"A Time to Change or a False Opportunity?Accession to the European Convention on Human Rights and the *Locus Standi* Problem in the European Union"

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Introduction: Twenty-first century Europe[1]

In 1976 Eric Stein and Gregg Vinning wrote that the nature of the (then) European Economic Community (EEC) was "at the borderline between the federal and the international", due to the expansive constitutional integration led up by the Court of Justice of the European Union (CJEU) and to its governance structure and decision-making processes which resembled more of a common international organization[2]. In fact, as the classic doctrine of European Union (EU) law has discussed, the process of establishing the European political project was a constitutional struggle between the judicial and the political, with the former taking up the lead from the latter[3].The paradigm started to change in the end of the eighties. Since the Treaty of Maastricht that the political process has picked up the wheel of integration and directed the constitutional evolution of the project at an unprecedented speed. For example, there were three treaties signed between 1992 and 2013 (Amsterdam, Nice and Lisbon). The EU adopted a single currency, the euro, which is nowadays used by eighteen Member States. Also, the EU more than doubled its members since Maastricht, being now composed of twenty-eight countries. These events prove how fast did the Union change during the past twenty years. It is is true that this constitutional momentum had some backlash, most notably with the failure of the Constitutional Treaty in the beginning of the new century. But even this project was rescued and re-cast as the Treaty of Lisbon, in 2007. Political support for the project has been steadily renovated by heads of state, and enlargement processes continue.

It is even difficult to predict when will this evolution stop. The current financial crisis has showed many deficiencies of the project, and the necessity for closer integration. There have been talks of a banking union and stricter financial supervision. Discussions concerning new forms of

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[1] Thank you to Samantha Besson for being the supervisor of this work; for all the comments, feedback and thoughtful insights made during this process, and for all the support given. Thank you to Daniel Halberstam, Donald Reagan and Virginia Gordan for receiving me at Michigan Law School as a Research Scholar, where the majority of this work was thought and idealized. Thank you to Samo and Maria Bardustky, Julian Lehmann, Appoline Roger, Alejandro Perera and Elaine Fahey for all the comments and helpful discussions (and, most important of all: library company) in Ann Arbor; and to Valerio Signore, Alessandro Pozzi, Federico Satanino and Silvyo Guzelbahar for the same, in Brussels. Thank you to my family, friends, and girlfriend for all the support and patience given throughout this period, with a very special regard to my mother Maria Teresa. Last but not the least, thank you to Católica Global School of Law and Flávia Beja da Costa, Tânia Abreu Godinho, Luís Barreto Xavier and Gonçalo Almeida Ribeiro for all their help, and incentive.

During the final stages of work for this thesis, assistant professor Patrícia Martins of Universidade Católica Portuguesa successfully defended her PHD thesis entitled *Rethinking Access by Private Parties to the Court of Justice of the European Union* (2013). The dissertation discussed several of the same topics as the present work. The author was present at the arguings, but unfortunetately was not able to read the dissertation until the delivery of this thesis.

[2] Eric Stein and Gregg Vinning, "Citizen Access to Judicial Review of Administrative Action in a Transnational and Federal Context" *American Journal of International Law*, 70, 1976, pp. 222

[3] See for all Joseph H.H. Weiler, "The Transformation of Europe" *Yale Law Journal* Volume 100, 1990-1991

political governance have also emerged consistently over the last two years, in order to strengthen certain deficiencies of the project[4].

Another point which represents this steep evolution, and one which clearly marks a shift to the federal side, is the new human rights paradigm of the Union. The fundamental rights policy created by the CJEU since the *Stauder* case has also been constitutionalized. The EU has now an extensive and ambitious catalogue of rights protected in its Charter of Fundamental Rights. Moreover, another important step has been taken with the eminent accession of the Union to the European Convention on Human Rights (ECHR). This process, discussed for many years, received an impressive political support with Lisbon and the constitutionalization of the duty to accede. Discussions are still underway, with some problems awaiting to be solved, but it seems that the process will have a positive ending. The Union will then be another member of the Convention, another contracting "State", an event which fuels hopes for an even greater scrutiny of its institutions in face of individuals.

In sum, this has been the originality of the European project, to transform itself into a hybrid political form that, although resembling an international organization, has powers that go well beyond just that. However, it is also its main focus of frustration, since albeit being fairly integrated, it still shows several structural deficiencies. Some of these deficiencies are fundamental — the lack of a financial governance structure prepared to deal with deficit imbalances inside the federal system is the first to come to mind, nowadays — and risk to undermine in the long run the successes already achieved. One of these problems is the limited standing granted to individuals when challenging EU acts in front of the EU's courts. The restrictive approach laid down by the CJEU in 1965 in *Plaumann*, concerning the interpretation of the criteria of individual concern remains practically still valid nowadays. This is a quarrel that has existed since the beginning stages of the EU's history and has never been fully solved, much to the annoyance of private plaintiffs and academic commentators who believe there is a denial of access to justice being perpetuated.

Some authors like Francis Jacobs, former Advocate General (AG) of the CJEU and one of the most devoted critics of the ECJ's long-standing interpretation of *locus standi* provisions, believes that accession to the ECHR will be an opportunity to solve this problem[5]. This is a legitimate belief. In fact, by being for the first time under the judicial control of an external entity,

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[4] For example, Bruce Ackerman and Miguel Poiares Maduro, "How to make a European constitution for the 21st century", Wednesday 3 October 2012 12.38 http://www.theguardian.com/commentisfree/2012/oct/03/european-constitution-21st-century

[5] Francis Jacobs, "The Lisbon Treaty and the Court of Justice", *EU Law After Lisbon*, Edited by Andrea Biondi, Piet Eeckhout and Stefanie Ripley; Oxford, New York: Oxford University Press, 2012, pp. 206

there will be more pressure in the EU to comply with fundamental rights. The ECtHR could very well find a violation of right of access to court in the EU. However, there have been no studies considering this chance, and to concretely assess what could be the impact of accession in solving this problem specifically. Although it is true that the Convention protects the right of access to justice, it also accepts certain restrictions on its adjudication by contracting states. More so, before the period of accession, the ECtHR had already the opportunity to express its opinion regarding the judicial system of the EU. These issues show that the proponents of a more-relaxed *locus standi* rules in the EU will still face several hurdles when discussing their claim in Strasbourg. The purpose of this thesis is, by looking at the history of relations between the ECHR and the EU and of both the right of access to court in the case-law of the ECtHR and to the *locus standi* problem in the case-law of the ECJ, to see how this issue could be solved if a claim arrived to the ECtHR after accession.

This work is divided in five parts. In the first one we will look at the relationship between the ECHR and the EU, and see how the Convention became an integral part of the EU's legal system, first through the case-law and then by the Treaties. We will also see how the ECtHR has dealt with problems concerning the EU and the Convention in its case-law. In the second part we will look at the accession process, its impact and the difficulties arising from it. In the third part we will look at how the ECtHR has protected the right of access to court. We will see how the Strasbourg court has stated the emanation of the right from article 6(1) of the Convention and how it has interpreted its magnitude. We will see that, like most rights of the Convention, the right of access to court is not an absolute one and allows for certain limitations, albeit inside certain limits. In the fourth part of this work we will shift to the EU and look at the *locus standi* problem, both into its historical progress and to its critical perspective. Finally, in the fifth and final part, we will look at how the restrictive approach to *locus standi* rules could be discussed in front of the ECtHR. We will base ourselves in the findings of the second and third parts of the thesis to elaborate certain points of discussion and their possibility of success. We will finish by giving our assessment on the impact of accession to *locus standi* in the EU: is it really a time for change, or just a false opportunity?

1. The ECHR and the EU

1.1 The relationship of the EU to the ECHR: from *Hauer* to the Charter

The ECHR was adopted in 1950, as a symbol of a common commitment of European countries to protect fundamental rights[6]. It was signed five years after the end of the Second World War, in a time where several mechanisms that exalted a universal, humanitarian kantian-like project of individual protection at a global level — like the Universal Declaration of the Rights of Man, approved at the United Nations in 1948 — were also created. It appeared seven years before the EEC. Jean Paul Jacqué wrote that "the problem of relations between the ECHR and European Integration is almost as old as integration itself"[7]. In fact, there were discussions in the "travaux preparatoires" of the ad hoc assembly of the European Coal and Steel Community concerning the possible insertion of provisions of the Convention in what would be the Treaty of Rome[8]. These discussions were fruitless in the end, since the Treaty did not make one single mention to fundamental rights or the ECHR in its text.

However, it was only a matter of time before these two legal projects would interact, thanks to the action of the CJEU. The Luxembourg Court was faced with a series of cases in the sixties, starting with *Stauder,* that put the question of whether the EEC had a fundamental rights policy[9]. Since there was no mention of fundamental rights protection in the Treaty of Rome, the Court had to create this notion and justify where it came from. It first stated, in the *Nold* case, that the protection of fundamental rights in the EU emanated from "constitutional traditions common to the Member States"[10]. Then, in *Hauer*, the Court added to these traditions the principles of the Convention, stating that "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law" like the "European Convention for

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[6] For the history of the Convention see Ed Bates, *The Evolution of the European Convention of Human Rights* Oxford, New York: Oxford University Press, 2010

[7] Jean Paul Jacqué, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms" *Common Market Law Review*, 48, 2011, pp. 995

[8] Draft Treaty Embodying the Statute of the European Community in http://aei.pitt.edu/991/1/political_union_draft_treaty_1.pdf, pp. 24 and 25; Jean Paul Jacqué, id, pp. 995.

[9] Gráinne De Búrca and Paul Craig *EU Law: Text, Cases, and Materials* (Fourth Edition) New York: Oxford University Press, 2011, pp. 364; Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* Cambridge: Cambridge University Press, 2010, pp. 233

[10] Case 4/73 J. Nold, Kohlen-und Baustoffgroßhandlung v. Commission of the European Communities, [1974] ECR 491

the Protection of Human Rights and Fundamental Freedoms of 4 November 1950"[11]. It made sense that if the Court was to insert its action in a common humanitarian "space", it would need to refer to the most important symbol of the European commitment to fundamental rights, the "minimum" protection level accepted[12].

From that moment on, the ECHR became part of the legal order of the EEC. This was a move that has been strengthen over the years in decisions like *Pupino* or *Elgafaji*[13]. This situation, however, was problematic and controversial, since there was no way for the ECtHR to control the action of the Union or the CJEU when applying the Convention. The Luxembourg Court, in fact, made an interesting move: it inserted the Convention as a source of fundamental rights of EU law, but put under its umbrella the control of its application in the EU. As Jacqué writes, "the *de facto* substantive incorporation had the effect of giving the Court the last word on the Convention within the scope of Community law"[14]. It was the best of two worlds for the CJEU, since it maintained its autonomy but solved possible complications with Member States regarding the role of the Convention in the EU. According to Bruno de Witte, this allowed for the CJEU to make "an eclectic and unsystematic approach" to the Convention that would better serve its interests[15].

