of course again more evident under the interpretation of AG Cruz Villalon for implementing measures, since this interpretation would include significantly more measures within the scope of the Lisbon Treaty reform.

In this respect, this review seems to give some support to the argument that the process of adoption of a measure might not be the proper criterion for the determination of the applicable standing criteria. This argument reaches the peak of its strength when comparing actual cases of legislative acts not entailing implementing measures to cases of regulatory acts not entailing implementing measures, at least under the interpretation of AG Cruz Villalon. In some such cases, for example in the comparison of *Chiquita Banana* with *Comafrica*, it seems difficult to justify the difference in treatment for measures that produce similar or comparable effects on private parties, just because of the procedure under which they had been adopted. The process of adoption of a measure, being the basis for the distinction between legislative and non legislative acts under the Lisbon Treaty, has of course never been considered relevant in any way to the assessment of standing.

It further becomes evident from this review that, in some of the cases that were reviewed, legislative acts indeed affected private parties in just the same way as regulatory acts. Indeed, the pre-Lisbon Case-Law shows that both measures that would, post-Lisbon, have been classified as legislative acts and measures that would

have been classified as regulatory acts were considered to belong to the same type or category, interestingly described by the EU courts to be "legislative" in nature,[626] and had similar effects on private parties. In fact, the very essence of the judgment in *Codorniu* and the mere existence of this category of exceptions to the general application of the *Plaumann* test in cases of exceptional economic impact on an applicant, may even be seen as proof of this. Both *Extramet* and *Codorniu*, the contested measures in which would now have been classified as legislative acts, have been cited in challenges against all kinds of measures, irrespective of the type or process under which such measures were adopted.

Of course, as mentioned, this problem of difference in treatment between legislative acts and regulatory acts producing similar effects, would have been significantly more intense had the interpretation of AG Cruz Villalon for implementing measures been adopted, as this appears from the comparison offered in this review. The interpretation of the CJEU is a step away from this issue, but still of course, on the other hand, so big a limitation to the extent of the reform, that makes this problem seem secondary. This issue will be further examined in the following chapter, in the quantitative study.

14.4. *Possible restriction of challenges by choice of procedure*

A final concern that is supported by this review is that there seems, in fact, to be some room for the EU institutions to restrict challenges for measures of similar effect through their choice of procedure for the adoption of a measure. It has always been a concern for the EU courts not to allow the institutions to avoid actions for annulment

[626] See for example, Case C-447/98 P *Molkerei and another v. Commission* [2000] ECR I-9097, at para 67.

by their choice of measure.[627] It should of course be recognised that de jure all acts of EU institutions remain challengeable under Article 263(4) TFEU, although some require individual concern while others do not, so the judicial review system cannot be criticised for that. Given the difficulty of satisfying individual concern however, it seems possible to say that, except for measures that are based directly on the Treaty, where use of a legislative procedure is imposed by the authorising Treaty article, the Council and the European Parliament are de facto able, by their choice of procedure or by their decision whether to delegate a task to the Commission or the Council, to restrict challenges by means of direct actions for annulment. Of course, again, the interpretation of implementing measures by the CJEU significantly reduces the extent of this issue.

With the results of this chapter showing that the reform has indeed been rendered of limited effect, the quantitative study of measures in the following Chapter adds to the discussion and shows insides from other angles.

[627] See for example Case 101/76 *Koninklijke Scholten Honig v. Council and Commission* [1977] ECR 797, at paras 5-7 of the judgment.

CHAPTER 6: EFFECT OF LISBON TREATY REFORM THROUGH A QUANTITATIVE STUDY

This chapter provides an assessment of a sample of post-Lisbon EU measures, seeking an appreciation of the effects of the Lisbon Treaty reform in quantitative terms. The methodology is first outlined, followed by the examination of the results. The results are presented both under the interpretation of the CJEU and of AG Cruz Villalon for implementing measures in order to offer a comparison.

1. Scope

The effect of the Lisbon Treaty reform in Article 263(4) TFEU has not been examined quantitatively. The various occurring or anticipated problems and shortcomings have been identified and are real, but the benefits of such an examination seem crucial. To refer to just one single example, it is arguably a shortcoming that legislative acts have been excluded from the definition of regulatory acts. However, no indication has been given as to its magnitude.

Such an examination naturally requires extensive resources and analyses in order to render statistically accurate results. However, for the purposes of the intended assessment of the effect of the Lisbon Treaty reform and the scale of the related problems and concerns, such statistically accurate results seem hardly necessary. The issues that are of interest for the purposes of this analysis do not require and do not depend on any degree of statistical accuracy of the results produced. In the sense that if a smaller sample produces similar and recurring results, it is not necessary for the purposes of this examination to have any more accuracy. The analysis and

conclusions to be drawn will hardly differ if, to give a very abstract and theoretical example, a smaller sample shows that on average 70% to 73% of non legislative acts are regulatory acts, or if a larger scale analysis, rendering more statistically accurate results, shows that 71.3% of non legislative acts are regulatory acts. What accordingly suffices is a more general overview, rendering a rough idea or rough appreciation of the position, and this can be adequately produced by means of a simpler quantitative study of legislative activity.

In the light of the above, this exercise has been carried out by an analysis of the legislative activity within three randomly chosen calendar months, namely May 2010, January 2011 and September 2011, as published in the Official Journal of the European Union. The results produced a repeating pattern, corroborating the expectation that it would be unnecessary to consider a larger sample for the purposes of the intended review.

For the purposes of the intended classification, the distinction between legislative and non legislative acts is straightforward, and they are also published under different heads in the Official Journal of the European Union. The definition of the term "regulatory act" in *Inuit* to include all non legislative acts of general application has of course been followed. In contrast, however, the effect that a different interpretation of the term "regulatory act" would have had if it included legislative acts, is also produced by these results and also by the separate examination of all legislative acts of 2011.

The interpretation of the term "implementing measures" by the CJEU in *T & L Sugars*, considering this to include any measures taken by national authorities, irrespective of the mechanical or automatic nature of such measures, has also been

followed. In order to show in contrast the effect that a different interpretation would have had, the results have also been classified, in the alternative, under the interpretation proposed by AG Cruz Villalon in *T & L Sugars*.

2. Categories of classification

For the purposes of the general analysis of the three randomly chosen calendar months, measures have been classified in 11 categories:

a) Category A – Legislative acts

This category records all legislative acts, irrespective of whether they entail implementing measures or not. These measures can still only be challenged directly by a private party able to show direct and individual concern.

b) Category B – Non legislative acts

This category records all non legislative acts, in order to compare this total number with its subcategory of regulatory acts not entailing implementing measures, and also to the number of non legislative acts that are measures of uncertain categorisation. It also serves to compare the number of measures that are passed as legislative acts to those that are passed as non legislative acts.

c) Category C – Legislative acts with IM at EU level

The third category will be legislative acts entailing implementing measures at EU level. The importance of this will lie in the possibility of a challenge against the implementing measure before the EU courts, which, if available, could be combined with a possibility of a challenge against the main legislative act recorded in this category via a plea of illegality under Article

277 TFEU. This naturally serves only as a record of such a possibility, which is dependent on whether the implementing measure will constitute a regulatory act not entailing implementing measures or whether a private party can otherwise show standing, something which cannot be known or researched.

d) Category D – Legislative acts with IM at national level

This category will supplement Category C, showing legislative acts entailing implementing measures at national level. For such measures, unless an applicant can show direct and individual concern for a direct action, a challenge against the national measure before the national courts coupled with an attempt for a preliminary reference will remain the main route of validity challenge by private parties. With possibly the added benefit of the *Unibet*[628] ruling, not permitting Member States to require an applicant to contravene the implementing measure in order to obtain access to justice, which may even suggest that new judicial means should be created at national level if this is necessary.[629]

e) Category E – Legislative acts without IM

For this category of legislative acts not entailing implementing measures, annulment can only be sought through a direct action for annulment by an applicant who can show direct and individual concern, unless their validity is somehow relevant in national proceedings and warrants a preliminary reference. This may be a category of measures where the possibility that the

[628] Case C-432/05 *Unibet v. Justitiekanslern* [2007] ECR I-2271.
[629] See G. Anagnostaras, "The Quest for an Effective Remedy and the Measure of Judicial Protection Afforded to Putative Community Law Rights" (2007) *European Law Review* 727, at p. 738, and G. Anagnostaras, "The Incomplete State of Community Harmonisation in the Provision of Interim Protection by the National Courts" (2008) *European Law Review* 586.

applicant may need to contravene the measure in order to obtain access to justice cannot be excluded.

f) Category F – Non legislative acts without IM

This category records all non legislative acts that do not entail implementing measures. This will not be limited to those non legislative acts that are of general application and accordingly classified as regulatory acts. The purpose of this category is to compare the number of this category with Category I which will record regulatory acts not entailing implementing measures.

g) Category G – Non legislative acts with IM at EU level

This category records non legislative acts that entail implementing measures at EU level. The same considerations listed above for Category C apply, but for non legislative acts in this category.

h) Category H – Non legislative acts with IM at national level

This category records non legislative acts that entail implementing measures at national level. The same considerations as for Category D apply, but for non legislative acts in this category.

i) Category I – Regulatory acts not entailing IM when examining the results under the interpretation of IM by AG Cruz Villalon, and regulatory acts entailing IM when examining the results under the interpretation of the CJEU

When examining the results under the interpretation of implementing measures by AG Cruz Villalon, this category lists regulatory acts not entailing implementing measures which were the subject matter of the reform, and for

which individual concern need not be shown in direct actions for annulment. When the results are examined under the interpretation of implementing measures by the CJEU, this category lists regulatory acts entailing implementing measures. The reason for this differentiation is the strikingly different results that are produced by the two interpretations.

j) Category J – Regulatory acts not entailing IM that relate to or are IM of another act when examining the results under the interpretation of IM by AG Cruz Villalon, and regulatory acts entailing IM that relate to or are IM of another act when examining the results under the interpretation of the CJEU

When examining the results under the interpretation of implementing measures by AG Cruz Villalon, this follows Category I by listing regulatory acts not entailing implementing measures that themselves constitute implementing measures of another act. A private party can challenge these acts by means of an action for annulment by showing direct concern, and in the process of such an action for annulment will also have the possibility to lodge a plea of illegality under Article 277 TFEU against the measure on which they are based, subject to the *TWD* rule of course.[630] When the results are examined under the interpretation of implementing measures by the CJEU, this category lists regulatory acts entailing implementing measures that themselves constitute implementing measures of another act. The reason for this differentiation is, again, the different results that are produced by the two interpretations.

[630] See the related concerns on the application of the *TWD* rule in S. Balthasar, "Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU" (2010) 35 *European Law Review* 542, at p.p. 548-549. See also R. Schwensfeier, "The *TWD* principle post-Lisbon" (2012) 37 *European Law Review* 156.

k) Category K – Measures of uncertain categorisation

This category lists the measures that are difficult to categorise. The number of these measures will relate to the examination of the workability of the reformed system and the question whether there is now a clearer set of rules for national courts to follow, especially in view of the effects of the *TWD* rule.

3. Legislative acts

As the numbers of legislative acts rendered within these three calendar months are limited, a further review has been carried out in relation to all legislative acts of the year 2011, which was again randomly chosen. The categories of classification in that review follow the above with some necessary differentiation.

In that part of the review, Category A lists all legislative acts, Category B lists legislative acts with implementing measures at EU level, Category C those with implementing measures at national level, and Category D those with implementing measures possibly at both EU and national level.

Following these, Category E lists legislative acts that do not entail implementing measures under the interpretation of the CJEU in *T & L Sugars*, whereas, as a comparison, Category F lists those that would not entail implementing measures under the interpretation of AG Cruz Villalon. This comparison is of course theoretical since under *Inuit* legislative acts can never be considered as regulatory acts in order to benefit from the relaxed standing conditions. Nevertheless, it is useful in testing the argument whether the reform should have been extended to legislative acts as well. Category G then lists legislative acts that relate to or are implementing measures of another EU measure, since in those cases there is also the possibility of a plea of

illegality under Article 277 TFEU against that measure on which it is based in proceedings before the CJEU.

Finally, Category H lists legislative acts that are of uncertain categorisation, based on similar considerations as stated above.

4. Excluded measures

The following measures have been excluded from this study, due to the danger of interfering with the results, and as not within the scope of the review:

a) Measures authorising or incorporating international agreements. Although the jurisdiction of the EU courts not only covers EU acts approving the conclusion of the agreements, but also encompasses the agreements themselves once concluded and entered into force as integral parts of the EU legal order,[631] these have intentionally been left outside the scope of this study as acts not necessarily affecting private parties, but which in any event would highly unlikely have been classified as regulatory acts not entailing implementing measures under any definition. The number of these measures in the three months analysed was anyway very low, so their exclusion does not have any effect on the results or the discussion.

b) Corrigenda.

c) Acts of extra EU bodies, as not within the scope of Article 263 TFEU.

d) Acts appointing judges of the EU courts, as not affecting private parties.

[631] Case C-266/16 *Western Sahara Campaign UK*. See also the related discussion in C. Tovo, "Judicial Review of Harmonised Standards: Changing the Paradigms of Legality and Legitimacy of Private Rulemaking under EU Law" (2018) 55 *Common Market Law Review* 1187, at p.p. 1201-1202.

e) Acts appointing special representatives or officials of the EU, as not affecting private parties.

f) Measures related to budgets and accounts of the EU or fixing remuneration of officials. These were however included in review of the legislative acts of 2011.

g) Measures declaring financial deficits of Member States.

h) All measures adopted under the Common Foreign and Security Policy, the review of which is still excluded from the scope of Article 263 TFEU.

i) Recommendations, as not generally reviewable under Article 263 TFEU. Although there is of course the possibility that an act entitled as a recommendation which was intended to have legal effects would not constitute a genuine recommendation and would be open to review,[632] this is something very difficult to judge for the purposes of this study, so this exceptional case was intentionally left outside its scope.