Approval of article 6 of the Treaty of the European Union (TEU) signed in 1992 in Maastricht was an important step in the understanding of the ECHR in the EU. According to this provision, the Union had now to respect fundamental rights "as guaranteed by the European Convention of Human Rights"[16]. For the first time ever, there was a political document of constitutional level that stated the need for the Union to act with respect towards the Convention. However, this did not change the primacy of interpretation of the Convention by the CJEU in the Union's sphere. One thing is to have the duty — even if constitutional — to respect the ECHR. Another thing is to be subject to the interpretative control of the Strasbourg Court. What article 6 TEU did was just to politically formalize the criterium settled by the ECJ in *Hauer*. The Union still had the power to define the final interpretation of the Convention in its sphere, since the Court

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[11] Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz ECR, paragraph 15

[12] Yutaka Arai, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerpen, Oxford, New York: Intersentia, 2001, pp. 3

[13] Case C-465/07 Elgafaji, [2009] ECR 1921; Case C-105/03 Pupino, [2005] ECR I-5285; and Jacqué, id, pp. 1000

[14] Jean Paul Jacqué, id, pp. 1000

[15] Bruno de Witte, "The Use of the ECHR and Convention Case Law by the European Court of Justice" *Human Rights Protection in the European Legal Order: The Interaction between the European and the National Courts*, edited by P. Popelier, C. van De Heyning and P. Van Nuffel; Antwerpen: Intersentia, 2011, pp. 19

[16] Carol Harlow, "Access to Justice And Human Rights: The European Convention and The European Union" *The EU and Human Rights,* Edited by Philip Alston, Oxford, New York: Oxford University Press, 1999, pp. 188

judging this prerogative was the CJEU. Still, it was an important political move to declare that the EU had to respect, as a whole, the rights set out in the Convention.

Another step with regards to the role of the ECHR in the EU happened with the approval of the Charter of Fundamental Rights in 2000, in the Treaty of Nice. There are two norms of this document that concern how the Convention impacts the interpretation and adjudication of rights established in the Charter. The first article is paragraph three of article 52, which states that the scope of the rights established in the Charter will have the same "meaning and scope" as the correspondent rights established in the ECHR. The second norm is article 53, which adds to the former that "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application" by the ECHR. Both these norms express the important status of the Convention as the basic paradigm for correspondent fundamental rights proclaimed in the Charter. This has been evidenced in cases such as *Melloni* or *Fransson*, where for example the CJEU stated that "as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR"[17].

These political movements confirmed the existing case-law of the CJEU in the matter, and did not alter the formal *status quo* between both systems. However, it is clear that the Convention is part of the EU legal order.

1.2 The relationship of the ECHR to the EU: under the hand of *Bosphorus*

It was not only the EU that had to react to the existence of the Convention in its same space of intervention, nor was the CJEU the only court that had to decide on controversies regarding the concrete relationships between these two systems. The ECtHR also had to deal with the impact of EU law in the legal space of its contracting states. Some EU measures had direct effect in the national sphere, such as regulations and decisions. Others, like directives, had an indirect effect since they needed to be transposed to the national sphere. This was a complex situation, since national laws — and by this we mean laws approved by national parliaments through national constitutional processes — were approved following a legal obligation to comply with general

[17] Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, ECR I-0000, paragraph 44; Case C-399/11, Stefano Melloni v. Ministerio Fiscal [2013] ECR I-0000

commands of European nature, thus shading doubts about who was, in fact, the "true" legislator. Although the general aspects of the law were laid down by European institutions, the concrete measure was created by national legislators. The other problem concerned the application of the law. Through the idea of direct effect and supremacy established by the ECJ in the "holy trinity" of *Costa Enel*, *Van Gen den Loos* and *Simmenthal*, European law is applied by national authorities as if it was national law. However, the law is not national, but European or "federal". The problem then arises when an individual challenges an action by a national authority that regards an infringement of his / her convention rights due to the application of EU law. Since the EU is not a formal member to the Convention, there is a dangerous "grey" area with respect to the control of EU law which is applied by Member States. On one hand, Member States can argue that it is not "their law" since they it was not their parliament who made it. On the other hand, the EU can argue that since it has no formal obligations to the Convention, it can not be held responsible in Strasbourg for violating it.

The ECtHR took two steps in this regard, which can be seen as answers to the ECJ take on the Convention[18]. The first step happened in *Matthews*[19]. In this case, the ECtHR had to deal with the voting rights of citizens of Gibraltar for the European Parliament, which were not granted by the UK, the country which holds political control of the island. The Court considered in that matter that an EU act could not be challenged for violating the Convention rules since the EU was not a party to the ECHR. However, "[t]he Convention does not exclude the transfer of competences to international organizations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer."[20] With this statement, the Court opened the door for the possibility of controlling the powers which were transferred for the EU. However, it did not develop it further, considering that the prohibition stated by the UK to citizens of Gibraltar to vote on the elections for the European Parliament violated their right to vote[21].

The second step, and arguably the most prominent case concerning the relationship of the EU with the ECHR, was *Bosphorus*[22]. In this case, the ECtHR had to deal with the application of an EC Regulation concerning the seizure of an airplane which was originally from former Yugoslavia,

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[18] Jean Paul Jacqué, id, pp. 1001

[19] ECtHR, 18 February 1999, *Case of Matthews v. United Kingdom*, application no. 24833/94

[20] Id, paragraph 32.

[21] Id, paragraph 65

[22] ECtHR, 30 June 2005, *Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, application no. 45036/98

in Ireland. The Strasbourg Court argued, as it had done before in *Matthews*, that States could transfer competences to international organizations. However, these transfers could not serve as a way to obliterate their duties with regards to the Convention. "[T]he Court has recognized that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards"[23]. In order to prevent this, the ECtHR created the concept of equivalent protection. According to the ECtHR, the transfer of powers from a contracting state to a transnational entity can only be valid if this entity offers a similar level of protection of fundamental rights to that of the Convention[24]. Following this notion, the ECtHR did an analysis of European integration history and its progressive commitment to human rights protection[25]. It then decided that the EU fulfilled the equivalent level of protection. "[T]he Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" (...) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community"[26] and therefore the decision of the Irish authorities did not infringe the Convention.

The ECtHR made two important moves with this decision. In the first one, by developing the argument of *Matthews* and stating that it could judge the action of international organizations acting through a transfer of powers by the Member States, the Court delivered an answer to the ECJ's take on the Convention. It was as if the ECtHR was saying to the ECJ that "if you can use the Convention, that I can also judge EU law when Member States act under its rule". The second move served as a cold shower on the first. By creating the idea of equivalent protection, the ECtHR was judging in fact the level of protection of the EU's fundamental rights policy. Although the final The decision of considering the level of protection offered by the EU of equivalent level to the one in Strasbourg softened the impact of the first move it meant, basically, that Strasbourg could control

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[23] Id, paragraph 154.

[24] Id, paragraphes 155-157; Leonard F. M. Besselink, "The European Union and the European Convention on Human Rights After the Lisbon Treaty: from *Bosphorus* sovereign immunity to full scrutiny?", 13 January 2008, http://ssrn.com/abstract=1132788 or http://dx.doi.org/10.2139/ssrn.1132788, pp. 4

[25] *Case of Bosphorus*, id, paragraph 159

[26] Id, paragraph 165

Brussels and, maybe, even Luxembourg, if it considered that the presumption was not valid anymore.

Other cases two cases granted two more opinions on the relationship between the ECHR and the EU. In the *Emesa Sugar* case an applicant wished to prove that the impossibility of responding to the opinion of the AG in a case submitted to the EU courts amounted to a violation of fair trial rights under article 6(1) of the ECHR. There was the question of whether the ECtHR would find the action inadmissible *ratione personae* since the EU was not a formal member to the Convention. The Court did not find it necessary to discuss the matter, since it considered that the applicant's claim did not fall under the category of "civil rights and obligations" established in article 6(1), since it was a tax dispute[27]. However, in the subsequent *Kokkelvisserij U.A* which addressed the same problem (the possibility to answer to the opinion of the AG) the Court went further and considered the admissibility of challenging an act of the CJEU. Since the preliminary ruling had been asked by a domestic Dutch court, the ECtHR considered that it existed an international legal obligation that the State had to comply with, and applied the *Bosphorus* test of equivalent protection. The Court then decided that there were sufficient procedural guarantees for the applicants to use, since they could ask for a reopening of the oral procedures or for another preliminary ruling. The presumption of equivalent protection was maintained, and the Court decided against the plaintiffs[28]. Once again, there was a deferral to the EU and its fundamental rights approach.

[27] ECtHR, 13 January 2005, Case of Emesa Sugar N.V. vs. the Netherlands, application no. 62023/00

[28] ECtHR, 20 January 2009, *Case of Cooperatieve Producentenorganisatie Van de Nederlandse Kokkelvisserij U.A vs. The Netherlands,* application no.13645/05

2. Accession of the EU to the ECHR

2.1 Problems and complexities

Laurent Scheek called the moves made by the ECtHR in cases such as *Bosphorus* as diplomatic intrusions on the legal order of the EU, with effects in the way the CJEU regards the application of the Convention in its sphere. "The 'diplomatic intrusion' of the ECtHR into European affairs and its diplomatic political and juridical dialogue, has not only transformed the way in which the CJEU sets its priorities, defines its autonomy, and interprets EU law, but it has also deeply influenced EU law and treaty-making"[29]. Although the author forgets to mention that the CJEU had already made a slight intrusion itself on the ECHR, by inserting the Convention in the EU legal sphere (an almost informal type of accession), it correctly points out the implications that the Convention has had in the EU and its development.

However, this picture seems incomplete. The ECHR is part of EU law, integrated through the ECJ's case law and confirmed by the recent constitutional treaties. But the ECtHR has no way of formally controlling the interpretation of the Convention made by the ECJ. For that to happen, the EU would have to become a contracting party and accede to the Convention. In fact, talks concerning this option were discussed as long as 30 years ago, being the subject of a Commission report in 1979[30], although only the EU only created a committee to deal with the matter in 1992[31]. The CJEU stated in Opinion 2/94 that the treaties, as they were at the time, did not grant competence to the Union to become part of the Convention [32]. Member States should then do an amendment in order to be able to continue with an accession project. The political process followed this suggestion with the approval of the Treaty of Lisbon in 2007, whose second paragraph of article 6 TEU states that the Union shall accede to the Convention. This step is an ambitious one, since it lays down a compromise by the EU which is constitutionalized in the treaties. This is the opinion of

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[29] Laurent Scheek, "Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European Court as a Constitutional Actor of the European Union" *The European Court of Human Rights Between Law and Politics*, Edited by Jonas Christoffersen and Mikael Rask Madsen; Oxford, New York: Oxford University Press, 2011, pp. 165

[30] Tobias Lock, "EU Accession to ECHR: Implications for Judicial Review in Strasbourg" *European Law Review* 35 Issue 6, 2010, pp. 777; Jean Paul Jacqué, id, pp. 1001

[31] Jean Paul Jacqué, id, pp. 1002.

[32] Opinion 2/94 of the European Court of Justice, "Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms", 28 March 1996, http://www.pravo.unizg.hr/_download/repository/Opinion_2_1994.pdf

Jean Paul Jacqué, that "[a] failure to do so could be ground for an action for failure to act before the Court of Justice"[33].

The implications of this event are too big for both parties, risking to change the institutional, political and legal landscape of Europe. One has to remember that this is a novelty for both systems of law. On one side, the ECHR never had a member like the EU, a sort-of a federal state with a strong institutional structure. As Christina Eckes states, "[t]he EU is a compound legal order consisting of numerous international actors and the largest share of EU law is implemented or applied by national authorities. This means that it requires national support and involvement in order to become effective"[34]. On the other side, the EU never has been subject to an external control by another system of law. It is true that the EU is part to certain international treaties (like the GATT, for example) and that has to comply with judicial structures established by these systems. However, to be controlled by a human rights court is to be subject to a more extensive system of scrutiny than a trade regime, since all the actions of the EU — be them legal, executive, or judicial — of whatever core subject (trade, single market, foreign relations) may affect fundamental rights. If the EU accedes to the Convention, it will face scrutiny regarding all its actions. It is not an easy process to start, undergo, and end.