5. Inherent problems

There are however some inherent problems and shortcomings in this study, which are unavoidable.

The first relates to the classification, for the purposes of this review, of a measure that is a regulatory act under the *Inuit* definition, but which has some provisions entailing implementing measures and others that do not. In practice, it seems highly arguable

[632] Case C-16/16 P *Kingdom of Belgium v. Commission*, judgment of 20/2/2018. See also A. Arnull, "EU Recommendations and Judicial Review – ECJ 20 February 2018, Case C-16/16P *Kingdom of Belgium v. European Commission*" (2018) 14 *European Constitutional Law Review* 609.

that a private party could contest the part requiring implementing measures by showing individual concern, and also contest the part not entailing implementing measures without needing to show individual concern. The answer would depend on the part actually challenged in an action for annulment, but this does not work for the purposes of this analysis. However, in the sample analysed this did not emerge as a common occurrence and would not accordingly prejudice the results. Such measures have been classified as of uncertain categorisation where there was such serious doubt, something which proved rather exceptional. Measures were however classified in their respective categories, and not as measures of uncertain categorisation, where it transpired that the largest part, or the main provisions, of a measure entailed or did not entail implementing measures, as regards an applicant engaging in a professional or other activity or having another capacity that is closely related to the measure.

This leads to the second shortcoming, which is of course closely related to the first. This is caused by the fact that a measure may be interpreted as entailing implementing measures for one particular applicant or class of applicants, but not for another. The CJEU in *T & L Sugars* and the related Case-Law firmly settled that the question of implementing measures is judged from the standpoint of the party pleading that the contested provision is a regulatory act that does not so entail implementing measures. As this review is necessarily done in the abstract and without reference to any particular applicant, this appears as an inevitable issue. For the purposes of this review, a measure has been classified as a regulatory act not entailing implementing measures if it could be said that it would not entail implementing measures for some possible applicant or class of applicants, engaging in a professional or other activity or having another capacity that is closely related to the measure. Such a private party is anyway the most likely litigant.

For example, a measure dealing with car emissions has been considered from the standpoint of a car manufacturer, not from the standpoint of a consumer. Nevertheless, an interesting finding came to surface, and this relates generally to the fact that it seems rather infrequent, or it was at least very uncommon in this sample, that the same provision would require implementing measures as regards one class of applicants but not as regards another class of applicants. Generally, a provision either entails further implementation or does not entail further implementation. In the example of the car emissions measure, either a provision would require a further EU or national measure calculating or fixing the emissions standard for a particular car model, or it would not.[633] And the answer appears to be the same for car manufacturers, car retailers and consumers.

Of course, this shortcoming of considering a measure from the standpoint of an applicant defined in the abstract, is also further mitigated by the review of older Case-Law in Chapter 5, which examines real scenarios.

The third shortcoming is that the answer to the question whether an act entails implementing measures will not always be uncontroversial and necessarily involves a degree of subjective opinion. In order to mitigate this, only the clearer cases were listed in Categories I and J as regulatory acts not entailing implementing measures. Doubtful cases were classified as regulatory acts entailing implementing measures or if there is real uncertainty, under Category K as measures of uncertain categorisation. As also previously mentioned, the existence of such possible uncertainty is anyway fruitful in considering the role of national courts, and the problems in the application of the *TWD* rule.

[633] See the example of Regulation 510/2011 on car emissions, considered below. See also the further example of Regulation 305/2011 on construction products, also considered below.

Respectively, this shortcoming caused by the inevitable existence of some degree of subjective opinion also extends to measures of uncertain categorisation, which is another important area, in that for such measures national courts may face difficulties in applying the *TWD* rule. As previously mentioned, the nature of this study demanded that only the clearer cases of measures are classified as regulatory acts entailing or not entailing implementing measures. If there was doubt, a measure was classified as of uncertain categorisation, but this was not a common occurrence.

The size of this review and the sample could also be regarded as a fourth shortcoming, but as mentioned above, they are considered as sufficient for the purposes of the intended study.

Despite these three, or perhaps four, inherent shortcomings, this review does however convey an appreciation of the effect of the reform in quantitative terms, and also, on the typical content of legislative acts and their effects on private parties. It also provides a striking comparison as to what the effect of the reform would have been had the CJEU adopted the interpretation of AG Cruz Villalon on implementing measures.

6. The results for the three month sample

The results for May 2010 appear in Appendices A and B, for January 2011 in Appendices C and D, and for September 2011 in Appendices E and F. Appendices A, C and E show the results produced under the interpretation of implementing measures adopted by the CJEU in *T & L Sugars*, whereas Appendices B, D and F show the results that would have been produced had the interpretation of AG Cruz Villalon been accepted. Appendix G shows the classification of all legislative acts of 2011.

6.1. *Results of May 2010*

In May 2010, only 4 legislative acts were passed, one in the form of a decision and 3 in the form of Regulations, all of which were acts requiring implementing measures both at EU level and at national level. Under the interpretation of implementing measures of the CJEU in Appendix A, out of 124 non legislative acts, 121 are classified as regulatory acts which require implementing measures and for which accordingly the criterion of individual concern remains under Article 263(4) TFEU. Of these 121 regulatory acts, 120 were acts that constitute implementing measures of other EU measures or relate to such other measures, and an action for annulment against these acts would also possibly enable the possibility of a plea of illegality against the other related measures. Only 2 non legislative acts did not entail implementing measures.

Under the interpretation of implementing measures of AG Cruz Villalon in Appendix B, out of the 124 non legislative acts of May 2010, 84 would have been regulatory acts not entailing implementing measures, 2 would require implementing measures at EU level and 36 at national level. All 84 regulatory acts not entailing implementing measures were acts that constitute implementing measures of other EU measures or relate to such other measures. This also revealed 2 measures of uncertain categorisation, of which the uncertainty was centred upon ambiguity as to whether they would or would not entail implementing measures.

6.2. *Results of January 2011*

In January 2011, no legislative acts were passed. Under the interpretation of implementing measures of the CJEU in Appendix C, out of 110 non legislative acts, 101 are classified as regulatory acts which require implementing measures and for

which, as above, the criterion of individual concern remains under Article 263(4) TFEU. Out of these 101 regulatory acts, 100 were acts that constitute implementing measures of other EU measures or relate to such other measures, and an action for annulment against these acts would also possibly enable the possibility of a plea of illegality against the other related measures. Again, only 4 non legislative acts did not entail implementing measures. There were two measures of uncertain categorisation, both of which were in the form of Decisions. Both amended earlier decisions and it was unclear whether they would entail implementing measures under either interpretation of that term.

Under the interpretation of implementing measures of AG Cruz Villalon in Appendix D, out of the 110 non legislative acts of January 2011, 77 would have been regulatory acts not entailing implementing measures, 3 would require implementing measures at EU level and 24 at national level. All 77 regulatory acts not entailing implementing measures were acts that constitute implementing measures of other EU measures or relate to such other measures. The same two Decisions appeared as measures of uncertain categorisation in this review as well.

6.3. *Results of September 2011*

In September 2011, again only 2 legislative acts were passed, one in the form of a Decision and one in the form of a Directive. The Decision was an act requiring implementing measures both at EU level and at national level, while the Directive only at national level. Under the interpretation of implementing measures of the CJEU in Appendix E, out of 132 non legislative acts, 123 are classified as regulatory acts which require implementing measures. Of these 123 regulatory acts, 116 were acts that constitute implementing measures of other EU measures or relate to such other

measures, and an action for annulment against these acts would also possibly enable the possibility of a plea of illegality against the other related measures. Only one Decision appeared as a measure of uncertain categorisation under this interpretation of the CJEU, this being an ECB Guideline amending previous such guidelines and it was uncertain whether it would or would not entail implementing measures.

Under the interpretation of implementing measures of AG Cruz Villalon in Appendix F, out of the 132 non legislative acts of September 2011, 111 would have been regulatory acts not entailing implementing measures, none would require implementing measures at EU level and 18 at national level. Out of the 111 regulatory acts not entailing implementing measures, 104 were acts that constitute implementing measures of other EU measures or relate to such other measures. There was no non legislative acts that did not entail implementing measures. There were 2 measures of uncertain categorisation in the form of Decisions. One of them was the ECB Guideline that also appeared as such under the interpretation of the CJEU for the same reason, that it was uncertain whether it would or would not entail implementing measures under this interpretation either. The other amended the Annexes of another Decision and it was uncertain whether it would entail implementing measures under the interpretation of AG Cruz Villalon. This same Decision entailed implementing measures under the interpretation of the CJEU.

6.4. *Outcomes*

The results unfortunately show the inevitable and further corroborate the conclusion that the Lisbon Treaty reform has been rendered of very limited effect. They further corroborate AG Cruz Villalon in stating that an interpretation of implementing

measures to include any measure, irrespective of its automatic or mechanical nature, would frustrate the Lisbon Treaty reform in Article 263(4) TFEU.[634]

This review further suggests that the major problem has not proved to be the more or less expected interpretation of the notion of a regulatory act, despite the opposing views expressed upon the entry into force of the Lisbon Treaty, since the majority of measures indeed tend to be non legislative acts of general application. This analysis shows that had the interpretation of AG Cruz Villalon been accepted by the CJEU, the improvement to the availability of an action for annulment would have been significant. Throwing into the equation the fact that most regulatory acts are based or relate to other EU measures, and accordingly private parties would have been able to lodge a plea of illegality against those acts as well in the process of actions for annulment against regulatory acts, the improvement in the protection would have been even greater. It is little exaggeration, at least based on these results, that the GC would have become the main forum for the protection of private parties against EU activity.

Perhaps this was one of the main reasons why the CJEU adopted such an interpretation of implementing measures, as such a result, would reverse the judicial review system as created and so heavily defended by the CJEU since *Plaumann*. This being a highly decentralised system that placed national courts as the main forum for the protection of private interests against EU measures. Such a result would also enhance the perennial fear of mass litigation against the EU and the consequent disruption of the work of the institutions, leading back to the discussion of policy choice and the reasons for the restrictive interpretation of the locus standi criteria in the first place.

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[634] See Case C-456/13 P *T & L Sugars and Sidul Acucares v. Commission* EU:C:2015:284, at paras 25-33 of his Opinion.

This discussion can plausibly be extended to the intentions of the Member States in so formulating the reform. There is no evidence that the Member States did not intend such a significant change to take place, or that they did not anticipate that the reform would have this extent. The Member States simply relaxed the locus standi criteria in the case of regulatory acts not entailing implementing measures, without any qualification and for whatever that meant. This can hardly deduce any intention that a significant change, or a change to this extent, was not intended, and the impact the reform would have had, had the interpretation of AG Cruz Villalon for implementing measures been accepted, can hardly form a justification for that of the CJEU.

Another observation that can be made from this analysis is that the number of acts that require implementing measures at EU level is low, and consisted of legislative acts and very few non legislative acts. The vast majority of non legislative acts in this sample which, based on the interpretation under which they were examined, entailed implementing measures, this was almost universally at national level. For this vast majority that require implementing measures at national level, and accordingly an action for annulment is not available unless direct and individual concern is shown, private parties enjoy the benefit of *Unibet*, rendering it unacceptable for a Member State to force an applicant to contravene a measure in order to obtain access to justice.

The fact that the vast majority of non legislative acts require implementing measures at national level can also serve as a comparison with legislative acts, a high number of which require implementation at EU level or at both EU and national level, as is shown in Appendix G.

Further, as mentioned above, one of the anticipated problems was the application of the *TWD* rule following the Lisbon Treaty reform, as this requires national courts to

be able to recognise cases where a private party could undoubtedly have pursued an action for annulment but failed to do so within the time limit, so that they can refuse a preliminary reference on validity on that ground. Compared to the position under Article 230(4) EC, the change after the Lisbon Treaty reform effectively translates into whether national courts are able to readily recognise regulatory acts that do not entail implementing measures. As to the classification of a measure as a regulatory act, the question whether the measure is a non legislative act is straightforward, and the question whether it is of general application is also not a difficult task. The sample used herein comfortably corroborates this.

The second question of whether the regulatory act entails implementing measures also appeared as unproblematic in this analysis, which rendered very low numbers of measures of uncertain categorisation. This is true under both the interpretation of the CJEU and AG Cruz Villalon. This further weakens the potential argument favouring the interpretation of the CJEU based on the interests of clarity, predictability or easier application by national courts.

7. The results for legislative acts

The analysis of all legislative acts of 2011 appears in Appendix G. A total of 91 legislative acts were passed during that year, including acts related to EU budgets, with 8 of these entailing implementing measures at EU level, 34 at national level, and 40 possibly entailing implementing measures at both EU and national levels. No legislative acts from this sample were classified as measures of uncertain categorisation.

The theoretical comparison between legislative acts that would not entail implementing measures under the interpretations of the CJEU and AG Cruz Villalon

in *T & L Sugars* presents quite low numbers in both cases. Under the interpretation of the CJEU, out of 91 legislative acts, only 10 would not entail implementing measures, whereas under that of AG Cruz Villalon, only 14 would not entail implementing measures. Out of these, 8 related to EU budgets, and if these are removed, the numbers drop to just 2 under the interpretation of the CJEU and 6 under the interpretation of AG Cruz Villalon. It is interesting to examine the content of these 8 legislative acts that could possibly affect individuals as of themselves.

Regulation 305/2011 lays down harmonised conditions for the marketing of construction products and repeals a previous Council Directive. This Regulation lays down very detailed rules, which include obligations of importers and distributors as well as harmonised technical specifications. These are indeed rules with which traders of construction products must comply with. However, the possible supervision for compliance with this Regulation or other intervention by national authorities would be considered as implementing measures under the interpretation of the CJEU, despite its, most likely, mechanical nature. On the other hand, the parts of this Regulation that set the technical standards and obligations would under the interpretation of AG Cruz Villalon be considered as not entailing implementing measures.