Formal negotiations started in July 2010 and ended in April 5th 2013, with the signing of the Draft Accession Agreement of the European Union to the European Convention on Human Rights[35]. This draft agreement has now been sent to the CJEU for approval. Many of the problems that the doctrine has heightened have been answered in this agreement. We will now look at these problems and to the solutions proposed by agreement.

2.2 The legal problems of accession

a) The respondent mechanism

The first problem concerns the respondent mechanism. Most of the legal acts of the Union are either applied by the Member States (regulations or decisions) or developed by them (directives). In case an applicant needs to challenge this act, who should be on the stand? The

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[33] Jean Paul Jacqué, id, pp. 995

[34] Christina Eckes, 'One Step Closer: EU Accession to the ECHR ' Const. L. Blog (2nd May 2013) (available at http://ukconstitutionallaw.org).

[35] Draft Accession Agreement of the European Union to the European Convention on Human Rights, in http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1(2013)008rev2_EN.pdf.

Member State, since it was the national authority that applied the act, or the EU, since it was the one that formulated the act? Or both, even?

Tobias Lock defended the idea that there should be a clear understanding of which needs are being protected in this situation. In this situation, it is for the best interests of the applicant that the issue with the respondent must be answered. Following this lead, and basing himself on the notion created by the ECJ of the EU as an autonomous entity from its Member States, Tobias Lock proposed three solutions. First, in case the act is an EU measure, like a regulation or a decision, it should be the EU the respondent. Second, in case it is a national measure, then it is the national State the respondent. Third and last, if it is a measure with dual nature, like a directive, then the respondent should be the Member State, with the possibility of calling the EU through a co-respondent mechanism[36].

This was the approach followed by the Draft Agreement. In this document, it is stated that when a Member State is challenged in Strasbourg, "the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, including decisions taken under the TEU and under the TFEU, notably where that violation could have been avoided only by disregarding an obligation under European Union law"[37]. By this mechanism, the EU will become a part to the proceedings and may be held responsible for violations of the Convention. However, the ECtHR has the power of limiting responsibility to just one of the respondents, if it finds enough reasons to do so[38].

b) The preliminary ruling mechanism and prior involvement procedure

The second issue concerns the situation of how to deal with EU judicial remedies. As it is known, the EU judicial system works with the cooperation between national courts and their European counterparts through the mechanism of preliminary ruling. This mechanism consists on a question posed by the national court, concerning the interpretation of EU law, to the European Courts. The process has been developed by the ECJ in the *Fotofrost* and *CILFIT* cases, and it is not mandatory, unless there is a clear connection between the case and EU law and there are no more

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[36] Tobias Lock, "Accession of the EU to the ECHR: Who Would be Responsible in Strasbourg?" *The European Union After the Treaty of Lisbon,* Edited by Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos, Cambridge: Cambridge University Press, 2012, pp. 122-123

[37] Christina Ecke, id.

[38] Christina Ecke, id.

appeals to be used by the applicants[39]. The system of applying for the ECtHR is different, since it can only happen after all national remedies are exhausted. The question becomes, then, what would happen in case an EU question had not been put for preliminary ruling before the case reaches Strasbourg. Would the ECtHR be obliged to send a preliminary question to Luxembourg on the interpretation or validity of EU law, before deciding the case?

The ECJ could change its jurisprudence on preliminary ruling by making it mandatory for every Supreme Court to send a question to Luxembourg. As Jean Paul Jacqué states, with regards to a possible change to the *acte-claire* doctrine of *Cilfit*, "[n]othing prevents a return to a more rigorous application of the Treaty in such cases" where a possible conflict between an act of the EU and the ECHR is invoked[40]. The other option would be for the ECtHR to refer a question to ECJ before deciding a case where an EU act is at stake. Judge Timmermans of the ECJ has defended this solution, which is present in accession talks[41].

The Draft Agreement seems very deferential to the EU in this regard. According to article 3, paragraph 6, the CJEU may deliver an opinion on the compatibility of the challenged EU action and the ECHR if the EU is a (co)respondent to the proceedings[42]. This mechanism is known as the prior involvement procedure, by which the EU will be able to address the issue at stake before the ECtHR rules on the matter. This gives the EU a privileged position with regards to the other contracting parties. Giorgio Gaja states that "[i]t may be expected that the European Court of Human Rights will not lightly contradict an assessment specifically made by the Court of Justice"[43]. Christina Eckes, on her side, argues that this should happen since the system of Strasbourg has to understand the peculiarities of the EU's own judicial structure. "The special position accorded to the Court of Justice should be seen both as accommodating the Court's concern with its judicial autonomy and acknowledging the particularities of the EU legal order and the judicial power in the EU"[44].

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[39] See Graínne de Búrca and Paul Craig, id, pp. 456-459; Damian Chalmers, Gareth Davies and Giorgio Monti, id, pp. 175-176

[40] Jean Paul Jacqué, id, pp.1019

[41] Id, pp. 1020

[42] Giorgio Gaja, "The 'Co-Respondent Mechanisms' According to the Draft Agreement for the Accession of the EU to the ECHR", *European Society of International Law Reflections*, Volume 2, Issue 1, January 9 2013, http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflections%20-%20Gaja_0.pdf, pp. 3

[43] Id, pp. 4

[44] Christina Ecke, id.

c) Review of EU primary law

The third issue, which is also raised with regard to remedies, is the possibility for the ECtHR to review EU primary law. Jean Paul Jacqué stresses the fact that since the "Union is not the author of its primary law, and the EU court cannot exercise any review of legality", then the ECtHR should not have be able to control it also[45]. He argues that if the Strasbourg court did so it would be acting inconsistently with its own previous case-law on the matter. Oly Stian Johansen, on the contrary, stresses that the ECtHR has control over the contracting State's constitutions, and that due to the equal-footing of the EU as a party to the Convention, it should also be subject to the same control[46].

In our view, this is a false question. Review of constitutional norms is not even a prerogative that national courts have in their own legal orders. As Tobias Lock states, "Convention States' constitutional courts do not have jurisdiction to review the validity of provisions contained in their constitution, which they are called upon to interpret"[47]. There is then no reason for the ECtHR to have a different approach regarding the EU's case. This seems to be the case, since the Draft Agreement does not state anything in this regard.

d) The second pillar

The final problem to be discussed is the matter of the second pillar of the EU, concerning the Common Foreign and Security Policy (CFSP). Accession will, in principle, cover all of the EU's activities. However, there are some competences in the EU that cannot be controlled by its own CJEU, such as the CFSP. Article 275 TFEU only allows the Luxembourg Court to control, under this policy, restrictive measures against individuals. However, it If accession happens as expected, it could "result in an asymmetry between the control exercised by the Court of Justice and that of the ECtHR"[48].

The ideal answer would be for the EU to make a reservation under article 57 of the Convention, as long as it is only of a particular provision and not of "general character". Another option would be for the Convention to be amended in order not to be touch this issue. The Draft

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[45] Jean Paul Jacqué, id, pp. 1006

[46] Stian Oby Johansen, "The European Union's Accession to the ECHR as Seen From Strasbourg", *University of Oslo Faculty of Law Legal Studies* Research Paper Series, No. 2012-29, pp. 76

[47] Tobias Lock, "EU Accession to ECHR: Implications for Judicial Review in Strasbourg", id, pp. 790

[48] Jean Paul Jacqué, id, pp. 1005

Agreement does not state anything in this regard, which makes both options still fairly plausible, in the current stage of proceedings.

2.3 The end of *Bosphorus*

Another important question, which is not directly answered in the Draft Agreement, must be made. The question concerns the fate of the *Bosphorus* paradigm after the accession. Will it still apply or not?

As seen before, the argument laid down in the *Bosphorus* case regards the level of human rights‘ protection offered by the EU in comparison with the Convention itself. According to the wording of the case, the EU offers a level of protection which is considered equivalent to that of the Convention. Judges arrived to this conclusion after an extensive analysis of the history of European Integration and its progressive path, undergone by both the judicial and political process, towards a more developed protection of fundamental rights. As Tobias Lock states, “[t]he rationale given by the ECtHR for granting the Union’s legal order this privilege is a substantive one: it is an acknowledgment that the protection of human rights in the European Union and by the ECJ is of such high quality that the ECtHR can afford to only exercise its jurisdiction where, exceptionally, the protection was manifestly deficient”[49].

However, the main problem in *Bosphorus*, in the perspective of the ECtHR, is the application of an international regulation, external to the ECHR, by a signatory State that infringes a Convention right. With accession, this act is no longer an external act to the ECHR, since it is a legal act by one of its contracting parties. The criterium of equivalent protection rests on this point: that the transfer of powers of a contacting party is made to an external party. Once the EU becomes part of the Convention, the ECtHR will loose the *ratione materiae* for applying this paradigm. The whole situation could be solved by applying the normal procedure. As Christina Ecke states, “[a]fter receiving the Court of Justice’s opinion, the Strasbourg Court will have to scrutinize and rule whether the Convention has been breached. It can only find the specific opinion either correct (offering equivalent protection; no violation) or incorrect (misinterpreting the Convention; violation). It cannot hide behind general considerations of the human rights protection in the EU legal order. The times of *Bosphorus* are over”.[50]

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[49] Tobias Lock, id, pp. 797

[50] Christina Ecke, id.

The other is more institutional political than legal *per se*, since it concerns the way two important judicial bodies will operate in the same space. The institutional framework between both European Courts will change after accession, since one of them — the ECtHR — will have the final answer in the interpretation of the Convention and its impact in EU law. Until now, we have been watching a type of judicial version of "game of thrones", where both courts have made their moves in stating their power towards one another but cautiously controlling a conflict at the same time. The underlying political message for the EU in *Bosphorus* is clear: "we can control; but we will not do it".

But now one of the Courts will be on top of the other. This will have important implications for the ECJ, specially. The ECJ has been used to have the final word in all matters concerning the interpretation of EU law. Now, its own interpretation will have to be subject to the control of Strasbourg, and without any kind of charity like *Bosphorus*. It is true that this control does not mean that a EU measure will be invalidated in case of violation of the Convention. The judgments of the ECtHR have only declarative effect. But even if this last court cannot invalidate a EU measure, the political burden of having its methods and decision-making processes analyzed and judged by another entity is not be something judges in the ECJ — and the EU itself — are used too. A decision regarding the EU's failure to protect fundamental rights under the Convention could have important effects on the public perception of the Union. This control could compel judges to be more strict on their fundamental rights approach and therefore change some of the EU's polemic decisions. This seems to be the meaning of Dean Spielmann's argument, when defending that "the question of who is invested with the final word on a particular issue will then soon become obsolete" after accession[51].

[51] Dean Spielmann, id, pp. 780.