The example of some of the provisions of this Regulation is illustrative. Among them, Article 11(1) provides that manufacturers of construction products shall draw up a declaration of performance and technical documentation describing all the relevant elements related to the required system of assessment and verification of constancy of performance. Article 11(5) also provides that manufacturers shall indicate on the construction product or on its packaging or in a document accompanying it, their name, registered trade name or registered trade mark and their contact address. Article

13(1) provides that importers of construction products shall place on the EU market only construction products which are compliant with the applicable requirements of this Regulation. Article 13(5) provides that importers of construction products shall ensure that while a construction product is under their responsibility, storage or transport conditions do not jeopardise its conformity with the declaration of performance and compliance with other applicable requirements in the Regulation. All these provisions impose immediate obligations on private parties despite the fact that they are included in legislative act, and in this sense, there seems to be virtually no difference had they been included in a non legislative act. Yet, since they are part of a legislative act, most applicants would be excluded from an action for annulment due to inability to show individual concern.

Taking the example of Article 13(5) of Regulation 305/2011, the argument cannot be easily excluded that if an importer wishes to challenge the legality of its provisions on the grounds of, say, proportionality, he may first have to contravene it. The counter argument would be that such an importer may first write to the national authorities requesting a relaxation and challenge any possible refusal in national proceedings where a preliminary reference on validity of this provision can be requested.[635]

The provisions mentioned above would anyway probably be considered as entailing implementing measures under the interpretation of the CJEU, due to the intervention of national authorities, for example, in supervising imports or compliance under Article 56 of this Regulation, although only mechanically in respect of these provisions. These provisions would most likely not entail implementing measures under the interpretation of AG Cruz Villalon.

[635] See the Opinion of AG Kokott in Case C-583/11 P *Inuit Tapiriit Kanatami and others v. European Parliament and Council* EU:C:2013:625

There are however other parts of this Regulation, such as market surveillance and safeguard procedures and provisions for delegation to the Commission of various tasks, which are distant from individuals and only set the framework for the further application and development of the rules.

Regulation 510/2011 is another set of detailed rules setting emission performance standards for light commercial vehicles. Despite the details and standards that are set under it, most of its provisions operate in a way that encompasses extensive involvement of the Commission or national authorities. There are however parts, such as Articles 5 and 6 which provide for the calculation of emissions, which produce immediate effects by setting the methodology of calculations. Of course, the Commission or national authorities need to apply these to specific manufacturers and vehicles but this will be simply an application of the calculation to specific circumstances which cannot differ from the Regulation's formula. While this would clearly be entailing implementing measures under the interpretation of the CJEU, it seems arguable that it would not under that of AG Cruz Villalon.

Regulation 306/2011 is a simple legislative act simply repealing another Regulation on tariff rates for bananas. The possible intervention of national authorities by means of communicating the tariff rates that become applicable after the repeal would constitute implementing measures under the interpretation of the CJEU, whereas this would not be the case under the interpretation of AG Cruz Villalon. This again has effects in the same way as a non legislative act.

Regulation 580/2011 is one of the two legislative acts in the sample that could be said not to entail implementing measures under both interpretations, being a plainly simple provision changing the duration of establishment of the European Network and

Information Security Agency. As such however, it is not the type of act that can be said to have consequences on private parties, being more of a functional or operational measure within a specific policy framework. This type of measure may fail the test for a reviewable act, which is a further requirement for an action for annulment, as possibly not being binding on and capable of affecting the interests of a private party by bringing about a distinct change in his legal position.[636]

The second such measure is Regulation 1077/2011, establishing a European Agency for the operational management of large scale IT systems, and setting out its functions and competences. The same considerations apply to this as well as for Regulation 580/2011, being again a functional or operational matter within a policy framework without any real consequences on private parties from that alone.

Regulation 955/2011 repeals another Regulation on the proof of origin for certain textile products in its entirety, and amends another Regulation. As to the repeal, it can be said to have consequences on private parties. While it is possible that the intervention of national authorities could be considered as implementing measures under the interpretation of the CJEU, this would not be the case under that of AG Cruz Villalon.

As aforesaid, all other legislative acts from this sample required further implementing measures or even simply set a wide framework for EU policies or action. In this light they could be characterised as rather distant from individuals, in the sense that they did not have themselves any immediate consequences on individuals, but the further action contemplated in their implementation would. Appendix G contains a brief summary of the content of the legislative acts analysed in this sample.

[636] See Case 60/81 *IBM v. Commission* [1981] ECR 2639. See also Chapter 2.

In terms of possible immediate effects, some legislative acts are even more distant from any effects on private parties than others. Such examples include Directives on combatting late payments in commercial transactions, on administrative cooperation in the field of taxation, on patients' rights in cross border healthcare, on combatting human trafficking, on tourism statistics, on cross border exchange of information on traffic offences, on combatting child pornography, on the European protection order, Regulations on the citizen's initiative establishing the rules for submission to the Commission of a proposal signed by one million EU citizens to submit a proposal where a legal act of the EU is deemed necessary, on cooperation in the enforcement of consumer protection legislation, on a programme for further development of integrated maritime policy, on a financing instrument for cooperation with industrialised countries, and Decisions on the establishment of an EU action for the European Heritage Label and on the European year for active ageing and solidarity between generations.

Others are less distant from any effects on private parties, like Directives on merger of public limited liability companies, on falsified medicinal products, on hazardous substances in electronic equipment, on the protection of copyright, on indications on foodstuffs, Regulations on rights of bus and coach passengers, on credit rating agencies, and Decisions on quotas benefiting from reduced excise duty and exemptions from tax on certain products, but still quite distant in the above sense, that their provisions are not such that without further significant implementation can reach the interests of private parties.

The vast majority of legislative acts in this sample left something substantial or significant to be done at EU or national level, or at both. The type of measure that can

affect private parties, like the example of the Regulation on construction products covered above, is by no means excluded. However, the sample employed herein suggested that, at least quantitively, such legislative acts are rather the exception.

In this sense, quantitatively again, the exclusion of legislative acts from the interpretation of the notion of regulatory acts, is not of the gravity that was anticipated. The numbers as well as the nature, function and content of the legislative acts in this sample suggest that, with exceptions of course, the exclusion of legislative acts is not such an effect that jeopardises the results of the reform as far as the protection of the rights of private parties is concerned.

8. Summary of outcomes

The results of this review also confirm that the effect of the Lisbon Treaty reform is rather limited, and a great opportunity for significant improvement in judicial protection has been missed. It is once again confirmed that had the interpretation of AG Cruz Villalon for implementing measures been adopted by the CJEU, the result would have been entirely different. As the vast majority of EU measures are non legislative acts, and again in their majority, regulatory acts, the interpretation of AG Cruz Villalon would have significantly increased the availability of a direct action for annulment.