3. Access to justice in the ECHR

3.1 From "right to a fair trial" to access to justice in the *Golder* case

The ECHR does not establish anywhere in its text and explicit right of access to court, like for example the Charter of Fundamental Rights does, in its article 47 on the right for "an effective remedy". There are, however, two articles in the Convention which deal with an individual's procedural rights. The first is article 6, which states the right to a fair trial. According to the first prong of this article:

"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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The second is article 13, which states the right of a citizen of a contracting state to defend its claim to the ECHR (a right of access to the ECHR itself):

"Everyone whose rights and freedoms as set forth in this 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."

As we can see, none of these provisions establishes a right of an individual to, in abstract, access a court in order to defend his / her claim. However, this is a right that is nowadays undeniably protected by the Convention. The Court, through an interpretation of the ECHR, acknowledged its existence by deriving it from the preamble and being inherent to article 6(1). The paradigmatic case in this regard was *Golder*, decided in 1975[52]. The case concerned the situation of Sidney Golder, a UK citizen that at the time of the proceedings was serving prison time for a robbery. He had been accused of participating with a group of inmates on an attack against one prison guard, but charges were dropped after further investigations. He then decided to ask the UK's

[52] ECtHR, 21 February 1975, *Golder - United Kingdom,* application no. 4451/70; David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights*, Oxford, New York: Oxford University Press, 2009, pp. 235; and Peter Van Dijk, Fried Van Hoof, Arjen van Rijn and Leo Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, Antwerpen, Oxford: Intersentia, 2006, pp. 557

Home Secretary permission to consult a solicitor in order to press charges of libel against those who had accused him of being part of the disturbance. However, the Home Secretary, following a law that granted him discretionary powers when deciding on this type of permission, did not satisfy Mr. Golder's request, provoking his subsequent complaint to the ECtHR. According to Mr. Golder, the refusal by the Home Secretary to grant him permission to see a solicitor gravely affected is right of access to justice.

The ECtHR started by saying that although access to justice is not mentioned in the Convention, it is an inherent part of it, and established in article 6(1). The Court's argumentation derives from a teleological interpretation of the preamble of the ECHR, where it is stated that all contracting parts share "a common heritage of political traditions, ideals, freedom and the rule of law"[53]. It is from this last value that the Court takes the idea of access to justice. This right "is a key feature of the concept of the 'rule of law', which, as the preamble to the Convention stated, was a part of the 'common heritage' of Council of Europe states"[54]. Also, according to the decision, it should be implicit by a matter of reason in a provision conferring minimum requirements for judicial actions to take place (fair hearing, legal assistance, etc) the right to put those same actions into place. As the ECtHR clearly states: "It would be inconceivable (...) that Article (...) 6-1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings."[55]

The Court continued this interpretation in further decisions such as *Hornby*, *Immobiliaire Saffi* and *Antonakopoulos,* thus developing the concept of the right and its place in the ECHR[56].

3.2 The right of access and the margin of appreciation

The right of access to justice, as other rights in the Convention, is not absolute, and needs to be balanced with other realities, since it can be subject to counter-claims regarding its

[53] Case of Golder, id, paragraph 34

[54] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, id, pp. 235

[55] Case of Golder, id, paragraph 35

[56] Peter Van Dijk, Fried Van Hoof, Arjen van Rijn and Leo Zwaak, id, pp. 558

adjudication[57]. The ECtHR acknowledge this in *Golder*, also. Basing itself on a previous decision concerning the right of education, *Belgian Linguistic,* the Court stated that right of access to court calls "for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and the individuals"[58]. The Court added that if this is true of a right which is clearly expressed in the Convention, it should be even more true of a right which is inherent to it, like right of access[59]. States have therefore some margin of appreciation when applying the right.

The *Golder* decision ends without any consideration of what is or is not a limit to access to court. It was a notion for the Court to develop in subsequent decisions. In *Ashingdane* the Court states that there should be a margin of appreciation for States when setting these limits, as long as there is a minimum standard of protection[60]. The Court has developed these margin, and a current example can be seen in the *Freimann* decision of 2004. The Court stated in this decision that:

"However, this right is not absolute, but may be subject to limitations. These are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"[61].

There are then three criteria created by the Court in order to assess if a State went beyond its margin of appreciation. The first is to assess if certain restrictions on the right affect its "very essence"; the second is to assess if these restrictions pursue a legitimate aim; and the third is a proportionality test between the goals at stake and the methods used to achieve it[62]. These three

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[57] For a theory of fundamental rights adjudication see Mattias Kümm, "The Idea of Socratic Contestation and the Right to Justification: the Point of Rights-Based Proportionality Review" *Law and Ethics of Human Rights,* Vol. 4 [2010], Iss. 2, Art. 1, pp. 144-152.

[58] Case of Golder, paragraph 38; Yutaka Arai, id, pp. 35

[59] Yutaka Arai, id.

[60] ECtHR, 28 May 1985, *Ashingdane v. United Kingdom*, application no. 8225/78, paragraph 57

[61] ECtHR, 24 June 2004 *Freimann v. Croatia*, application no. 5266/02, paragraph 26

[62] Yutaka Arai, id.

notions have been treated as being "closely associated or included in the proportionality assessment"[63].

Yutaka Arai argues that the Court has failed in an early stage to provide a coherent definition of "very essence" and delivered a very relaxed understanding of the margin of appreciation. "Firstly, there was absence of any fully-fledged review of the merits and the failure of the part on the part of the Court, in balancing, to have due regard to the *effects* of the limitations on the victim's right. Secondly, the Court (...) reduced the 'very essence' and proportionality requirements to rhetorical values"[64]. However, the Court shifted its position and acted more stringently with regards to the margin of appreciation allowed. Some decisions of the ECtHR like *Canea Catholic Church*, *Klass*, *Todorescu* and *De Geouffre de la Pradelle* lay down certain limits considered to be part of that minimum acceptable standard according to Peter Van Dijk, Fried Van Hoof, Arjen van Rijn and Leo Zwaak. "These cases indicate that the Court is not inclined to leave a very broad margin of appreciation to the national authorities and courts in restricting access to court"[65].

The more stringent version of very essence is divided in three parts. The right of access, in order not to be minimally impaired, should be in first place foreseeable, in the sense that the litigant must have a "clear, practical opportunity" to present his / her claim and that his / her legitimate expectations concerning the way the process is run must be "sufficiently safeguarded" [66] . An example of this situation is the case of *Levages Prestations Services*. Here, a company saw its claim dismissed by the Court de Cassation for failure to produce an interlocutory judgement in the proceedings, and argued that the law requesting this was unclear. The Court, "[i]n order to satisfy itself that the very essence of the applicant company's "right to a tribunal" was not impaired by the declaration that the appeal was inadmissible, the Court will firstly examine whether the procedure to be followed for an appeal on points of law, in particular with respect to the production of documents, could be regarded as foreseeable from the point of view of a litigant"[67].

In second place, access to justice has to exist "in law and in fact", being effective and not merely theoretical[68]. In *De Geouffre de la Pradelle* the Court declared that the right is not effective if the national law regulating access to courts is so complex and unclear that it creates legal

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[63] Id, pp. 37

[64] Id, pp. 38

[65] Peter Van Dijk, Fried Van Hoof, Arjen van Rijn and Leo Zwaak, id, pp. 572

[66] Yutaka Arai, id, pp. 39

[67] ECtHR, 23 October 1996, *Case of Levages Prestations de Services v. France*, application no. 21920/93, paragraph 42

[68] David Harris, Michael O'Boyle, Ed Bates and Carla Buckley, id, pp. 236; Yutaka Arai, id, pp. 40

uncertainty[69]. This idea was stated also in *Kutic*: "[a]ccess to justice is also made illusory if the applicant has the possibility of bringing legal proceedings, but is prevented by operation of the law from pursuing his claim" [70].

The third and final requirement is proportionality, or a "'direct, necessary and adequate link' between the legitimate objective and the restriction on the right of access to a court"[71]. In this last prong, the Court has had to deal with many policy issues, like those concerning national security, immunity of any kind, mental capacity of the litigants and fiscal matters, just to name a few[72]. In the case of *Osman*, for example, where the applicants were refused to put an action against the police for negligence action, the Court stated that it was "not persuaded (...) by the Government's plea that the applicants had available to them alternative routes for securing compensation". According to the Court, "they were entitled to have the police account for their actions and omissions in adversarial proceedings" and so the restriction "in the instant case constituted a disproportionate restriction on the applicants' right of access to a court" [73]. This was a limitation on access to justice that was not accepted by Strasbourg. But the ECtHR has accepted, for reasons of public policy falling under the margin of appreciation, restrictions on access to court based on, for example, parliamentary immunity, the provision of good or fair administration of justice, prevention of court overload and maintenance of the proper functioning of the judiciary in itself[74].

In sum, the right of access to court is recognised by the ECtHR, which has been having a stricter approach concerning the limitations on the right, specially if these limitations impair the central "nucleus" or the "very essence" of access to court. The Court has understood that restrictions which affect the foreseeability of the litigant's claim, frustrating his legitimate expectations towards his procedural rights, or measure which do not grant an effective access but a mere illusory one, or measures that are disproportional must be considered to affect the notion of "very essence".

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[69] ECtHR, 16 December 1992, *Case of De Geouffre de la Pradelle v. France*, application no. 12964/87, paragraphs 33-34; and Peter Van Dijk, Fried Van Hoof, Arjen van Rijn and Leo Zwaak, id, pp. 562

[70] ECtHR, 1 June 2002, *Case of Kutic v. Croatia*, application no. 48778/99, paragraph 25; Peter Van Dijk, Fried Van Hoof, Arjen van Rijn and Leo Zwaak, id, pp. 559; Yutaka Arai, id, pp. 36

[71] Yutaka Arai, id, pp. 41

[72] Id, pp. 43-46

[73] ECtHR, 28 October 1998, *Case of Osman v. United Kingdom*, application no. 23452/94, paragraph 153-154

[74] Peter Van Dijk, Fried Van Hoof, Arjen van Rijn and Leo Zwaak, id, pp. 573

4. The problem of *locus standi* in EU courts

4.1 Notion of the problem: dissecting article 263(4)

Standing in order to challenge a measure by an European institution is currently regulated in article 263, parts (2), (3) and (4) of the Treaty of Functioning of the European Union (TFEU) (previously article 173 of the Rome treaty and 230 of Maastricht[75]). The article reads as follows:

"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 or legal person may, under the conditions laid down in the first and in the 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."

The provision establishes two things: first, who can bring an action of annulment to the European Courts; and second, on what grounds can the applicant bring an action.

The second part of the article identifies four applicants: the Member States of the Union, the European Parliament, the Council and the Commission. According to the wording of the article, these applicants do not need to fulfill any kind of criteria in order to challenge a measure in the European Courts. They have that right just for being these entities. They can thus challenge any measure on such open grounds as, for example, "infringement of the Treaties". For these reasons, they are usually referred to as "privileged" applicants. Historically, the only problem with this prong was the inclusion of the Parliament in the list of privileged applicants. Article 173 did not

[75] The majority of the literature on the subject has always refered to article 173. This has to do with historical circunstances. Article 263(4) has a different wording which will be analyzed specifically: until then, I am always refering to article 173, 230 and 236 indiferrently, as if they had the same formulation.

mention this institution in its original wording, and there were doubts that the Parliament could have the same standing as other institutions such as the Council and the Commission. The Court started by answering this question negatively in the *Comitology* case, but changed its opinion in *Chernobyl*[76]. In the Treaty of Maastricht the Parliament was granted standing to defend its own prerogatives, whilst in the Treaty of Lisbon it was finally put at the same level of the other two main institutions. The third part of the article establishes the grounds of standing for other applicants, which historically were institutions that did not exist or had much influence in the early days of the Community. These institutions are the Court of Auditors, the European Central Bank and the Committee of Regions. Subsequent treaty amendments granted them standing in order to defend their own prerogatives, a situation similar to the one facing the Parliament after Maastricht.The fourth prong of the norm is the problematic part for the purposes of this work. The second part of the article, as said before, does not state any criterium for the applicants to fulfill in order to challenge a measure. In the third part, the criterium to fulfill is the defense of the institutions' own prerogatives. In the fourth part, on the contrary, we have three sets of criteria that private parties must fulfill in order to be able to stand and challenge a legal act. This is why, in comparison with the three institutions and Member States, private applicants are usually referred as being "non-privileged", since they must fulfill the conditions laid down in the article in order to challenge a measure[77].

There are three dimensions to the limited standing question, presented in the article. First, it is important to know which measures are capable of being challenged — or, in other words, what does the notion of "regulatory acts" cover. Second, it is necessary to understand what is the meaning of an act being considered of "direct concern" to a certain legal person. Finally, one has to know what is the meaning of an act being considered of "individual concern" for that same legal person. The openness of the wording of the article already shows us what is at stake. If the Court decides to interpret these provisions in a very restrictive manner, then it will be harder for private applicants to challenge EU legal acts. Otherwise, if the Court decides to interpret these concepts in a more relaxing manner, then it will be easier for private applicants to have direct standing. Art. 263

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[76] Albertina Albors-Llorens, *Private Parties in European Community Law: Challenging Community Measures* Oxford, New York: Oxford University Press, 1996, pp. 24-25; Anthony Arnull, "Private Applicants and the Action For Annulment Since *Codorniu*" *Common Market Law Review* 38, 2001, pp. 19 and *The European Union and Its Court of Justice*, Oxford, New York: Oxford University Press, 2006, pp. 64-68; Case 70/88 European Parliament vs. Council [1991] ECR 2041, paragraph 26-27.

[77] Angela Ward, *Judicial Review and the Rights of Private Parties in EU Law,* Oxford, New York: Oxford University Press, 2007, pp. 284-285

(4) can thus be compared to the controls of a gate, opening and closing, depending on the will of the gate's keeper — in this case, the judges of the ECJ.

The impact of this situation cannot be underestimated. In a time where the Union has competence and powers to act in a way that directly affects individuals in a series of important areas of economic and non-economic nature, the possibility for these same individuals to challenge a measure that "bite[s] deeply into national law (...) can thus carry considerable effects for private sector actors"[78]. The possibility of controlling the legal and executive acts of the political power is a guarantee that has to exist in order to maintain the proper functioning of the liberal democratic system. This is the epitome in most European States, like Germany, France, England and Italy[79]. As Marionlina Eliantonio and Betül Kas state: "[i]n the EU legal system, because of the democratic deficit and the limited supervisory role of the European Parliament, it is of even greater importance to create a system of control over the acts of the European institutions"[80]. If this possibility of challenging legal acts is restrictive, then one might say that it is not only an individual right of access to justice that is at stake, but also a fundamental element of political control and constitutional functioning.

Let us now look at the interpretation the CJEU has done with regards the three dimensions of article 263(4).

4.2 The three dimensions of article 263(4)

a) Type of act

The first dimension concerns the type of acts that can be challenged by non-privileged applicants. The second paragraph of article 173 of the Treaty of Rome read as follows:

"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."

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[78] Angela Ward, id, pp. 259.

[79] Albertina Albors-Llorens, id, pp. 29-40

[80] Mariolina Eliantonio and Betül Kas, *Private Parties and the Annulment Procedure: Can the Gap in the European System of Judicial Protection Be Closed?* Canadian Center of Science and Education, Journal of Politics and Law, Vol. 3, No. 2; September 2010, pp. 121

The wording of the provision made a distinction between decisions and regulations. Only the first type of measures could be challenged by private applicants. The second type could only be challenged if it substantively corresponded to a decision. Article 173, thus, only allowed for the challenge of measures which were *de facto* decisions, independent of their form. Regulations which contained particular commands for specific actors could be challenged. As Anthony Arnull stated, "[w]here the contested act took the form of a regulation, the applicant was generally required to show that it constituted in substance a decision(...)" in order to be able to challenge it[81]. Only acts that were substantively of a general nature could not be challenged by private applicants. The CJEU stated that the purpose of this prong "is to prevent the Community institutions from being able to bar proceedings instituted by an individual against a decision of direct and individual concern to him by simply choosing the form of a regulation."[82]

The problem with this issue is to try to define what counts as a decision, to find a material and not only formal distinction between general and individual acts. The Treaty of Rome defined what was both a decision and a regulation in article 189. Whereas a regulation is an act of general nature, binding everyone, a decision only binds those to whom it is addressed. Anthony Arnull says that the problem with knowing if a regulation is in fact a decision has to do not with whom it addresses but with whom if affects. "The crucial distinction therefore seems to be between being *bound* by a measure and being *affected* by it: a true decision binds only a class, while a true regulation is potentially binding on everyone, although the class of people it affects may be more limited"[83]. That was the main question of the applicants in *Calpak*, for example, since there were few peach producers in the EU and they were easily identifiable[84].

The Treaty of Lisbon changed the wording of the norm. Article 263(4) now makes mention to "a regulatory act". The notion of regulatory act, unlike the notions of regulation or decision, is not written in the Treaty. There is now the problem of what this definition means. According to Mariolina Eliantonio and Betül Kas, the notion of regulatory act means acts of general nature, but not legislative ones. This was the meaning proposed to the drafters by the then presidents of the ECJ and the CFI, who "argued that it would be appropriate to continue to take a restrictive approach to actions by individuals against legislative measures and to provide for a more open approach with

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[81] Anthony Arnull, "Private Applicants and the Action For Annulment Under Article 173 of the EC Treaty" *Common Market Law Review* 32, 1995, pp. 19.

[82] Case 162/78, Wagner v. Commission, [1979] ECR 3467, paragraph 16; Anthony Arnull, id, pp. 14

[83] Anthony Arnull, id, pp. 21

[84] Joined Cases 789 and 790/79, Calpak Spa Bologna and Societa Emiliana Lavorazione Frutta Spa v. Commission [1980] ECR 1949

regard to actions against regulatory measures"[85]. This new terminology still shades some doubts, since it is open to interpretation, whilst before the terms of decision and regulation had at least a definition on the Treaty. It seems clear that the category now includes acts of other EU bodies and agencies that can produce effects to third parties[86]. But it is difficult to understand what is the impact of this change concerning certain regulations which materially are not of legislative nature. The amendment does not change the material distinction of what amounts or not to a legislative act, which was the problem concerning the past version of the article.

However, the doctrine seems to agrees that this change has facilitated access to justice for individuals, since as Alexandra Dubóva states, "individuals are relieved from the obligation of proving *individual concern* when seeking an annulment of the regulatory act"[87]. Former AG Francis Jacobs also believes that this change was the most important one for the judicial system of the EU[88].

b) Direct concern

The second problem is to understand what the Treaty means by "direct concern". Of the three problems this is the one which has not brought many controversy over time, sine the Court's approach in the case of *Les Verts vs. Parliament* has stood up until today. In this decision the ECJ stated that a measure is of direct concern for someone if it can be immediately applied without the need for any other action by a third party to happen. In the words of the Court, if the measure abounds to a "complete set of rules which are sufficient in themselves and which require no implementing provisions" then it is of direct concern[89].

The criteria laid by the Court means to exclude from article 263(4) the possibility of challenging measures which only affect the applicant by means of a a discretionary action given to a third party by the law-maker. The Court stressed this in the *NTN Toyo Bearing Company v.*

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[85] Mariolina Eliantonio and Betül Kas, id, pp. 127; and Alexandra Dubóva, *Individuals At the Gate of the European Court of Justice: Accessibility of Judicial Review For Private Applicants in the European Union and its Compatibility With Standards of Access to Justice,* LL.M Long Thesis, Human Rights Program, Central European University November 29, 2010, pp. 55

[86] Alexandra Dubova, id, pp. 51

[87] Id, pp. 52

[88] Francis Jacobs, "The Lisbon Treaty and the Court of Justice", EU Law After Lisbon, Edited by Andrea Biondi, Piet Eeckhout and Stefanie Ripley; Oxford, New York: Oxford University Press, 2012, pp. 197; . Stephan Balthasar, "Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263 (4) TFEU" European Law Review, Vol. 35, Issue 4, August 2010, pp. 548

[89] Case 294/83, Les Verts vs. Parliament [1986] ECR 1339, paragraph 31; Anthony Arnull, "Private Applicants and the Action For Annulment Under Article 173 of the EC Treaty", id, pp. 24-25

Council case[90]. The measure is of direct concern if the third party does not have any type of discretion in its application. This means the exclusion of directives from the category legal acts to be challenged due to the necessity of being implemented[91]. This was the idea established in the notion of article 263(4) made in the Treaty of Lisbon, by stating that a regulatory act might challenged when it "is of direct concern to [the applicant] and does not entail implementing measures".

c) Individual concern

The notion of individual concern is the most problematic of the three article 263(4) because it is the real "key" to the gate. It is through the interpretation of this criteria that the ECJ has limited access of private parties in order to challenge EU acts.

The Court had to define what was individual concern in 1963, six years after the signing of the Treaty of Rome, in the case of *Plaumann & Co. vs. Commission*. This case concerned a German company that imported fruits from a third country, an activity subject to a custom duty, according to the Common Customs Tariff in place in the EEC at the time. The company, Plaumann, decided to challenge the act of the European Commission that refused a request of the Federal Republic Germany to suspend this tariff, which damaged their business. In essence, there was a decision addressed to Germany which a third person wanted to contest, alleging that it was affected by it. The case fit like a glove under the umbrella of possible situations covered by article 173.

The Court stated that an applicant can only be individually concerned in the terms of article 173 "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" [92]. In essence, the applicant has to prove that that measure affects him in a way which is similar to the original addressee and different from all other external parties to the act. The Court, following this idea, assessed that Plaumann did not have individual concern because it lacked these specific attributes. The company was affected by the measure for importing clementines, an activity which anyone could exercise at any time. In the Court's own words, "the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised

[90] Case 113/77, NTN Toyo Bearing Co. v. Council, [1979] ECR 1185

[91] Anthony Arnull, "Private Applicants and the Action for Annulment Since Codorniu", id, pp. 22-23

[92] Case 25/62 Plaumann v. Commission [1963] ECR 95, paragraph 107.

by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee"[93]. For this reason, Plaumann did not have standing, according to article 173, to challenge the act.

The problem with the notion is that it is very difficult to envisage a situation which could possibly fulfill it. The criteria of the Court is very strict since it implicates that the applicant proves that the measure affects him in an isolated way from all the other recipients of the measure itself. Only when the applicant managed to prove that he belonged to a closed class of people whose number "was fixed and (...) no new applications could be added", as it happened in the *International Fruit Company vs. Commission* case where the Court grant standing[94]. "[W]here the class of persons affected by a measure was an open one, it was much more difficult for a member of that class to establish individual concern"[95]. However, even this argument of a closed class of people affected by the measure did not stand by itself, since the CFI refused several cases where the applicants fitted this logic[96]. Also, this criterion of "specificity" of the applicant's individual position *vis-a-vis* the general recipients of the measure made it very difficult for any kind of applicant to challenge a legal measure like a regulation, although it could happen, as seen in the *International Fruit Company* case[97]. Taki Tridimas and Sara Poli state that this test is "detached from economic reality", leading to "the refusal of *locus standi* even in cases where the applicant is the only person of a potential open class at the time the contested measure is adopted and there is economically no realistic prospect that other undertakings will become part of the same group"[98].