This review also revealed that there are legislative acts that can have immediate effects on private parties. Although this possibility cannot be excluded, from the examination of the sample used herein, this seems to be rather the exception. Legislative acts generally appear to be rather distant from private parties, requiring further implementation before their effects reach private parties, or simply setting general policy frameworks. In this light, it appears that the non inclusion of legislative

acts in the interpretation of the notion of a regulatory act, may not be regarded as equally regrettable as the interpretation of the notion of implementing measures.

The outcomes of Chapters 4, 5 and 6, firmly confirm the conclusion that the Lisbon Treaty reform is another false dawn, but regrettably even constitutes the greatest opportunity lost thus far in enhancing judicial protection in the EU judicial review system.

CHAPTER 7: CONCLUSION

1. A false dawn

Amid heavy criticism that the CJEU's interpretation of the locus standi criteria for direct actions for annulment against EU measures did not ensure the effective judicial protection of private parties, the Lisbon Treaty relaxed these criteria in the case of regulatory acts that do not entailing implementing measures. The interpretation of these two notions, along with consequent question whether this reform would be the dawn of effective judicial protection or a false one, were left to the CJEU.

While the CJEU adopted a rather foreseeable, although not universally desirable, interpretation for the notion of a regulatory act, the interpretation of the notion of implementing measures significantly limited the effect of the Lisbon Treaty reform, rendering it another false dawn in relation to effective judicial protection of private parties. The results of the review of older Case-Law and the quantitative study in Chapters 5 and 6 have shown that the CJEU would have greatly improved judicial protection had it adopted the interpretation proposed by AG Cruz Villalon in *T & L Sugars* for this newly introduced notion.

1.1. *Missing an unconditional opportunity*

With the above in mind, it seems difficult to find any boundaries or incompatibilities limiting the opportunity the Lisbon Treaty offered the CJEU to significantly enhance judicial protection by increasing the availability of an action for annulment under Article 263 TFEU.

To the question whether the CJEU had to go beyond the text of Article 263 TFEU, the answer is no. The interpretation of AG Cruz Villalon for implementing measures sufficed.

To the question whether the CJEU had to abandon the heavily defended *Plaumann* formula for individual concern, the answer is no. Individual concern is no longer required for regulatory acts not entailing implementing measures.

To the question whether it needed to alter the interpretation of direct concern, the answer is also no.

To the question whether the CJEU had to disregard the travaux preparatoires of the Constitutional Treaty and include legislative acts in the notion of a regulatory act, the answer is again no, although with some hesitation. Although Chapters 5 and 6 have shown that the possibility of legislative acts affecting private parties directly exists, the quantitative study in Chapter 6 suggests that this is rather the exception.

To the wider question whether the CJEU had to recognise that it was wrong in accepting that the Treaties offered complete remedies and procedures to ensure judicial review and effective judicial protection even before the Lisbon Treaty, the answer is yet another no. A significant improvement in judicial protection could have been achieved only by the interpretation of the newly introduced notion of implementing measures.

The CJEU did not have to touch the pre-Lisbon judicial review system and its interpretation of the locus standi conditions at all. The only requirement was that this newly introduced concept of implementing measures be given a pragmatic and not overly strict interpretation. Yet the CJEU, despite having been offered such an

unconditional opportunity, and despite being virtually unlimited in its interpretative choice, resorted to an overly restrictive interpretation in *T & L Sugars* which severely limits the effects of the reform.

An interpretation which, despite the declaration that the purpose of the reform was primarily to prevent the situation where a private party is forced to contravene a measure in order to obtain access to a court, might, on a not overly weak view, not even be able to reverse *Jego Quere*. In the example of which, a national authority might communicate the prohibition of certain fishing mesh sizes by the EU act, investigate the activities of the applicants and then issue proceedings. Entirely mechanically or automatically, yet so entailing implementing measures in the reasoning of the CJEU. And in this respect, possibly an interpretation which may also still require applicants, in effect, to contravene measures in order to reach their national courts.

Secondly, an interpretation which arguably also sits rather unwell with the retention of direct concern for regulatory acts not entailing implementing measures, in the sense that if there are no implementing measures, not even mechanical or automatic, no one can exercise any form of discretion anyway.[637] So, in this respect, what is really the point of requiring direct concern, a realisation also corroborated by the Opinion of AG Cruz Villalon.

Finally, an interpretation, whose inherent reassurance or guarantee in terms of effective judicial protection must be that there are national measures for applicants to challenge before national courts, arguably assumes dangerously too much of national systems and procedures. There can be no presumption that a notice demanding

[637] See also the Opinion of AG Wathelet in Case C-132/12 P *Stichting Woonpunt and others v. Commission* EU:C:2014:100.

repayment of state aid for example, being purely automatic or mechanical, would be challengeable in national administrative proceedings. National systems may very well treat this type of measures as confirmatory acts or otherwise non reviewable acts. Generally, there can be no certainty as to whether mechanical or automatic intermediate acts not entailing the exercise of any administrative discretion or otherwise not embodying the autonomous exercise of administrative power vested in a national authority, will be challengeable before national courts, although these will be considered as implementing measures for the purposes of Article 263(4) TFEU. Then Article 19(1) TEU and the right to effective judicial protection come into play, along with the *UPA* obligation that Member States should establish rules and procedures rendering such acts challengeable before national courts. But naturally, this national remedy invention requirement, while good on paper, is inevitably cumbersome to establish in practice, and constitutes a significant additional hurdle for private parties and another obstacle to judicial protection.

1.2. *Clarity and predictability being indecisive*

On the other hand, it could possibly be argued that the CJEU's interpretation of implementing measures provides clarity. It is easy to identify the acts that entail implementing measures since this is so openly defined, and makes it easier for applicants to assess their possibilities of establishing locus standi for direct actions for annulment, and also for national courts in applying the *TWD* rule.

For the same reasons of clarity and ease of application, it could possibly further be argued that this interpretation of implementing measures would further assist, following EU accession to the ECHR, if and when this occurs, in the determination of whether an applicant would need to exhaust an action for annulment under Article

263 TFEU, as a "domestic" remedy under Article 35(1) ECHR, before being able to claim a violation on behalf of the EU. Closely related to this, it would also render easier the application of the *Vagrancy*[638] judgment that does not oblige an applicant to pursue clearly inadmissible means of challenge for the purposes of Article 35(1) ECHR.

The above are true, and certainly clarity and predictability are important in terms of workability of the system and the protection offered therein. However, both the review of older Case-Law and the quantitative study conducted herein, did not reveal any such problems under the interpretation of AG Cruz Villalon either. The application of this interpretation to the samples used has proved just as easy as that of the CJEU. Accordingly, the possible argument in favour of the interpretation of the CJEU based on clarity, easier application and predictability weakens. In this light, it becomes rather questionable whether this dilution of the effects of the reform can be justified even under such considerations of clarity and predictability. This can only render even further questionable the choice of the CJEU.