4.3 *Extramet* and *Codorniu*: the revolution that was not

The interpretation of the notion of individual concern for non-privileged applicants was held consistently by the ECJ during a series of cases. The jurisprudence was open and relaxed in a small number of situations, but in general continued to be very restrictive. Anthony Arnull stated that

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[93] Id.

[94] International Fruit Company vs. Commission; Anthony Arnull, "Private Applicants and the Action For Annulment Under Article 173 of the EC Treaty", id, pp. 28

[95] Anthony Arnull, id, pp. 28

[96] Anthony Arnull, "Private Applicants and The Action for Annulment Since Codorniu", id, pp. 32

[97] Anthony Arnull, "Private Applicants and the Action For Annulment Under Article 173 of the EC Treaty", id, pp. 26.

[98] Taki Tridimas and Sara Poli, "*Locus Standi* of Individuals Under Article 230(4): the Return of Euridice?" *Making Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice,* Edited by Philip Moser and Katrine Sawyer. Cheltenham, Northampton: Edward Elgar Publishing Group, 2008, pp. 82

some of these cases where the Court granted standing, like *Les Verts* or *Piraiki-Patraiki*, "were characterized by a variety of special features which cast doubt on their wider application"[99]. Usually these cases referred to specific areas such as state-aid or anti-dumping. A general relaxation did not seem possible.

However, in the beginning of the nineties, the CJEU decided two cases in a fashion which seemed to show a new willingness to relax the standing for private applicants. These decisions could pave way for the much awaited overruling of the *Plaumann* case law and allow for individual applicants to have more opportunities to challenge EU measures.

The first case was *Extramet*[100]. *Extramet* was the largest calcium importer in the EU and decided to challenge an anti-dumping regulation which gravely affected its position in the market. The Court stated that Extramet was "the largest importer of the product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product" and agreed that the company was severely affected by the regulation, in a market where it had only one competitor[101]. For the Court, this situation satisfied the *Plaumann* test, and the applicant could stand to challenge the regulation. The novelty of *Extramet* was the fact that the Court used the same criteria for a situation which would usually be dismissed, since — and paraphrasing *Plaumann* — anyone could exercise that activity in the future. The Court decided to follow a more material approach than usual, taking into considerations the effects of the restriction in the applicant's market position. Although the measure was general, it materially applied only to one concrete actor, the sole competitor in the market. However, although this case showed an opening for change, the Court also chose carefully to make this decision in order to limit its effects to happen only in the area of anti-dumping, an economic-oriented case, which was closer to the essential constituent elements of the treaties[102]. There was then the doubt of whether this relaxation could be applied to other situations[103].

Two years after *Extramet* came the *Codorniu* case[104]. *Codorniu* concerned a Spanish company which was the largest producer of a sparkling wine of "crémant" type, which it had been producing since 1924. The Council issued a regulation stipulation that the designation of "crémant"

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[99] Anthony Arnull, id, pp. 28

[100] Case C-358/89, Extramet Industrie SA v. Council [1991] ECR I-2501

[101] Extramet Industrie SA v. Council, id, paragraph. Graínne de Búrca and Paul Craig, id, pp. 519

[102] Graínne de Búrca and Paul Craig, id, pp. 518-521

[103] Taki Tridimas and Sara Poli, id, pp. 80

[104] Case C-309/89, Codorniu SA v. Council [1994] ECR I-01853

could only be used for sparkling wines produced in France and Luxembourg. Codorniu challenged the regulation since it prohibited the company from selling its product as being the type of wine that they had always produced. Like in *Extramet*, the applicant also succeed in having standing. The Court held that the criteria of individual concern was satisfied since the regulation gravely affected the business of Codorniu, since the company had been selling the "crémant" wine for several decades. Again, the Court decided to follow a material reasoning: the applicant's commercial interests were gravely affected by the regulation, and that was why he should have standing in order to challenge the measure.

These cases brought big hopes with regards to the solving of the limited standing problem. But more than just relaxing the criteria, these cases did not overruled the old *Plaumann* formula. Both decisions were sparse in reasoning: in *Codorniu* the ECJ just stated that the applicant had "established the existence of a situation which from the point of view of the contested provision differentiates it from all other traders"[105]. "The reader of both judgments is left with the impression that the Court was unable to agree to anything more than the briefest of reasons to support its conclusions."[106] This option by the Court, as Anthony Arnull states, might have been meant to "conceal" the importance of its judgment[107]. By not overruling *Plaumann*, the Court was taking pragmatic steps in relaxing the criteria. It did not present a new solution for cautious reasons — after all, the *Plaumann* criteria had been in use since 1963; to simply overrule it would have meant a big step for the CJEU. But even with this reasoning, it seemed that the CJEU was more open to relax the criteria, even if it did so by using it all the same when deciding on the applicant's right to standing.

However, this was not what happened. Taki Tridimas and Sara Poli write that two cases in the aftermath of *Codorniu*, *Campo Ebro* and *Buralux* were solved by the traditional *Plaumann* formula[108]. As Anthony Arnull states, "Recent case law shows that the optimism with which some commentators (this one included) greeted the ruling in *Codorniu* was largely misplaced. It is true that private applicants may now in principle challenge true regulations and true directives without having to show that the contested act is in substance a decision. However, the test of individual concern seems to have become even stricter, particularly where a legislative act is being

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[105] Codorniu SA v. Council, id, paragraph 22.

[106] Anthony Arnull, "Private Applicants and the Action for Annulment Since Codorniu", id, pp. 8

[107] Id, pp. 9

[108] Taki Tridimas and Sara Poli, id, pp. 81

challenged"[109]. In sum, opening showed by these two cases was not sufficient for stating that the limited standing problem had been solved.

4.4 The *UPA* case and the final word of the CJEU

In 2001 a new case on appeal from the CFI, *Union di Pequeños Agricultores vs. Council* (the *UPA* case) arrived at the CJEU. The case concerned a Spanish trade association who lodged an annulment action against a regulation that organized the olive oil market in the Union. This regulation, according to them, gravely affected their commercial interests. The CFI had already ruled on the inadmissibility of the action, considering that although it is possible to challenge regulations, the applicant did not have individual concern in this matter. It also stated that the fact of UPA's interests being severely affected by the regulation could not count as being a sufficient reason to grant standing[110]. The ECJ was then called to decide on the possibility of UPA being or not able to challenge the measure.

AG Francis Jacobs delivered an important opinion in the first stages of the case. In his declaration during the proceedings, AG Jacobs stated that what was at question in the case was to understand if the EU judicial system, with the interaction between national and European courts, provided an effective system of judicial protection for individuals. He stated that the CJEU believed it to be so, basing himself in the Court's opinion in the *Greenpeace* case. "Suffice it to note that the Court's judgment is based on the view that Community measures of general application should in principle be challenged by individuals through proceedings before national courts, and that individual applicants are granted effective judicial protection against unlawful measures because the national courts may request a preliminary ruling on the validity of Community measures from the Court of Justice"[111]. But AG Francis Jacobs did not agree with the Court's opinion. He argued that the mechanism of preliminary ruling did not allow for a complete system of justice and fair access, due to the fact that the question is dependent on the national court, which can decide not to put it or to err when referring the question. As he said:

"[T]he principle of effective judicial protection requires that applicants have access to a court which is competent to grant remedies capable of protecting them against the effects of unlawful measures. Access

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[109] Anthony Arnull, id, pp. 51

[110] Case T-173/98, Unión de Pequeños Agricultores v Council [1999] ECR II-03357, paragraphs 53-55

[111] Opinion of Mr Advocate General Jacobs delivered on 21 March 2002, Unión de Pequeños Agricultores v Council, Case C-50/00, paragraph 35

to the Court of Justice via Article 234 EC [preliminary ruling] is however not a remedy available to individual applicants as a matter of right. National courts may refuse to refer questions, and although courts of last instance are obliged to refer under the third paragraph of Article 234 EC, appeals within the national judicial systems are liable to entail long delays which may themselves be incompatible with the principle of effective judicial protection and with the need for legal certainty"[112].

Also, not all community measures require acts of implementation by national authorities. For AG Francis Jacobs, the important thing to do is to change the notion of individual concern. The new notion should be more pro-applicant, thus considering the material consequences of the EU act on the individual's interest. "[It] should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests"[113].

The CFI received the *Jego-Quéré* case while the CJEU was still deciding on *UPA,* and took the opportunity to make an important decision in the quarrel of *locus standi* rules. Jego-Quéré was a French fishing company that wished to challenge a Council regulation concerning fishing methods. The regulation prohibited the use of a certain type of nets which were used by the applicant. The CFI started by stating that "access to the courts is one of the essential elements of a community based on the rule of law" and that it is defended by the case-law of the ECJ and article 47 of the Charter of Fundamental Rights[114]. Then, the Court tried to see if there were any available judicial options for the applicant to challenge the measure, taking direct issue with the ECJ's position of a complete system of remedies. The Court did not think this was the case in the present situation, citing AG Francis Jacobs' opinion in *UPA*. "The fact that an individual affected by a Community measure may be able to bring its validity before the national courts by violating the rules it lays down and then asserting their illegality in subsequent judicial proceedings brought against him does not constitute an adequate means of judicial protection."[115]. The Court thus reached the conclusion that standing must be granted to the applicant, because otherwise it would not be possible for him to challenge a measure which affected his situation. This would have amounted to a denial of his right to access justice. The CFI decided to follow the opinion of AG Francis Jacobs in UPA, and defended a looser understanding of *locus standi* provisions in this particular case, thus taking issues with the previous approach of the CJEU in the matter.

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[112] Opinion of Mr Advocate General Jacobs, id, paragraph 42

[113] Id, paragraph 60

[114] Case T-177/01, Jégo-Quéré & Cie SA v. Commission [2002] ECR II-02365, pp. 41-42

[115] Jégo-Quéré, id, paragraph 45.

The CFI was not proposing a new long-term solution for the problem, but rather to avoid that the applicant in this specific case had his right of access to court violated. Taki Tridimas and Sara Poli state that "The CFI test is clearly less ambitious: understandably, the Court was preoccupied with the facts of the case and less concerned about articulating a general theory of *locus standi*"[116]. Both the decision and the opinion of AG Jacobs seemed to follow the new approach of the CJEU in *Codorniu* and put some pressure on the higher Court to clearly withdraw its historical position on the issue.

However, the CJEU declined to follow the approach suggested by AG Francis Jacobs and by the CFI in *Jego-Quéré*. The decision is divided in three parts. In the first one, the Court decided to uphold the CFI's decision on the inadmissibility of standing for the applicant, since *UPA* does not fulfill the criteria of individual concern[117]. In the second one, the Court responded to AG Jacobs (and indirectly, to the CFI's decision in *Jego-Quéré*), considering that the judicial structure of the EU provides for "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions"[118]. In the third and final part, the Court admitted that a different system of judicial review is possible in the Union. But that system can only be created by a Treaty amendment, thus putting the deciding key on the Member States, the guardians of the treaties[119]. The Court then "washed its hands" from solving the problem and put the onus of changing the system on the Member States, as Angela Ward points out. "It would seem, therefore, that amendment to Article 230 of the EC Treaty will be necessary if private parties are to be entitled to bind Community institutions, through judicial channels, to their duty (...) when elaborating Community policies." Although "[t]his contrasts markedly with the policy pursued by the Court of Justice in the context of its case law concerning Member States remedies and procedural rules, with respect to which the Court of Justice was equally bereft of a mandate in the foundation treaties to elaborate detailed principles"[120], the last statement of the ECJ in *UPA* is clear. Only by a change through the political process could limited standing be solved.

The problem with this idea is the difficulty in making amendments to the treaties, since it requires a unanimous agreement between all Member States. There were movements on this direction taken by the Union in the period that preceded the signing of the Treaty of Nice, with the

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[116] Taki Tridimas and Sara Poli, id, pp. 89

[117] Case C-50/00, Unión de Pequeños Agricultores (UPA) v. Council [2002], ECR I-06677, paragraph 32

[118] UPA, id, paragraph 40

[119] UPA, id, paragraph 45

[120] Angela Ward, id, pp. 328.

publishing of two reports concerning the judicial system, and addressing the main issues of the *fin de siécle* ECJ: the amounting delay in procedures, the way of dealing with an ever growing case-load and the composition of the Court, specially with the enlargement of 2004 in the horizon[121].

Despite these publications and some minor changes to the rules of procedure of the ECJ and the CFI, and the already mentioned amendment to article 26, both the treaties of Nice and Lisbon failed to bring substantive developments to limited standing rules. Not even the approval of the Charter of Fundamental Rights managed to influence the Court to change its understanding of individual concern and move to a more material approach. The overture showed in *Extramet* and *Codorniu* did not develop.

4.5 Critiques to the limited standing problem

Many authors have taken issues with the restrictive interpretation of the notion of individual concern taken by the CJEU since *Plaumann*.

For Eric Stein and Gregg Vinning this had to do with the difficulty of the Court of Justice, working as a transnational court and "opening ground" in a revolutionary and controversial way, to locate itself in the European judicial and political realm. Although it risked several important decisions with the granting of direct effect and supremacy to European law, it still had to decide whether to be a "transnational" or a "federal" entity. This "existential" problem made it be more federal in one way (direct effect and supremacy) and more transnational in another, by limiting the access of private people to the Court. It was a way not to compromise the progressive and historical achievements that it was doing by giving power to applicants *vis-a-vis* the Member States[122].

Hjalte Rasmussen, on his part, argues that limiting *locus standi* rules is part of the Court's ideal of becoming a higher court of appeals of European law. The way of getting this is by allowing private applicants to challenge EU measures in national courts through the preliminary ruling mechanism, thus making these same courts refer to the ECJ which then acts as a supreme court and establishes the rules that other lower courts will have to follow[123].

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[121] There were also a series of academic writtings concerning the EU judicial system around this time. Two books worth mentioning are "The Future of the Judicial System of the European Union", edited by Alan Dashwood and Angus Johnston, and "The European Court of Justice" edited by Graínne de Búrca and Joseph Weiller.

[122] Eric Stein and Gregg Vinning, id, pp. 230-234

[123] Hjalte Rasmussen, "Why is Article 173 Interpreted Against Plaintiffs?" *European Law Review*, Vol. 5 No. 2, April 1980, European Law Review, pp. 120-125.

Albertina Albors-Llorens, on her side, believes that the Court in *Plaumann* was just following the will of the Member States. She makes an historic overview of European Integration and states that, in the European Coal and Steel Community Treaty, standing requirements were very liberal. Article 33 was interpreted by the High Authority in the *Nold* case in order to encompass every measure that "directly affects the position of the applicant". The framers of the Treaty of Rome did not state the same in article 173, by creating the requirements of direct and individual concern. Albors-Llorens thus argues that the Court did not want to go against the framer's intention[124].

Anthony Arnull, on its turn, dismisses this argument. He looks at how the Court did not follow the letter of the Treaty in the early stages of EU integration as a sign of its will to go against the framer's intention when deemed necessary. He cites the *ERTA* case, which allowed parties to challenge an act in the beginning of procedures, where the Court stated that "to interpret the conditions under which the action is admissible (...) restrictively" is not compatible with the purpose of the rule of law[125], and the *Chernobyl* case, which gave powers of standing to the Parliament, as evidence of this. The reason for having art. 173 has to be different. He then presents reasons which are very similar to those of Stein and Vinning: that the Court was still trying to establish itself in the Community. More than that, the Court was trying, through its actions, to establish *the* Community itself in European legal and political sphere.

This is also the idea of Taki Tridimas and Sara Poli. Both authors state that the "[CJEU] and the CFI are already overburdened by a heavy case-load" and that relaxing the criteria would bring a proliferation of cases which in the end might be unbearable to handle. They present other arguments, such as the fact that restrictions of access to court are normal in most European states, as the limiting possibilities for individuals to challenge legal acts [126]. In another article, now co-written with Gabriel Gari, Taki Tridimas states that it is an institutional concern to maintain a sustain case-load, and that the Court is more eager to have a strict approach regarding Member States actions than with EU legal acts. "Where it comes to judicial review of Community action, the influence of pro-integration policies in the Court's decision making is manifested not by way of judicial activism but by way of self-restraint. It is the passive approach to the review of the legality of measures

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[124] Albertina Albors-Llorens, id, pp. 40-42

[125] Case 22/70, Commission v. Council [1971] ECR 263, paragraphs 40-41; Anthony Arnull, "Private Applicants and the Action For Annulment Under Article 173 of the EC Treaty", id, pp. 16-17

[126] Taki Tridimas and Sara Poli, id, pp. 91-92

adopted by Community institutions and the conservative criteria on standing which functions as instruments of federalism"[127].

In our view, we agree with Eric Stein and Gregg Vinning and Takis Tridimas and Gabriel Gari's opinion that the CJEU operated (and operates yet) a different control vis-à-vis acts of the European institutions than it does regarding acts of the Member States. The Court was trying in the first years to empower the EU in front of the Member States by giving direct effect to EU law. To extend the notion of standing would have meant a step too far for the Court at that stage, since it could risk suffering a backlash form private parties regarding the own action of the EU. Nowadays, albeit the pressure from plaintiffs and academics, but due to the current case-overload, it is difficult for the CJEU to change its approach.

[127] Taki Tridimas and Gabriel Gari "Statistical Analysis of Judicial Review of EU Law (2001-2005)" *European Law Review,* 35 Issue 2, 2010, pp. 133 and pp. 136

5. Limited standing problem and the ECHR

5.1 The two paradigms: "very essence" and Bosphorus

We have seen, on one hand, how the right of access to justice is understood by the ECtHR. The Strasbourg Court declares that it is an important right protected by the Convention, but that States have a margin of appreciation concerning its adjudication, as long as that margin respects the "very essence" of the right. We have also seen, in another hand, how the ECJ has answered critiques to its position towards standing of private parties in order to challenge EU measures. The Luxembourg Court considers that the current *status quo*, which allows for individuals to challenge EU measures in front of national courts, provides an effective judicial protection. We now face the final task of our work, which is to see how, in case of accession, would the limited standing problem in the EU judicial system be judged under the ECHR system.

As said before, the ECtHR gives some margin of appreciation to States when limiting access to justice, as long as the minimum level of protection required is maintained. A defense of the ECJ's strict interpretation of standing rules in article 263(4) would inevitably need to prove that the "very essence" of the right of access to court, in its three notions, is respected. An analysis of these requirements by looking at the judicial criteria laid by the case-law of Strasbourg from *Golder* until recently, and a comparison with the ECJ's defense of its system in *UPA* is therefore necessary.

However, another important element must be pondered. The ECtHR had the opportunity to express its opinion on the EU's judicial system in a series of decisions since (and including) *Bosphorus*. The Court issues here clear considerations regarding the way individual's access to judicial protection is respected in the EU. These considerations must be taken into account when assessing a possible judgment of *locus standi* rules since they reveal a prior opinion of the ECtHR which may be deferential of the ECJ's position.

We will focus on these two points in this section. First, we will consider the margin of appreciation granted to contracting states with regards the adjudication of the right of access to justice, and see how the EU's approach, laid in *UPA*, might or not fit in this criteria. Second, we will look at the decisions of the ECtHR that make references to the EU's judicial system of protection and what consequences they might have for the debate at stake.

5.2 Margin of appreciation and the "very essence" requirement

As discussed in part two, the right of access to court is inherently established in article 6(1) of the Convention. The ECtHR admits that Contracting States have a margin of appreciation when restricting this right, but this margin is subject to limits. The restriction imposed on the right cannot, on one hand, violate its "very essence" — it cannot frustrate legitimate expectations of the applicant and its exercise must be factually possible and not just illusory — and, on the other hand, has to pursue legitimate aims. Finally, the means applied must be proportional to the achievement of the purpose that is pursued. It is through these three tests that the position of the ECJ must be assessed.

Let us look at first at the test of the "very essence" requirement. We will start with the second sub-test of the criteria, that the exercise of the right must be possible and not illusory. This seems to be the most difficult point for the EU to defend since it is where the strict interpretation of the notion of individual concern will be more at stake. Although there is a measure that allows individual applicants to challenge a legal act of the EU — article 263(4) — the strict interpretation rendered by the ECJ may make this possibility rather difficult in practice to happen. Only those who can prove that the measure affects them as if they were the receivers of the act, isolating them from all other possibly affected people, can *de facto* have standing. As we have seen before, only a small category of people can possibly fit this notion. This interpretation amounts for a denial of justice for those who are concretely affected by the measure in their economic interests, such as *Jego Quéré* or *UPA*. It is therefore a right which, albeit theoretically possible, it is very difficult to be exercised in a concrete situation. The partial relaxation of the article in the Lisbon Treaty, in situations concerning decisions, should not change this paradigm very much, since in matter where regulations are at stake (such as *UPA*, for instances) the applicant will still not be granted a right to

The other sub-test, of foreseability and protection of legitimate expectations of the applicant, is connected to the test of concrete and possible exercise of the right. An applicant must have a "clear, practical opportunity" to challenge any a measure which affects his / her rights. This connects with one of the points raised by AG Francis Jacobs' opinion in *UPA*, the problem of legal certainty[128]. The application of the notion of individual concern is not always clear. Although the ECJ's interpretation has been more or less consistently upheld, there are still cases where the Court applies the criteria differently, such as *Codorniu*. Individual applicants therefore have problems in foresseing the chance for their claim to be accepted in the ECJ. In some cases the Court seems to accept the effect suffered by these same individuals in their legal sphere; in other it does not.

The second test of article 6(1) concerns the purpose of achieving a legitimate aim with the approval or maintenance of the restriction. We enter the discussion of policy reasons that might be

[128] Opinion of Mr Advocate General Jacobs, id, paragraph 48.

behind the restriction imposed by the strict interpretation of the ECJ. This is a difficult test to argue. The ECJ has never presented the reasons behind its approach. In fact, since *Plaumann* that the Luxemborug Court merely states its interpretation of individual concern, assesses if the applicant fits the test and dismisses or accepts the claim. It has been the task and work of legal scholars to present their thoughts on the possible policy reasons behind this interpretation, as seen in the last section of part three. In this regard, there are two reasons which we consider more pertinent and that might be used by the EU to explain its policy.