1.3. *Possibly a new focus for further reform*

The findings of the review of older Case-Law and the quantitative study in relation to what the position would have been had the interpretation of AG Cruz Villalon for implementing measures been adopted, are of such contrast, that even suggest that future calls for reform can be directed towards a reinterpretation of the notion of implementing measures than towards a reinterpretation of individual concern. Surely, a more liberal interpretation of individual concern would have greater effects in increasing protection by means of wider availability of an action for annulment, but it

[638] *De Wilde, Ooms and Versyp ("Vagrancy") v. Belgium*, Applications No. 2832/66, 2835/66 and 2899/66, 18/6/1971.

can be suggested that a reinterpretation of the notion of implementing measures along the line of the proposals of AG Cruz Villalon would still render quite satisfactory results. And indeed, this can be achieved without touching any of the realities stated above.[639]

2. The same shortcomings continue

The Rule of Law Checklist of the Venice Commission of the Council of Europe asks, among others, two important questions in relation to access to justice.[640] Whether an individual has an easily accessible and effective opportunity to challenge an act that interferes with his rights. And whether access to justice is easy in practice. These two questions are bound to continue to trouble anyone reviewing the choice of the CJEU for a decentralised judicial review system built on the preliminary reference mechanism.

The preliminary reference route is not completely ineffective as a means of challenging validity, and in theory, it might seem sufficient to mitigate the consequences of the limited availability of a direct action for annulment. The reality however is another issue, and entails the problems highlighted by AG Jacobs. On top of these comes the additional problem that in certain circumstances, national systems may not provide for challenges against certain types of measures, and the remedy invention requirement of *UPA* that Member States should establish rules and procedures rendering such acts challengeable before national courts constitutes, as mentioned above, yet another hurdle for private parties. It cannot accordingly even be excluded that the effectiveness of the preliminary reference mechanism for validity

[639] See Chapter 1.
[640] Rule of Law Checklist of the European Commission for Democracy Through Law of the Council of Europe ("Venice Commission"), CDL-AD(2016)007, at p. 25.

challenges, and consequently the level of judicial protection, may differ from jurisdiction to jurisdiction.

All these are real and significant obstacles, making the preliminary reference mechanism undesirable for such a significant area of judicial review of legality in a supranational body such as the EU. Whatever the intention was, with the problems that are inherent in it, it could even be described as leading to a challenge based on stamina approach. Where only those who have the stamina to undertake all costs and wait for an unpredictable amount of time, can seek annulment of an EU measure that affects them.

3. A system of possible inconsistency in judicial protection

Since the effectiveness of the preliminary reference mechanism is highly dependent on national courts and national procedural rules, the level of judicial protection may likewise vary from jurisdiction to jurisdiction. For example, one jurisdiction may permit courts to deal with requests for preliminary references on validity at an early stage of the proceedings, and by means of a specialised application for such a preliminary reference and shorten any delays.[641] Or a type of national measure taken in connection to an EU act may be challengeable before national courts in one jurisdiction, thus providing private parties with easy access to justice, but not in another.

However, it cannot also be excluded that levels of protection may also vary depending on the competence of national judges to deal with such issues. It seems inevitable that such competence will vary even among the courts or judges of a single jurisdiction.

[641] See the example of the Preliminary Reference to the Court of the European Communities Procedural Regulation (No. 1) of 2008, in Cyprus.

These problems are of course not particular to the EU preliminary reference mechanism. They are inherent in such preliminary reference systems. The Venice Commission of the Council of Europe characteristically recognises that the effectiveness of preliminary ruling procedures heavily relies on the capacity and willingness of ordinary judges to identify potentially unconstitutional normative acts and refer these questions to the constitutional court.[642] What makes the position worse in the EU is that it is a union of several states and multi-jurisdictional.

It might be argued that it is inappropriate to make general claims about the completeness of a system or the effectiveness of judicial protection, where these depend on several different jurisdictions. In the EU as it stands today, and with the activities it has today, a uniform and equal level of protection should be ensured, and this can only be achieved by a centralised judicial review system. The preliminary reference mechanism is so heavily dependent on various factors, jurisdiction specific or otherwise, that render it inherently unsuitable for such a task.

The CJEU makes such a general claim that the Treaties established a complete system of remedies and procedures and that it is up to the Member States to ensure effective judicial protection. Apart from making such a general claim, in reality the CJEU has no means of assessing whether adequate standards of protection have been attained, unless a private party files a claim on *Kobler* liability for failure to provide access to a court or failure to send a preliminary reference. This naturally comes at a very later stage, after he has exhausted all national remedies.[643] And presumably after he has been burdened with the full costs of the procedure. The delay and the risk entailed are

[642] See Study on Individual Access to Constitutional Justice of the European Commission for Democracy Through Law ("Venice Commission"), CDL-AD(2010)039rev, at para 56.
[643] K. Lenaerts and T. Corthaut, "Judicial Review as a Contribution to European Constitutionalism" (2003) 22 *YEL* 1, at p.p. 16-18.

shortcomings in judicial protection. In addition, there can be no general finding that a Member State ensures effective judicial protection in all areas of law. There needs to be examination on a case by case basis. These problems could very well have been avoided by the availability of an action for annulment.

It should further be noted that such a review on a case by case basis is customary under the ECHR, in the examination of compliance with the right to a fair trial and an effective remedy. Even without EU accession, such scrutinization of national rules and proceedings can nevertheless take place since all Member States are signatories, and *Bosphorus*[644] was such an example. On the one hand, this can act as a mechanism assisting the goal of the CJEU, that Member States provide effective access to national courts where private parties may put forward their claims for invalidity of an EU measure. On the other hand, further such scrutinization could also backfire in a sense, and bring to surface the inherent problems of the preliminary reference route which come as a result of its reliance on national courts and proceedings.

It is another of the realities that reference systems, sometimes termed as systems of indirect access to judicial review, exist all over the world and have not been declared incompatible with the ECHR.[645] And it is true that the EU preliminary reference mechanism was considered compliant with the ECHR in *Bosphorus*. However, this reality and *Bosphorus* do not exclude further scrutiny of compliance in specific situations or on a case by case basis. And perhaps gradually *Bosphorus* may not last as a general rule of compliance of the preliminary reference mechanism with the ECHR in all cases. Further such scrutinization under the ECHR could move Member

[644] *Bosphorus Hava Yollari Turizm v. Ireland* (2006) 42 EHRR 1.
[645] See also Study on Individual Access to Constitutional Justice of the European Commission for Democracy Through Law ("Venice Commission"), CDL-AD(2010)039rev.

States for further Treaty amendment towards a more centralised system. Or perhaps the CJEU to reconsider its choices.

EU accession to the ECHR would have brought some control by the ECHR over the CJEU. This could be seen as something positive in the attainment of the above goal, because the ECHR is more distant from the political pressures of the EU than the CJEU, and is not bound by the choices the CJEU has made, be these judicial or policy choices. This is not of course to say that the CJEU lacks independency in any way, but only that the external supervision under the ECHR will act as an additional layer of protection of individual rights. And would render the EU as a possible respondent for violations of human rights.