The first is the defense of the preliminary ruling system and the principle of sincere cooperation laid down in article 5 of the TEU. The preliminary ruling mechanism has been one of the central motors of European integration and a unique characteristic of its system. With this system of cooperation, national courts have been called upon to participate in the Integration process through the submission of questions to the ECJ. This system allows for the national courts to have the possibility of judging the claim at stake, since EU law is part of national law, and for the ECJ to have control over the application of EU law. In *UPA* the ECJ refers to this issue when stating the principle of sincere cooperation and the effective protection granted to individuals through this inter-State system[129]. The maintenance of this *status quo* can be used as a legitimate aim to protect by the ECJ with this interpretation.

The second reason is the argument of case overload. The preliminary ruling mechanism spares the Court the discussion of several cases that can be decided at a national level, since according to the *Cilfit* doctrine of "acte claire" it is not mandatory for a court to send a question. As we have seen before, authors like Anthony Arnull, Takis Tridimas and Sara Poli defend that the ECJ is not relaxing its interpretation of individual concern in order to protect itself from a possible case overload. This is an argument with strong factual evidence: the number of cases has been rising steeply in the past few years and decisions have been rendered with more and more delay[130]. It is likely that the case-load will tend to continue on this growing tendency, thanks to the enlargement process going on in Eastern countries and the growth of political competences of the Union, now in the financial area. This is an argument that might receive acceptance in Strasbourg, since the ECtHR has accepted it as falling under the margin of appreciation of States when complying with article 6 of the Convention. The example is the case *Brualla Gómez de La Torre v. Spain*, where the court considered "legitimate the aim pursued by" the restriction on access to court "so as to avoid

[129] UPA, id paragraphs 40-42

[130] See for all Taki Tridimas and Gabriel Gari, id, pp. 131-173

that court's becoming overloaded with cases of lesser importance"[131]. The ECtHR is also having problems with case-load managing, which would make an argument in this regard more sensible. However, as we have seen, the ECJ never said that this was the reason behind its continuing position regarding strict standing rules. The Court prefers to say that is applies the criteria due to legal reasoning than to say that the criteria is applied for reasons of political or institutional nature — although it seems that this is the case. In any case, the fear of case overload might be seen as a system of

The third and final test concerns a proportionality assessment between the goal sought and the means used to achieve it. This proportionality judgement will focus on seeing if the restrictive interpretation in the end affects the right of access in an unfair manner. The critical bulk for this test will be the justification of the ECJ when upholding its defense of the *Plaumann* formula in *UPA*. The ECJ stated that the current judicial structure of the EU allows for "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions"[132]. The EU might argue that albeit its judicial system makes it difficult for individual applicants to directly challenge EU measures in front of its Courts, they can challenge them through the courts of the Member States. By this way, the individual will be protected and be able to present a claim upon a violation of EU law.

Summarizing our thoughts, it seems that the biggest challenges for the ECJ will be in "the very essence" test and on the presentation of its legitimate aims to do so. The EU Court's interpretation of *locus standi* rules does in fact render a denial of justice to individuals, which However, in the subsequent proportionality test, it seems that the EU might have a case to defend this strictness of approach. And, as we shall see next, it might have already been given a helping hand by the ECtHR itself.

5.3 The bed that the ECtHR laid

In part one of this work we looked at the relation between the legal orders of the EU and the ECHR, and how both Courts have interacted with the other's system when the circumstances of the case at stake asked for it. In the case of the ECtHR, this happened in decisions like *Matthews*, *Bosphorus*, *Emesa Sugar* and *Kokkelviserij*. As we stated before, there are two cases where the

[131] ECtHR, 19 December 1997, *Case of Brualla Gómes de La Torre vs. Spain*, application no. 26737/95, paragraph 36

[132] UPA, id, paragraph 4

ECtHR had the opportunity to express opinions concerning the EU's judicial system. These decisions can be chronologically organized and allow for the presentation of a theory.

We have already seen the impact of *Bosphorus* in defining the relations between the ECHR and the EU, through the creation of the criteria of equivalent protection. What we did not speak about was that the ECtHR made several interesting arguments concerning the judicial system of the EU and how it protects individuals in the decision. This happened when the Court was evaluating the EU's commitment to human rights protection in order to understand if it offered an equivalent level of protection to that of the Convention. Although the Court admits that "access of individuals to the ECJ (...) is limited" since there is restrictive standing rules under the Treaty provisions to challenge a EU measure[133], it also considers that it "remains the case that actions initiated before the ECJ by the Community institutions or a member State constitute important control of compliance with Community norms to the indirect benefit of individuals"[134]. The Court did not go further in developing this argument, since the case at stake concerned other issues that right of access to court. But it laid what can be called a first stone, seemingly accepting that the EU judicial system offered a sufficient level of protection to individuals even if it granted only limited standing.

There were discussions about article 6 in *Emesa Sugar* and *Kokkelviserij*, but they were focused on the problem of fair trial — the question of adversarial procedure in an applicant's claim to reply to the AG's opinion — and not specifically on right of access to court. However, the ECtHR either dismissed the claim as inadmissible or considered that the rules of fair trial were not violated by the impossibility of answering to the AG. These two steps can be seen as some leniency of the ECtHR towards the EU judicial system.

It was in the recent *Michaud* case that the ECtHR made a clear declaration regarding the protection of individuals by the judicial system. *Michaud* concerned a French lawyer who wished to contest an EU directive on the subject of money laundering. According to the directive, lawyers should report any behavior of their clients that might be considered suspicious of money laundering when counseling them in certain activities, such as real-estate negotiations or banking matters. Michaud considered that this matter violated the duty of confidentiality between lawyer and client, protected by article 8 of the Convention. In the decision, the ECtHR had to analyse the relationship of this case with EU law since there was a directive at stake. Following the same rationale of *Bosphorus*, the Court looked to see if the presumption of equivalent protection (which was rebutted by Michaud in his complaint) was still valid. The ECtHR acknowledged, like it did in *Bosphorus*,

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[133] Case of Bosphorus, id, paragraph 162

[134] Id, paragraph 163

that the EU "offered equivalent protection of the substantive guarantees" and that it had to see if the "machinery for monitoring" this same protection was equivalent to that of the Convention or not. The Court then laid his opinion in paragraph 111:

"So, although individual access to the Court of Justice is far more limited than the access private individuals have to the Court under Article 34 of the Convention, the Court accepts that, all in all, the supervisory mechanism provided for in European Union law affords protection comparable to that provided by the Convention. Firstly, because private individuals are protected under Community law by the actions brought before the Court of Justice by the Member States and the institutions of the European Union. Secondly, because they have the possibility of applying to the domestic courts to determine whether a member State has breached Community law, in which case the control exercised by the Court of Justice takes the form of the preliminary referral procedure open to the domestic courts."[135]

The Court decided that equivalent protection could not be used, but the statement was already done. This reasoning of Strasbourg is the best answer that the EU can present in order to justify in the proportionality test why it does comply with article 6(1) of the ECHR. It is also interesting to note the similarity between the ECtHR's opinion and the one laid down by the ECJ in *UPA*, when stating the importance of the system of preliminary ruling, although the Strasbourg Court presents another interesting argument. The "indirect protection" of individuals offered by the Member States and the EU institutions bases itself on the premise of the defense of public good by public bodies. It represents a classic view that the State is the best protector of individual's rights in the international sphere, and resonates with Eric Stein and Gregg Vining's assessment of the role the EU was playing in the seventies, between being a federal or an international political entity.

[135] ECtHR, 6 December 2012, *Case of Michaud v. France*, application no. 12323/11, paragraph 111

Conclusion: A never ending story?

The limited standing problem is as old as European integration itself. One can say that it is a mark, a scar of what Eric Stein and Gregg Vinning defined as the existential-constitutional "angst" of the Community, to be a mere transnational body or a full-federal entity. It is interesting to see that the interpretation of "individual concern" has stood more or less consistently over all the history of the EU. As Anthony Arnull states, it is necessary to "adapt the action for annulment to the way in which the Community has developed and to address difficulties which the authors of Article 230 quite understandably failed to foresee. The thread which links them together is the need to ensure that the political institutions of the Community respect the limits of their powers and to give individuals a remedy when they fail to do so"[136]. This is yet to happen, with the current changes in Lisbon unlikely to bring any significant change in the matter.

The future accession to the ECHR could be an opportunity for the *locus standi* problem to be finally resolved. The external control of the ECtHR in Strasbourg and the political weight of its decisions would pressure the EU and its Court of Justice to change the strict interpretation of individual concern. However, as this work has tried to argue, it does not seem the case that the ECtHR would rule against the EU in this matter. The understanding of right of access to court in article 6 of the Convention and its limitations allow for derogations in accordance with certain criteria, such as a proportionality assessment and the purpose of achieving a legitimate aim. The over-burdening of the ECJ's dock could be used in this regard as a good counter-argument for a more flexible criteria of access to justice. Furthermore, the ECtHR has been very deferential in its approach regarding the EU, as the Draft Accession Agreement has proved. The Court has also ruled in previous decisions such as *Bosphorus* and *Michaud* that the judicial system of the EU allows for an effective protection of individuals. Accession is a positive event, but it does not seem that it will bring any development in the solution of this problem.

Three are three possible solutions for the question. The first one is the most direct and simple: the Court of Justice overrules the *Plaumann* interpretation explicitly, following the claim of former AG Francis Jacobs' opinion in *UPA*. However, as we have seen, the Court does not seem eager to change, even with the shift of constitutional paradigm. The second solution would be for the ECtHR to overrule its statements with regards the efficiency of the judicial system of the EU. something that, with the recent *Michaud* decision, does not appear likely either. The third solution would be to reform, once more, the articles concerning standing of private parties in front of the

[136] Anthony Arnull, "Private Applicants and the Action for Annulment Since Codorniu", id, pp. 24

Court of Justice, or something more. It is true that the interpretation of article 173 (now article 263) is to strict and amounts to a denial of justice, specially at a time when the Union has much more competences than it ever has. But one must remember that not being able to deal with its case load will eventually lead *tout court* to an inefficient delivery of justice, and so to a denial of it, *mutatis mutandis*. In this regard, only a re-structuring of the judicial system of the EU would allow for a change in this regard. This seems implausible at the current moment for two reasons. First, it would need the agreement of the 28 Member States in order to be effective. The Treaty of Lisbon was recently approved, and presented some changes in this regard that are not enough. There probably is no political will to change the paradigm. Second, the discussions of reform in the EU have been swept away by matters of financial and economic governance. The political actors are currently more focused in tackling the crisis than in changing the judicial structure of the EU.

"In UPA, Advocate General Jacobs declared: 'To insulate potentially unlawful measures from judicial scrutiny can rarely, if ever, be justified on grounds of administrative or legislative efficiency.' Only when that view commands widespread acceptance will the Union Courts be able to contribute fully to enhancing the Union's accountability and legitimacy."[137] In the end, we must either wait for a political or judicial shift regarding these issues. As implausible as they seem in the short-term, they will have to happen sometime, otherwise, this will be one more "brick in the wall" of integration and with the EU's current public image falling, these bricks might be dangerous in the long-term.

[137] Anthoy Arnull, *The European Union and Its Court of Justice*, id, pp. 94

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