In the recent ground breaking *ASJP*[646] ruling, the CJEU accepted that Article 19(1) TEU empowers the Court to review a national measure temporarily reducing the remuneration of judges for a possible violation of the independence of the judiciary, which is an aspect of the principle of effective judicial protection. Time will tell whether this ruling will be treated as limited to judicial independence or whether it will be extended to other aspects of the right to effective judicial protection.[647] Such an extension would of course be welcome and could result in increased surveillance by the CJEU of national measures, or inaction, as regards the *UPA* obligation to establish rules and procedures enabling private parties to put forward their claims against the validity of EU measures before national courts, as another aspect of effective judicial protection.

[646] Case C-64/16 *Associacao Sindical dos Juizes Portugueses* EU:C:2018:117.
[647] See L. Pech and S. Platon, "Judicial Independence Under Threat: The Court of Justice to the Rescue in the *ASJP* Case" (2018) 55 *Common Market Law Review* 1827, at p. 1844.

One of the shortcomings that are foreseen however, is that such review of national measures or inaction under Article 19(1) TEU as in *ASJP*, would normally occur in the context of a preliminary reference sent by a national court on the compatibility of such measures or inaction with the said *UPA* obligation. The problem that seems to remain, is that, still, a private party will need to somehow obtain access to a national court to put forward such a claim. And may be faced with similar difficulties in obtaining access to a national court in order to seek review of a national measure or inaction under Article 19(1) TEU, and actually inducing such a reference, in as much the same way as these difficulties occur when seeking access to national courts or trying to convince national courts to request a preliminary reference on validity. If not even more difficulty if the failure to comply with this *UPA* obligation is attributable to national courts. In this light, the development of such a jurisdiction would not appear to significantly improve the position of private parties in validity challenges against EU measures.

The above are accordingly illustrative of the difficulties in ensuring effective judicial protection or in providing adequate surveillance for this, in a decentralised judicial review system in a multi-state body such as the EU.

4. Fundamental rights and concepts rather indecisive

A strong notion in the Rule of Law tradition is that it is absolutely hostile to the untrammelled exercise of power, bringing the basic meaning of the Rule of Law down to the idea of subordination of the Law to another kind of Law which is not up to the sovereign to change at will.[648] This statement centres on the sovereign. But who decides what the Rule of Law dictates in a particular situation. The answer should be

[648] D. Kochenov, "EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?" (2015) 34 *Yearbook of European Law* 74, at p.p. 80-82.

the courts. So what if the courts have a different idea of what the Rule of Law demands in a particular situation than what theory suggests. Erroneously by intention or in good faith. Then it might be argued that there is no compliance with the Rule of Law. But what if this is an area where the notion is not entirely clear or if theory does not point to any specific result or direction in that case. Then the argument becomes rather circular and inconclusive. In this sense the concept fails to provide any more guidance, and it all becomes a policy choice, which can be exercised by the legislature or the courts.

Similar considerations apply to effective judicial protection, the right to a fair trial and Article 47 of the Charter of Fundamental Rights. As regards access to justice in relation to locus standi rules for direct challenges and the use of indirect means of challenge, they remain likewise inconclusive and unclear.

The case with the locus standi rules for a direct action for annulment is very similar. The choice had not originally been made by the drafters of the Treaties, so it had to be made by the CJEU. Several arguments were put forward that the interpretation of the locus standi rules should be altered, but the notion of the Rule of Law, the principle of effective judicial protection and recently Article 47 of the Charter of Fundamental Rights, as well as the right to a fair trial and an effective remedy under Articles 6 and 13 ECHR, did not clearly point to any particular direction, and arguments could go either way. Years have passed, and the drafters of the Treaties remained inactive in this area, despite effecting several other significant amendments to the Treaties. The time came where the drafters of the Treaties decided on a partial amendment of the locus standi rules by the Lisbon Treaty. Yet Article 263(4) TFEU still left the interpretation of the two most important elements of the reform, these being the notions of a regulatory act and implementing measures, to the judiciary. Accordingly,

again, the choice was only partially made by the drafters of the Treaties, but the gist of the choice was again left to the judiciary. The judiciary opted for interpretations which point towards its previous choices, for a decentralised judicial review system, built upon the preliminary reference mechanism, and very limited availability of centralised judicial review proceedings before the GC. Still not in obvious violation of any of the said principles and rights. The position and arguments become then rather circular.

Maybe this is indeed an area where these principles of effective judicial protection, the Rule of Law and the right to a fair trial, fail to provide more guidance. It is accordingly a matter of policy whether a better judicial review system is desired. No reform will come without such a choice. Should this however really be treated as one of the limits of these concepts. Should there not be a demand that borderline cases should be avoided, and that there is compliance with these concepts beyond reasonable doubt. Or perhaps that these concepts dictate a duty to avoid interpretations that could lead to different levels of protection among Member States. Upon such considerations, the EU judicial review system should move away from the decentralised model which is built upon the preliminary reference mechanism, and move towards a centralised model, centred upon the direct action for annulment under Article 263 TFEU.

5. Improvement is desired

In any event, why should a better judicial review system not be desired. The EU judiciary is there, the procedures are there and well developed throughout the years.

But there is anyway further sufficient reason for a policy choice in favour of a centralised judicial review system, and this is the need for uniform protection in

today's EU, given its development and activities. In its areas of competence it acts even like a state or a sovereign, and there should be uniform protection against the acts of this state or sovereign, in as much as there should be uniform application of the measures passed by that state or sovereign.

In this light, it can be argued that there was compelling reason for a policy choice in favour of accepting the interpretation of AG Cruz Villalon for implementing measures. It avoids the shortcomings of the preliminary reference mechanism for the majority of EU acts, and it also avoids the situation where there might be differing levels of protection under the preliminary reference mechanism. This is not an era of bare minimums in protection or even bare minimums of effectiveness in protection. This is not an era of a challenge based on stamina approach or end result. This is not an era of doubt whether the EU judicial review system would pass the standards of compliance with the ECHR or other concepts. This is an era of effectiveness beyond reasonable doubt in judicial protection. Why should this risk inherent in a multi-national decentralised judicial review model continue to exist, and why should we not opt for the better available protection offered by a centralised judicial review system. This will be safer in respect of compliance with all rights and principles, and there should not be argument as to borderline cases.

It has been characteristically stated that the question whether the Rule of Law can be relied on to justify an unconditional right of access for individuals deserves a negative answer, but that is not to say that there is no room for improvement.[649] This is precisely what is desired. Improvement.

[649] L. Pech, ""A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principe of EU Law" (2010) 6 *European Constitutional Law Review* 359, at p. 387.

Significant improvement can be achieved at any time, without further Treaty amendment, simply by a reinterpretation of the notion of implementing measures along the lines of the one proposed by AG Cruz Villalon. The Lisbon Treaty offered a great opportunity for a dawn of effective judicial protection. It is regrettable that it has been rendered a false one.

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APPENDICES